

November 2004

When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law

Deborah L. Brake
brake@law.pitt.edu

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Civil Rights and Discrimination Commons](#)

Repository Citation

Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 Wm. & Mary L. Rev. 513 (2004), <https://scholarship.law.wm.edu/wmlr/vol46/iss2/4>

Copyright c 2004 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmlr>

WHEN EQUALITY LEAVES EVERYONE WORSE OFF: THE
PROBLEM OF LEVELING DOWN IN EQUALITY LAW

DEBORAH L. BRAKE*

INTRODUCTION 515

I. THE TREATMENT OF LEVELING DOWN BY THE COURTS 525

 A. *Palmer v. Thompson Revisited: Formal Equality and
 Discriminatory Intent* 526

 B. *Doctrinal Discomfort with Leveling Down* 537

 C. *Seeds of Constraint* 541

 1. *The Significance of the Benefit* 541

 2. *Remedial Principles Favoring Extension of Benefits* . . 544

 3. *External Limits Fixing the Level of Treatment
 for One Class* 553

 4. *Leveling Down as a Cover for
 Continuing Discrimination* 556

 D. *Room for Further Development of
 Equality-Based Limits* 558

II. A MORE CRITICAL PERSPECTIVE ON LEVELING DOWN
 AND EQUALITY 559

 A. *Equality as Equal Concern* 560

 B. *An Expressive Meaning Approach to Leveling Down* 570

* Associate Professor of Law, University of Pittsburgh School of Law. I am deeply indebted to Martha Chamallas for her unsurpassed generosity as a mentor, friend, and critical reader. I am also very grateful to Richard Delgado, Karen Engle, Jules Lobel, John Parry, Tom Ross, Reva Siegel, and Lu-In Wang for sharing valuable comments and insights. Earlier drafts of this Article were presented at the Law and Society conference, the Law, Culture and Humanities conference, and a feminist law teachers' workshop at the University of Pennsylvania. I thank the participants of these conferences for their thoughtful questions and comments. I have benefited greatly from the research assistance of Jorge Battle, Carrie Cummings, Deborah Elman, and Lacy Wilber, and from a Dean's Scholarship Grant from the University of Pittsburgh School of Law. I am particularly grateful for the opportunity to present this paper at the 2004 Yale/Stanford Junior Faculty Forum and for the valuable feedback I received from the Forum participants. Finally, many thanks to the editors of the *William and Mary Law Review* for their hard work bringing this Article to fruition.

III. APPLYING AN EXPRESSIVE MEANING APPROACH	585
A. <i>Three Examples Where Leveling Down Conflicts with</i> <i>Equality Law</i>	585
B. <i>Three Examples Where It May Not</i>	592
IV. ADVANCING THE DEBATE OVER EQUALITY'S NORMATIVE VALUE	602
A. <i>Equality's Critics and the Leveling Down Objection</i>	603
B. <i>The Treatment of Leveling Down by</i> <i>Equality's Defenders</i>	608
C. <i>How Attention to Social Context and</i> <i>Expressive Meaning Would Enrich the Debate</i>	615
CONCLUSION	617

INTRODUCTION

In the canon of equal protection, it is seemingly well-settled that inequality may be remedied either by leveling up and improving the treatment of the disadvantaged class, or by leveling down and bringing the group that is better off down to the level of those worse off.¹ The presumptive permissibility of leveling down is viewed as an inherent feature of equality rights and is not limited to equal protection; it applies in the statutory context as well, so long as not expressly prohibited.² The acceptability of leveling down in response to inequality is even invoked to question whether equality has any normative appeal at all, since it may serve as the vehicle for producing an outcome which, by utilitarian standards, may seem inefficient and undesirable.³ As one of the leading constitutional law texts puts it:

Even if we could give substantive content to the equality requirement, it is not clear why it has any normative appeal. Although the demands of the equal protection clause can be satisfied by extending the contested benefit to a broader group, the government need not respond in this fashion. It may also fully satisfy the demand of equality by denying *both* groups the contested benefit.⁴

1. In this context, the phrase "leveling down" makes the most sense when the subject of the challenged inequality is a sought-after benefit, as opposed to a burden sought to be lessened, but the same phenomenon may occur in equality-based challenges to the allocation of burdens. In the latter case, the decision maker would extend the burden to those previously free of it, rather than lifting the burden from those disadvantaged by it. For the sake of brevity, this Article uses the term "leveling down" to refer to the general scenario where the advantaged group is made worse off (either by withdrawing benefits or extending burdens) in order to achieve equality with the disadvantaged group.

2. For discussion of statutes that expressly prohibit leveling down remedies, see the discussion *infra* at Part I.C.3.

3. Such a utilitarian objection to leveling down assumes that the utility loss from the withdrawal of the benefit is not outweighed by shifting the resources to other purposes with greater public benefit. For example, if leveling down resulted in resources being put to better use, the utilitarian objection to leveling down loses its force. This assumption may be defensible, given that the decision to offer the benefit in the first place presumably rested upon a determination that the value of the benefit chosen outweighed that of other possible uses of those resources.

4. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 480 (4th ed. 2001).

Utility aside, the leveling down problem casts doubt on whether conventional equality jurisprudence serves the interests of those whom it supposedly protects.⁵ The permissibility of leveling down confronts persons disadvantaged by inequality with a double bind: challenge the inequality and risk worsening the situation for others instead of improving one's own situation, or continue to endure unlawful discrimination.⁶ This Article argues that there is a way out of this double bind: to recognize that leveling down is not always consistent with the meaning of equality as reflected in U.S. discrimination law.

The current approach to leveling down rests on two contestable understandings. First, leveling down implicitly relies on a principle of equal treatment as the exclusive meaning of equality without taking into account alternative understandings that would render leveling down problematic in certain settings. Second, 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. Current analysis of leveling down treats equality as if it were about balancing faceless pieces of clay on a scale with the single goal of arriving at equal weights in either direction. As much critical scholarship has shown, that kind of abstracted analysis often incorporates privileged norms that obscure the full extent of injuries to subordinated persons.⁷ By

5. See, e.g., JUDITH A. BAER, OUR LIVES BEFORE THE LAW: CONSTRUCTING A FEMINIST JURISPRUDENCE 101 (1999) ("Feminists can hardly welcome rulings like the victories of William Orr, who reneged on court-ordered alimony payments.... After *Orr*, Alabama was under no obligation to make its alimony law gender-neutral (although it did); the state was free to abolish all alimony, as Texas has done.").

6. See generally MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 8-10 (2d ed. 2003) (discussing the prevalence of double binds confronting subordinated groups, and defining double binds as "situations in which options are reduced to a very few and all of them expose one to penalty, censure or deprivation") (quoting MARILYN FRYE, THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 2 (1983)).

7. So much critical scholarship emphasizes this theme, that it defies comprehensive citation in one brief footnote. For a small sampling, see, for example, CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) (compiling writings by critical race scholars containing rich critiques of formal principles of equality and neutrality as masking deeper racial biases); Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201 (indicating abstract principles of equality as failing to secure meaningful equality for women); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002) (critiquing conventional discrimination law for implicitly reinforcing privileged norms that place demands on members of subordinated groups to assimilate and "cover" their identities).

injecting the lived experience of inequality back into the equation, leveling down is revealed as a questionable strategy that is sometimes used to preserve dominance contrary to the values of equality.

As an example of how leveling down can thwart rather than secure equality, the lesser known case of *Cazares v. Barber* adds a human dimension to the problem.⁸ Elisa Cazares became pregnant when she was fifteen-years-old and a student at the Tohono O'Odham High School on the Tohono O'Odham Nation reservation in western Arizona.⁹ Cazares, a member of the Papago Indian Tribe, was ranked first in her sophomore class, served as a leader in student government, and actively participated in a number of student activities.¹⁰ When the school obtained a charter in 1989 entitling it to induct members into the National Honor Society (NHS), Cazares had every reason to expect that she would be included.¹¹ The school's selection committee, however, found Cazares unworthy of membership because she was "pregnant, unmarried, and not living with the father of her future child."¹² Cazares sued in federal district court, challenging her exclusion as a violation of both Title IX and equal protection.¹³ The district court found that the school had discriminated against Cazares on the basis of sex in violation of her rights under both Title IX and the Fifth Amendment, and entered an injunction ordering that she be included in the school's induction ceremony.¹⁴ The victory, however,

8. *Cazares v. Barber*, No. CIV-90-0128-TUC-ACM (D. Ariz. May 31, 1990), *aff'd*, 959 F.2d 753 (9th Cir. 1992).

9. See Nat Hentoff, Editorial, *The Moral Education of a Native American*, WASH. POST, Sept. 22, 1990, at A25.

10. *Id.*; see also Deborah M. Levy, *Sex in High School: Boys Play, Girls Pay*, LEGAL TIMES, June 11, 1990, at 24.

11. Hentoff, *supra* note 9.

12. *Id.*

13. Levy, *supra* note 10. Because the school was operated by the Federal Bureau of Indian Affairs of the Department of the Interior, the Due Process Clause of the Fifth Amendment was the source of the equal protection guarantee. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 681 (7th ed. 2004) (explaining that the Fifth Amendment Due process clause incorporates the equal protection guarantee and applies it to the federal government).

14. *Cazares v. Barber*, No. CIV-90-0128-TUL-ACM, slip op. at 3-5 (D. Ariz. May 31, 1990), *aff'd*, 959 F.2d 753 (9th Cir. 1992). In support of this ruling, the court pointed to evidence that a male student who had fathered a child out of wedlock had been accepted into the chapter, while Cazares, who was otherwise qualified, was denied entrance. *Id.* at 2.

proved to be hollow: the school responded by cancelling the ceremony and terminating its participation in the NHS.¹⁵

Whether the school district complied with the equality guarantees of Title IX and the Fifth Amendment turns on one's conception of equality and the values that it protects. This, in turn, depends on one's prior commitments and aspirations for equality law.¹⁶ If legal guarantees of equality require only formal equality, satisfied by eliminating differential treatment, then the school district's actions are difficult to challenge. If equality law includes a richer kind of equality principle that recognizes injuries other than tangible differences in treatment, however, then the cancellation of the induction ceremony not only failed to secure equality, but placed it farther out of reach. Although all of the students were treated the same with respect to the denial of NHS participation, Elisa Cazares was left no better off, and quite possibly worse off, for having won her sex discrimination case. The cancellation may have been even more stigmatizing to Cazares than her initial exclusion—the school deemed her so unworthy of membership in the organization that it preferred to cancel the NHS completely rather than to include her as an honoree. Further, it positioned her as the scapegoat responsible for disappointing the expectations of the students who otherwise would have been inducted into the NHS.

The current understanding of leveling down's compatibility with equality norms may be traced to *Palmer v. Thompson*,¹⁷ one of the earlier and more prominent cases in which this tactic was successfully employed. Specifically, *Palmer* arose out of an equal protection challenge by African American residents of Jackson, Mississippi, to the city's operation of racially segregated recreational facilities.¹⁸ Of the city's five publicly operated swimming pools, four had been restricted to whites only, leaving just one open to African Americans.¹⁹ Three African American residents of Jackson obtained

15. See *Cazares v. Barber*, 959 F.2d 753, 755 (9th Cir. 1992).

16. This language is loosely borrowed from Martha Chamallas, whose work in feminist legal theory has shown "how a difference in starting points and basic commitments can alter both what we describe as the law and our aspirations for what the law should be." CHAMALLAS, *supra* note 6, at xxiii.

17. 403 U.S. 217 (1971).

18. *Id.* at 219. The city also operated its public parks on a racially segregated basis. *Id.* at 218.

19. *Id.* at 218.

a declaratory judgment affirming their right under the Equal Protection Clause to the desegregated use of the city's public recreational facilities.²⁰ However, rather than integrate the pools, the city decided to end its role in providing public pools to city residents by closing the four pools that it owned and relinquishing its lease on the fifth.²¹ The pool closures prompted a second lawsuit by Jackson's African American residents that challenged the closures as another equal protection violation. The district court, the Fifth Circuit, and finally the U.S. Supreme Court all upheld the city's action as a legitimate response to the equal protection violation caused by the prior segregation.²²

Although the rationale for upholding leveling down responses has shifted somewhat since *Palmer*, the underlying premise—that equality law has little or nothing to say about leveling down as a response to inequality—has remained largely unchallenged. More

20. *Clark v. Thompson*, 206 F. Supp. 539 (S.D. Miss. 1962), *aff'd*, 313 F.2d 637 (5th Cir. 1963), *cert. denied*, 375 U.S. 951 (1963). The district court declined to enter an injunction ordering the city to integrate its public facilities. *Id.* The court's opinion exemplifies racial bias in judicial decision making. The court rejected the plaintiffs' attempt to pursue the matter as a class action, suggesting that the plaintiffs were not representative of other members of their race, and noting that "voluntary separation of the races in the use of public facilities has operated smoothly and apparently to the complete satisfaction of all concerned for many years." *Id.* at 541. The court attributed recent assertions of rights by African Americans to "the self-styled Freedom Riders" who "aroused strained racial feelings," and explained the existing racial segregation in housing and public facilities in Jackson based on the choices made by the city's "colored citizens." *Id.* Finally, the court denied injunctive relief partly because the plaintiffs failed "to show that their individual needs require injunctive relief," and partly because of the court's high esteem for Jackson's white city leaders. *Id.* at 543. In contrast to its pejorative treatment of the African American plaintiffs, the court lavished praise on the city defendants:

The individual defendants in this case are all outstanding, high class gentlemen and in my opinion will not violate the terms of the declaratory judgment issued herein. They know now what the law is and what their obligations are, and I am definitely of the opinion that they will conform to the ruling of this Court without being coerced so to do by an injunction. The City of Jackson, a municipality, of course is operated by some of these high class citizens. I am further of the opinion that during this period of turmoil the time now has arrived when the judiciary should not issue injunctions perfunctorily, but should place trust in men of high character that they will obey the mandate of the Court without an injunction hanging over their heads.

Id.

21. *Palmer*, 403 U.S. at 219. The city parks and other previously segregated facilities within them, other than the pools, were kept open and maintained on an integrated basis. *Id.*

22. *Id.*

than three decades after *Palmer*, leveling down the treatment of the favored group continues to be a viable strategy for thwarting equality claims. In addition to *Cazares*, recent examples of actual or threatened leveling down responses include the following:

- In a Title IX challenge to inequality in men's and women's intercollegiate athletics, Brown University proposed to remedy the Title IX violation by cutting the number of opportunities available to male athletes until they reached parity with the lower number of opportunities for female athletes.²³
- After losing an equal protection challenge to its males-only admissions policy, the Virginia Military Institute (VMI) threatened to become private and conducted a study of the feasibility of discontinuing its status as a public institution. This option was explored as a way to remedy the equal protection violation by eliminating VMI as a public institution altogether instead of admitting women.²⁴
- In response to successful litigation challenging inequality in public school funding under the New Jersey Constitution, former Governor Christine Whitman proposed a plan to level down spending in wealthier school districts to reach equality with poorer districts.²⁵
- Several school districts charged with discriminating against gay and lesbian student groups in violation of the federal Equal Access Act have responded by banning, or threatening to ban, all extracurricular student clubs.²⁶

23. *Cohen v. Brown Univ.*, 879 F. Supp. 185, 214 (D.R.I. 1995).

24. See *To Keep An All-Male V.M.I., Its Alumni Consider Buying It*, N.Y. TIMES, July 1, 1996, at A11; David Reed, *All-Male VMI Might Go Private*, CHI. SUN-TIMES, June 28, 1996, at 22. VMI's Board of Visitors ultimately rejected the proposal to go private by a one-vote margin. See Donald P. Baker, *By One Vote, VMI Decides to Go Coed; Nation's Last All-Male Military School to Enroll Women Starting in '97*, WASH. POST, Sept. 22, 1996, at A1.

25. See *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997) (declaring unconstitutional a state funding scheme that permitted wealthier school districts to add to the per-student allotment from the state without giving sufficient funds to poorer school districts to modernize and repair school buildings); Neil MacFarquhar, *Whitman Offers Fiscal Plan for Parity in Schools*, N.Y. TIMES, May 18, 1996, at 1; see generally Martha S. West, *Equitable Funding of Public Schools Under State Constitutional Law*, 2 J. GENDER RACE & JUST. 279 (1999) (discussing the New Jersey school funding litigation).

26. See, e.g., *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County*, 258 F. Supp. 2d 667, 680-84 (E.D. Ky. 2003) (holding that the school board violated the Equal Access Act in excluding Gay Straight Alliance because, even though it voted to suspend all

- In late March of 2004, in response to uncertainty generated by legal challenges from gay and lesbian couples to a law limiting marriage to a man and a woman, Benton County, Oregon suspended marriage licenses to all couples.²⁷ County officials had announced earlier that they would begin issuing marriage licenses to same-sex couples, following the footsteps of another Oregon county, but changed course in response to a lawsuit contending that such actions would violate the state's marriage law.²⁸

These cases differ in many respects, but they share one important feature: the assumption that leveling down would remedy the unlawful inequality was largely uncontested.

Even when it is not raised overtly, the presumptively available option of leveling down hangs over potential discrimination claims

student clubs, it continued to permit other clubs to use school facilities; but noting that the board could have complied with the Act if it had implemented a ban on all student clubs); *East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166, 1172-73 (C.D. Utah 1999) (holding that the school could exclude the Gay Straight Alliance if it maintained a closed forum and did not allow student groups that are not directly related to the curriculum); see also Randy Furst, *Gay Straight Alliance Gains Limited Status as Orono Student Group*, STAR TRIB., Aug. 14, 1998, at 1B (discussing response by Minnesota school district which created two tiers of student organizations when students tried to form a Gay Straight Alliance, grouping the GSA with other informal student groups in the second tier); Jeff Gottlieb & Kate Folmar, *O.C. District's New Rules for Clubs Trigger More Protests; Education: Parents Object to Ban on Groups in Lower Grades*, L.A. TIMES, Feb. 12, 2000, at B1 (discussing Orange County school board decision to ban all extracurricular school clubs not related to school work in middle and elementary schools to keep out gay student clubs); Katherine Kapos, *Majority Favors Clubs as Granite District Holds Hearings on a Controversial Issue*, SALT LAKE TRIB., Apr. 17, 1997, at B2 (discussing debate in Salt Lake City over whether to ban all student clubs or to allow the formation of gay student clubs); Joseph Landau, *Ripple Effect*, NEW REPUBLIC, June 23, 2003, at 12 (discussing a Texas school district's response to student effort to start a Gay-Straight Alliance by "banning all school groups that promote criminal behavior"); Esther Pan, *Safety is Priority for Gay Students, Speaker Says*, ANCHORAGE DAILY NEWS, Oct. 10, 1997, at 1F (noting Alaska school board member's suggestion of banning all extracurricular clubs in response to student request to form a Gay Straight Alliance). Other schools that are not willing to ban clubs completely have instituted new parental consent requirements for all student clubs in response to the formation of gay student clubs. See, e.g., Stacy Milbouer, *Gay Graduate Tells How Group Helped Him Cope*, BOSTON GLOBE, Aug. 15, 1999, at 1; Barbara Whitaker, *School Board, Facing Suit, Agrees to Recognize Gay Club*, N.Y. TIMES, Sept. 7, 2000, at A18.

27. Kate Zernike, *Gay? No Marriage License Here. Straight? Ditto.*, N.Y. TIMES, Mar. 27, 2004, at A8 [hereinafter Zernike, *No License*].

28. *Id.* Benton County officials imposed the marriage moratorium as a temporary measure, intended to last only until a decision from the Oregon Supreme Court clarified the validity of Oregon's marriage law under the state constitution.

like a dark cloud, undermining the effectiveness of equality rights, and even deterring individuals from bringing such claims in the first place.²⁹ In addition to its power to thwart specific challenges to inequality, the uncritical acceptance of leveling down functions to undermine popular support for equality law, as is evident in the recent controversy over whether Title IX should be abandoned or diluted based on the perception that it has resulted in the leveling down of men's athletic opportunities.³⁰

Despite its pervasiveness, the problem of leveling down in equality law has received scant attention in legal scholarship. Issues of how to define discrimination and close the gap between law and widespread inequality have taken precedence for many scholars writing in related areas. Leveling down as a remedy to inequality takes center stage in practice only after the inequality in question has been recognized as actionable. With few exceptions over the past two decades, the trend in the courts has been to narrow the types of bias and discrimination within the reach of both statutory and constitutional equality law.³¹ Those who challenge inequality often encounter insurmountable hurdles at the liability stage in proving unlawful discrimination. Consequently, questions of how to remedy discrimination arise less frequently in legal scholarship than concerns about the limited scope of legally recognized discrimination.

Yet, beliefs about leveling down as an acceptable remedy to inequality influence prevailing understandings of the meaning of

29. My initial interest in this topic stemmed from my own experience representing female athletes in Title IX challenges to discrimination in school athletic programs. In my conversations with potential plaintiffs, there was nothing more chilling to their consideration of litigation than their fear that a lawsuit would result only in the loss of men's opportunities, and that they would be scapegoated as spoilsports.

30. See Welch Suggs, *Federal Commission Considers Reinterpreting Title IX*, CHRON. OF HIGHER EDUC., Sept. 6, 2002, at 54 (discussing the debate over Title IX and allegations by wrestlers and other male athletes that Title IX has resulted in losses in their sports opportunities); see also Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 20-22 (2000-2001) (discussing the backlash against Title IX fueled by charges that Title IX has resulted in serious losses to male sports opportunities). For the time being, the current administration has decided not to revise Title IX. See Valerie Strauss & Liz Clarke, *Sex Bias Ban Upheld for School Athletics*, WASH. POST, July 12, 2003, at A1.

31. See Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 747-53 (2001) (discussing and critiquing the limits of modern antidiscrimination law).

equality as guaranteed in law.³² The conventional understanding of leveling down bolsters and reinforces a selective and overly narrow conception of equality, masking interpretive choices and contributing to the view that equality itself is misguided in law and in theory. For example, in the one area of legal scholarship that has paid significant attention to leveling down, the concept is invoked to undermine the normative appeal of equality rights altogether. In a recently rekindled debate, critics and defenders of equality argue about whether the permissibility of leveling down indicts equality as a principle of justice.³³ Both the critics and defenders assume a greater degree of flexibility in permitting leveling down than is necessary. A more contextual analysis of the case law and real world examples of leveling down demonstrates that there is room for further development of equality-based limits.

This Article contends that courts and commentators have assumed too readily that leveling down is an acceptable, if unfortunate, response to discrimination, and that the flexibility of equality law in this respect has been significantly overstated. Part I examines current doctrine and mines existing precedent for possible limitations. A survey of the case law shows that there is more room for contesting the validity of leveling down than is generally acknowledged. Although lower courts typically follow *Palmer's* approach, Supreme Court precedent does not foreclose a more critical analysis of leveling down and its relationship to equality. Indeed, the Court has shown some discomfort with leveling down and has struggled to articulate limits to this remedy.³⁴ Although the

32. See generally Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 593 (1983) ("Thus, when people disagree in their assessments of the relative 'effectiveness' of a particular remedy in curing the violation of a right, they are often disagreeing about how the right itself should be defined."); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) ("[R]ights and remedies are inextricably intertwined. Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.").

33. For recent critiques of equality rights, see Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210 (1997); Christopher J. Peters, *Slouching Towards Equality*, 84 IOWA L. REV. 801 (1999). For responses by scholars defending equality against these critiques, see Kent Greenawalt, *"Prescriptive Equality": Two Steps Forward*, 110 HARV. L. REV. 1265 (1997); Joshua D. Sarnoff, *Equality as Uncertainty*, 84 IOWA L. REV. 377 (1999); Joshua D. Sarnoff, *I Come to Praise Morality, Not to Bury It*, 84 IOWA L. REV. 819 (1999); Kenneth W. Simons, *The Logic of Egalitarian Norms*, 80 B.U. L. REV. 693 (2000).

34. Unfortunately, the existing articulations of limits to leveling down are inadequately

Court has not yet done so, there is room to further develop equality-based limits on leveling down.

Part II seeks to develop a more complete understanding of leveling down and its relationship to equality law. It begins by exploring the content of equality law and arguing that the fundamental principle of equality requires equal concern, a broader principle than mere equal treatment. An equal concern principle must be sensitive to inequality in social relations and must reject actions that devalue and exclude persons from equal membership in a shared community. Recent scholarly work on both the significance of expressive harms and the reproduction of status inequality and social stratification helps explain why some leveling down actions may violate a principle of equal concern. Insights from this literature also undermine the faith that the political process will adequately check leveling down because the majority will not unnecessarily deny itself benefits. Understanding the significance of status in intergroup relations exposes the political process as an insufficient check on leveling down when it functions as a strategy for preserving social inequality.

Part III applies this framework to examine particular examples of leveling down and how they fare under an equal concern principle. This section first examines the three cases of *Palmer*, *Cazares*, and the Virginia Military Institute's threat to privatize, and explains why the leveling down in each case should be viewed as a violation of equality law. It then explores three types of cases where leveling down may fit comfortably with an equal concern principle: (1) where the injury from the discrimination is a formal equality injury that may be remedied by the end of differential treatment; (2) where some leveling down is necessary to set a sustainable baseline consistent with equal concern; and (3) where the benefit at issue is so distorted by privilege that equal concern requires the relinquishment, rather than the extension, of unjust privilege. As these examples show, any analysis that does justice to equality law must attend to the facts and socio-historic context of the cases and must remain sensitive to the social meaning expressed by leveling down.

Finally, Part IV contrasts this Article's approach to leveling down with that taken by those scholars who have written about leveling

down in the debate over equality. Critics of equality raise the permissibility of leveling down as part of their indictment of equality's normative appeal. Defenders of equality respond by arguing that leveling down is not so problematic as to warrant the rejection of equality rights. In my view, neither side in this debate explores the relationship between leveling down and equality law adequately. The existing discourse on equality's value and the leveling down objection reflects an overly abstracted view of equality and insufficient attention to the relational injuries of inequality that leveling down may exacerbate. Both sides too readily assume leveling down's consistency with equality rights. A more nuanced understanding of leveling down would enrich the debate over equality's value.

I. THE TREATMENT OF LEVELING DOWN BY THE COURTS

Courts have not foreclosed the possibility that leveling down might conflict with equality law so much as they have not considered the issue thoroughly. For the most part, lower courts continue to take their lead from *Palmer* with little or no discussion. *Palmer*'s acceptance of the pool closure set the tone for future cases by viewing differential treatment as the touchstone of discrimination. Although *Palmer*'s reasoning was expressly disclaimed in later Supreme Court precedent,³⁵ the discriminatory intent standard that replaced it has not functioned, and is not likely to function in the future, as a meaningful limit on leveling down. Still, there is some precedent that supports setting limits on leveling down as a response to inequality in certain circumstances. None of the limits to date have been fully developed or adequately tethered to a basis in equality law, but their very articulation by courts suggests some doctrinal discomfort with the presumptive acceptability of leveling down remedies. The bottom line of this trek through the case law is that the prospects for regarding leveling down more critically are not as bleak as generally supposed, even if they require additional theoretical work.

35. See *infra* notes 56-83 and accompanying text.

A. Palmer v. Thompson Revisited: Formal Equality and Discriminatory Intent

The Court's resolution of the equal protection issue in *Palmer v. Thompson*,³⁶ and its treatment of *Palmer* in later decisions, provides a starting point for understanding the prevailing judicial approach to leveling down. In *Palmer*, Justice Black's opinion for the majority began with the rather obvious statement that nothing in the Constitution places "an affirmative duty on a State to begin to operate or to continue to operate swimming pools."³⁷ Framing the issue in terms of equal access to swimming pools, Justice Black viewed the decision to close the pools as one that did not provide white residents with any benefit or service that was denied to black residents.³⁸ The Court then turned to the doctrinal question of what role a defendant's intent plays in an equal protection analysis. Significantly, the Court decided *Palmer* five years before its decision in *Washington v. Davis*, which rejected a discriminatory effects standard and required proof of discriminatory intent to obtain heightened scrutiny of facially neutral practices under the Equal Protection Clause.³⁹ In *Palmer*, however, a majority of the Court took the opposite position and proclaimed the irrelevance of the Jackson city council's motives to the equal protection analysis.⁴⁰ Justice Black's opinion then waded through a series of prior Supreme Court decisions that might be thought to conflict with this pronouncement, recasting them as cases in which the seemingly neutral denial of a benefit was really a facade for ongoing discriminatory treatment.⁴¹ The Court then distinguished *Palmer* from the

36. 403 U.S. 217 (1971).

37. *Id.* at 220.

38. *Id.* To critics of formal equality, this will sound strikingly similar to the Court's opinion in *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974) ("There is no risk from which men are protected and women are not.").

39. See generally *Washington v. Davis*, 426 U.S. 229 (1976).

40. *Palmer*, 403 U.S. at 224 ("[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.").

41. *Id.* at 222. For example, the Court's decision in *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), forbidding a school district from closing its public schools in response to a desegregation order, was explained in *Palmer* based on the county's continuing involvement in maintaining segregated schools by covertly partnering with private, racially exclusive schools. See *Palmer*, 403 U.S. at 221-22. The *Palmer* Court offered a similar explanation for *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967), which affirmed the

prior precedent, highlighting it as a case where the differential treatment ended fully with the pool closures.⁴²

The dissenters in *Palmer* disagreed with the Court about the role of intent in an equal protection analysis, and found the city's actions to have been motivated by a discriminatory purpose. Justice White, joined by Justices Brennan and Marshall, concluded that "[c]losing the pools without a colorable nondiscriminatory reason was every bit as much an official endorsement of the notion that Negroes are not equal to whites" as official segregation.⁴³ Justice White began his discussion of the case by providing a detailed history of Jackson city officials' intransigent resistance to racial integration and their avowed determination to resist desegregation of the city's public facilities.⁴⁴ To Justice White, the pool closures did not remedy the harm of segregation, and may have exacerbated it.⁴⁵ As he put it, "the closed pools stand as mute reminders to the community of the official view of Negro inferiority."⁴⁶

California Supreme Court's ruling that a statewide referendum allowing private parties to engage in race discrimination in real estate transactions violated equal protection. *Palmer* explained this decision as an appropriate recognition that the referendum constituted a government endorsement of private discrimination and did not, unlike the pool closures, represent a true leveling down of treatment. *Palmer*, 403 U.S. at 223-24. Finally, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), a decision striking down a redistricting scheme that diluted the votes of minority voters, was explained as a case based on the discriminatory effects of the redistricting legislation, not on discriminatory intent. *Palmer*, 403 U.S. at 225. *But see id.* at 266-68 (White, J., dissenting) (arguing that the pool closures did indeed harm African Americans in Jackson differentially).

42. The distinction was somewhat fuzzier than the majority let on. As Justice White observed in his dissent, one of the formerly public pools continued to be operated by a private owner on a whites-only basis. *Palmer*, 403 U.S. at 252 (White, J., dissenting). In addition to this distinction, the Court also suggested in *Palmer* that the different result in school desegregation cases might be attributed partly to differences in the public importance of pools and schools, although the Court made less of this distinction than of the state's role in perpetuating discrimination. *Id.* at 221 n.6; *see infra* Part I.C.1.

43. *Palmer*, 403 U.S. at 266-67 (White, J., dissenting). Justice Douglas dissented separately, arguing that the Ninth Amendment provided a basis for invalidating the city's action. *Id.* at 231-40. Justice Marshall also wrote a separate dissent, joined by Justices Brennan and White, taking issue with the majority's view that the pool closures equally affected all persons regardless of race. *Id.* at 271-73.

44. *Id.* at 246-60 (White, J., dissenting).

45. *Id.* at 266 ("[B]y closing the pools solely because of the order to desegregate, the city is expressing its official view that Negroes are so inferior that they are unfit to share with whites this particular type of public facility, though pools were long a feature of the city's segregated recreation program.").

46. *Id.* at 268.

Five years later, Justice White's view of the significance of motive in an equal protection analysis prevailed in *Washington v. Davis*.⁴⁷ The Court's revised stance in *Davis* appeased the most prominent criticism of *Palmer* at the time: that an actor's discriminatory intent should invalidate an otherwise legitimate state action under the Equal Protection Clause.⁴⁸ After *Davis*, *Palmer*'s critics could take comfort in the belief that, however problematic the result in *Palmer*, equal protection doctrine would henceforth ensure the absence of discriminatory intent behind a leveling down response. Under current doctrine, the presence of a discriminatory motive may provide a basis for challenging an otherwise acceptable leveling down response.⁴⁹

The intent standard, however, has turned out to be not much of a limit on leveling down. The difficulty with focusing on the motive behind a leveling down response was foretold by Justice Blackmun's concurrence in *Palmer*. Justice Blackmun agreed with the dissenters that an impermissible motive could give rise to an equal protection violation, and joined with the majority on this point five years later in *Washington v. Davis*. Yet, he found *Palmer* to be a "hard" case in which "there is much to be said on each side."⁵⁰ Siding with the majority, he cited several factors that impressed him, including the fact that the city had not shut down its other recreational facilities under the threat of integration and his lack of conviction that the pool closures were "an official expression of inferiority toward black citizens," as Justice White and the other dissenters contended.⁵¹

47. 426 U.S. 229 (1976).

48. This critique of *Palmer* was offered most prominently by Paul Brest. See Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95 (1971).

49. See, e.g., *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (requiring a challenger of a facially neutral practice to prove that the measure was adopted "because of," not merely "in spite of," its adverse effects" on the disadvantaged group). One might argue that even with proof of intent, a leveling down response may still be valid because it does not impose discriminatory effects, if one reads *Davis* to require both discriminatory intent and effects. Disproportionate effects, however, are not difficult to discern in many leveling down cases, given the greater access of nonstigmatized groups to substitute benefits (as with private pools in *Palmer*) and the disparate social stigma inflicted by some leveling down decisions.

50. *Palmer*, 403 U.S. at 228 (Blackmun, J., concurring).

51. *Id.* at 229 (Blackmun, J., concurring). The other factors that Justice Blackmun cited were the nonessential quality of public pools, the fact that the pools had operated at a fiscal

The problems associated with proving discrimination under an intent standard, and the reluctance of courts to attribute discriminatory motives to public and private actors, have been the subject of much scholarly criticism.⁵² The difficulties identified in these well-founded critiques are no more daunting when the search for intent occurs at the leveling down phase of a case rather than at the point of determining an initial violation.⁵³ Under the prevailing version of the intent standard, it is extremely difficult to prove discriminatory motive where another legitimate explanation is possible.⁵⁴ As a decision to uniformly deny favorable treatment may

deficit, and the fear that the city would be "locked in" to providing public pools for the indefinite future. *Id.* at 229-30.

52. See, e.g., Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1166 (1991) (arguing that the intent standard deters the filing of legitimate claims because of the difficulty of proving intent); Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) (criticizing the intent standard as reflecting white transparency, the selection of legal standards based on implicit white norms); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1277-91 (1998) (discussing extensive literature on social psychology and cognitive bias demonstrating that much discrimination is not "intentional" in the legal sense) [hereinafter Krieger, *Civil Rights*]; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186-1201 (1995) (discussing the failure of an intent standard to capture cognitive bias and the actual mental processes that drive real world discrimination) [hereinafter Krieger, *Cognitive Bias*]; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that much discrimination is unconscious and that a discriminatory motive standard is insufficient to capture it); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989) (arguing that the Court settled on the intent standard not for a principled reason, but because it feared the potential breadth of an effects standard, but also arguing that an intent standard, applied in a principled fashion, is both sweeping and incoherent).

53. Cf. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 28 (1976) (acknowledging that the Court's turn-around on discriminatory intent "does not entirely obviate the problems implicit in *Palmer v. Thompson*," given the difficulty of determining "whether a decision was discriminatorily motivated").

54. See, e.g., *Feeney*, 442 U.S. at 260, 279 (accepting the state's proffered legitimate purpose for a veteran's preference with "a devastating impact upon the employment opportunities of women," absent proof that it was enacted "because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place"); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (stating that impact alone is insufficient to establish discriminatory intent where there is a legitimate, neutral explanation for the action taken). See also Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 26-29 (1990) (discussing the Court's refusal to see any perpetrators of discrimination in *Milliken v. Bradley*, 418 U.S. 717 (1974), and the

always be explained in terms of conserving resources and rearranging societal priorities, it is exceedingly difficult to establish a discriminatory motive as the foundation for a leveling down response. Indeed, Justice Blackmun noted in *Palmer* that the pools had been running at a fiscal deficit, and he deferred to "the judgment of the city officials that these deficits would increase."⁵⁵ Thus, even though *Washington v. Davis* reversed the rationale relied on by the majority in *Palmer*, the Court's shift to an intent standard does not necessarily unsettle *Palmer's* result.

The Court's subsequent treatment of *Palmer* makes explicit the understanding that the use of an intent standard might not have changed the result in that case. Writing for the majority in *Davis*, Justice White stated that:

The holding was that the city was not overtly or covertly operating segregated pools and was extending identical treatment to both whites and Negroes.... [T]he 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.⁵⁶

In Justice White's revisionist account, *Palmer* stands for the principle that equal protection is satisfied when persons of all races are treated the same and proof of a discriminatory purpose is lacking.⁵⁷ Ironically, the intent standard that Justice White fought for in his dissent in *Palmer* turned out to be inadequate to capture even the discriminatory motive that he thought present in that very case. That *Palmer* plausibly can be explained as a case lacking proof

rhetoical pull of "white innocence" in the Court's race discrimination jurisprudence).

55. *Palmer*, 403 U.S. at 229 (Blackmun, J., concurring). Justice White's masterful telling of the history of resistance to integration by Jackson city officials, however, leaves no doubt that fiscal concerns had nothing to do with the real reason for the pool closures. *Id.* at 249-60 (White, J., dissenting). Moreover, although Justice White only challenged the evidentiary basis for the city's argument that integrated pools would require greater expenditures to keep the peace, such justifications should not be considered race-neutral motives, given their obvious pandering to racial hostility.

56. *Washington v. Davis*, 426 U.S. 229, 243 (1976) (explaining the Court's holding in *Palmer*).

57. See also *Shaw v. Hunt*, 517 U.S. 899, 923 (1996) (Stevens, J., dissenting) (explaining that *Palmer* has come to be understood for the principle that only when the races are treated dissimilarly is there a violation of equal protection).

of discriminatory intent shows just how anemic the intent standard is when applied to leveling down.

Equal protection cases post-*Davis* provide little reason for optimism that an intent standard, as applied by the Court, will provide a meaningful tool for policing leveling down responses to discrimination claims. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁵⁸ the Court expressly noted the difficulty of discerning a discriminatory motive, citing *Palmer* for support.⁵⁹ In *City of Memphis v. Greene*,⁶⁰ the Court continued to explain *Palmer* as a case that involved neither differential treatment nor a discriminatory motive, citing it to support its holding that Memphis could close a street connecting a black and white neighborhood, in the absence of evidence of a discriminatory purpose, because the closing did not confer any benefit on whites that was refused to blacks.⁶¹

The upshot is that the Court's adoption of a discriminatory intent standard in *Davis* does little to set meaningful limits on leveling down. As long as leveling down is uniform and ends differential treatment, it is likely to elude a discriminatory intent standard. Indeed, lower courts confronted with leveling down proposals typically assume that it is a permissible response to discrimination without any serious inquiry into intent. Two examples from more recent cases reflect this current approach.

In *Cazares*, the Ninth Circuit expressed displeasure with the school's response, but did not view it as inconsistent with the equality guaranteed by either Title IX or the Constitution.⁶² After

58. 429 U.S. 252 (1977).

59. *Id.* at 265 n.11.

60. 451 U.S. 100, 102 (1981).

61. *Id.* at 105-06 n.7. In actuality, as in *Palmer*, a good deal of evidence suggested that the city's action was at least partially motivated by a discriminatory intent. *Id.* at 136-38, 143-44, 155 (Marshall, J., dissenting); see also Ross, *supra* note 54, at 1, 30-31 (criticizing the Court's opinion in *Greene* as distorted by "black abstraction," abstracting the lives of African Americans to avoid empathy, and noting "the refusal to place the case in any real and vivid social context"). Likewise, evidence suggesting the presence of a discriminatory motive was also present in *Palmer*. See *Palmer v. Thompson*, 403 U.S. 217, 246-61 (1971) (White, J., dissenting) (discussing evidence of discriminatory purpose).

62. *Cazares v. Barber*, 959 F.2d 753, 755 (9th Cir. 1992). The district court's order said that if the school district held the NHS ceremony, then it must include the plaintiff. *Cazares v. Barber*, No. CIV-90-0128-TUC-ACM, slip op. at 4-5 (D. Ariz. May 31, 1990), *aff'd*, 959 F.2d 753 (9th Cir. 1992).

the district court ruled in favor of the plaintiff and the school cancelled the awards ceremony and terminated its participation in the NHS, the plaintiff sought attorney's fees under the Equal Justice Act, which authorizes fees for prevailing plaintiffs in civil rights cases against the government.⁶³ In the litigation over attorney's fees, both the district court and the Ninth Circuit cited the school's response in canceling the honor society as a discretionary factor that supported an award of fees in excess of the statutory cap.⁶⁴

Although the treatment of the cancellation under the Equal Justice Act shows some discomfort with the leveling down remedy, the courts did not connect their concerns with any limits imposed by the underlying substantive law. Neither court questioned whether the school's response might violate the equality principle embodied in Title IX or the Constitution. Judge Kozinski, who dissented from the panel decision affirming the award of attorney's fees, was the most explicit on this point. He objected to the lower court's reliance on the cancellation to support a higher fee award, stating "[i]t doesn't matter, of course, why a party chooses one of two permissible ways of complying with a district court's order."⁶⁵ Neither the majority nor the district court offered any response to Judge Kozinski's point that cancellation was a valid remedial choice, presumably agreeing that neither Title IX nor the Equal Protection Clause prevented the school from canceling the ceremony, even though they disagreed with Judge Kozinski about whether the cancellation could support a higher award of fees under the fee shifting statute.⁶⁶ The bottom line is that the school's response was assumed to satisfy the requirements of equality without any inquiry

63. See *Cazares v. Barber*, 959 F.2d 753 (9th Cir. 1992).

64. *Id.* at 755.

65. *Id.* at 756-57 (Kozinski, J., dissenting).

66. Under the Equal Justice Act, a prevailing party may be awarded attorney's fees in litigation against the United States, "unless the Court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d) (2000). However, to grant fees against the government in excess of \$75 per hour, the court must find that the government litigated in "bad faith." *Cazares*, 959 F.2d at 754. The district court found that the government exhibited an arrogant and calloused attitude toward the litigation from the beginning and cited the school's cancellation of the ceremony as a clear indication. *Id.* at 755. A majority of the appellate court found that the district court's findings in this regard were not clearly erroneous. *Id.*

by the court into the school district's intent in canceling its participation in the NHS.

Another case involving a Title IX claim, *Cohen v. Brown University*,⁶⁷ also treated a proposal to remedy discrimination by leveling down as compatible with equality law without any inquiry into discriminatory intent. In *Cohen*, female student-athletes challenged Brown University's (Brown) failure to provide male and female athletes with equal opportunities to play varsity sports. Although this case did not include an equal protection claim, Title IX also prohibits intentional discrimination and would have provided recourse for an adverse action motivated by a discriminatory intent.⁶⁸ Yet, the First Circuit gave Brown seemingly unlimited discretion to achieve equality by leveling down, without any inquiry into whether Brown's proposal was motivated by a discriminatory intent.

The leveling down issue came before the court after Brown had been found in violation of Title IX. Rather than impose its own remedy, the district court gave Brown the opportunity to come forward with a remedial plan emphasizing the law's remedial flexibility:

Brown may achieve compliance with Title IX in a number of ways. It may eliminate its athletic program altogether, it may elevate or create the requisite number of women's positions, it may demote or eliminate the requisite number of men's positions, or it may implement a combination of these remedies. I leave it entirely to Brown's discretion to decide how it will balance its program to provide equal opportunities for its men and women athletes.⁶⁹

At the same time, however, the district court sounded a note of skepticism as to whether Brown actually needed to eliminate men's opportunities in order to achieve compliance, as the university had claimed throughout the litigation:

67. 101 F.3d 155 (1st Cir. 1996).

68. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992) (permitting damages claims under Title IX in actions for intentional discrimination).

69. *Cohen v. Brown Univ.*, 879 F. Supp. 185, 214 (D.R.I. 1995).

Defendants frequently raised the specter of being forced by financial constraints to eliminate men's athletic opportunities in order to achieve compliance under plaintiffs' interpretation of the law. I feel compelled to point out that an institution has much flexibility, even within a finite resource base.... Thus, defendants' plea that "[t]here is nothing further Brown can do except cut, cap or eliminate men's teams," ... is simply not true. Brown certainly retains the option to distribute its resources in a way that may slightly reduce the "standard of living" for its university-funded varsity sports in order to expand the participation opportunities for its women athletes and closer approach equal opportunity between its male and female athletes. Whether it will follow this course of action is, of course, well within its discretion.⁷⁰

The district court's skepticism turned to disbelief when presented with Brown's plan for compliance. Rather than accept the district court's invitation to lower the standard of living for its high-status teams in order to make way for new playing opportunities for women, Brown proposed to cap existing men's teams, while recognizing several new junior varsity teams for women. In case the district court found these measures inadequate, which it did,⁷¹ Brown proposed a back-up plan: eliminate men's athletic opportunities until their number reached parity with the lower number provided to women, with the end result that no new athletic opportunities would be added for women.⁷²

The district court rejected this plan and chastised Brown for the proposal's draconian nature:

In order to bring Brown into compliance ... under defendants' [plan], I would have to order Brown to cut enough men's teams to eradicate approximately 213 men's varsity positions. This extreme action is entirely unnecessary. The easy answer lies in ordering Brown to comply ... by upgrading the women's gymnastics, fencing, skiing, and water polo teams to university-funded varsity status.... This remedy would entail upgrading the

70. *Id.*

71. *Cohen*, 879 F. Supp. at 213-14. The district court rejected Brown's proposal to create new junior varsity opportunities for women because the additional *junior* varsity positions were not comparable to the existing *varsity* opportunities for men. *Id.* at 214.

72. *See id.* (summarizing Brown's proposal for compliance).

positions of approximately 40 women. In order to finance the 40 additional women's positions, Brown certainly will not have to eliminate as many as the 213 men's positions that would be cut under Brown's ... proposal.⁷³

Although the district court did not explicitly find that Brown's remedial proposal violated Title IX, the court's explanation for its ruling came close by suggesting a perceived conflict between Brown's proposal and the purpose of Title IX:

It is clearly in the best interests of both the male and the female athletes to have an increase in women's opportunities and a small decrease in men's opportunities, if necessary, rather than, as under Brown's plan, *no* increase in women's opportunities and a *large* decrease in men's opportunities. Expanding women's athletic opportunities in areas where there is proven ability and interest is the very purpose of Title IX and the simplest, least disruptive, route to Title IX compliance at Brown.⁷⁴

Concluding that Brown had not made a good faith effort to comply, the district court imposed its own remedy, ordering Brown to add several new women's varsity teams.⁷⁵

The First Circuit treated the leveling down issue very differently.⁷⁶ It did not share the district court's perception of any tension between Brown's plan and Title IX, and faulted the district court for imposing its own remedy rather than permitting Brown to

73. *Id.* at 187. The difference in the numbers is due to the different ways in which institutions may comply with Title IX: either by providing opportunities for men and women that are substantially proportionate to their enrollment or by fully accommodating the athletic interests and abilities of the underrepresented sex. In *Cohen*, Brown provided approximately 213 more opportunities for men than women, which it would have had to cut to meet the former standard. In contrast, Brown would have to have added approximately forty opportunities for women in order to meet the latter standard. See Brake, *supra* note 30, at 47-49 (explaining the various ways institutions may comply with Title IX's requirement of equal opportunities to participate in sports). Even focusing on substantial proportionality as the path to compliance, Brown still could have complied without cutting as many male athletes as it proposed if it used the resources saved from the mens' cuts to add some new opportunities for women, thus leveling only part of the way down while still adding new opportunities for women. Brown's proposal would have ensured that women received no gains whatsoever from the lawsuit.

74. *Cohen v. Brown Univ.*, 101 F.3d 155, 187 (1st Cir. 1996).

75. *Id.*

76. *Id.* at 185-87.

level down the men's opportunities until they reached parity with the women's.⁷⁷ The First Circuit based its ruling in part on the view that the proposal fully satisfied the equality required by Title IX.⁷⁸ The First Circuit did not inquire into Brown's motives for its proposal to cut men's opportunities drastically, despite the district court's finding that its proposal was not warranted by fiscal necessity or by a good faith desire to achieve compliance without allocating new resources to athletics.⁷⁹ Brown ultimately chose not to cut men's sports and to comply instead by funding new varsity opportunities for women, despite the court's approval of the legality of its initial proposal.⁸⁰

The judicial approaches in *Cazares* and *Cohen* reflect the prevailing assumption that leveling down satisfies equality law and a reluctance to look deeper. Although, in theory, the existence of a provable, discriminatory intent may undermine an otherwise valid and facially-neutral leveling down response, courts typically do not look past the surface of the uniform treatment itself. Even if they did, in light of the widely shared and forceful critique of the intent standard,⁸¹ there is little reason to believe that they would find anything other than simple neutrality.

Perhaps part of the reason for the judicial complacency toward leveling down is the belief that it is self-limiting and subject to correction in the political process. Conventional wisdom suggests that the majority will not often choose to fix inequality by subjecting itself to more negative treatment. As Justice Jackson observed in his well-known concurrence in *Railway Express Agency v. New York*:

[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the princi-

77. *Id.* at 185.

78. *Id.* (discussing principles of academic freedom, but noting that "academic freedom does not embrace the freedom to discriminate"). The court stated, "[i]t is clear ... that Brown's proposal to cut men's teams is a permissible means of effectuating compliance with the statute." *Id.* at 187. See also *Neal v. Bd. of Trustees of Cal. State Univ.*, 198 F.3d 763, 770 (9th Cir. 1999) (stating that "[i]f a university wishes to comply with Title IX by leveling down programs instead of ratcheting them up, as Appellant has done here, Title IX is not offended").

79. *Cohen*, 101 F.3d at 187-88 (discussing district court's ruling).

80. See Lynette Labinger, *Title IX and Athletics: A Discussion of Brown University v. Cohen by Plaintiffs' Counsel*, 20 WOMEN'S RTS. L. REP. 85, 91-94 (1998) (discussing the terms of the settlement of the case).

81. See, e.g., *supra* note 52 and accompanying text.

ples of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected⁸²

Although such confidence in the political process as a check turns out to be questionable when leveling down operates to serve the nonmaterial interests of the majority,⁸³ it may well provide some comfort to courts in reviewing these types of responses to inequality.

B. Doctrinal Discomfort with Leveling Down

Although the prevailing approach accepts leveling down as all that equality requires, this acceptance sits somewhat uncomfortably alongside a vague judicial dislike of leveling down remedies. As with much of our established legal doctrine, there are indications of instability and dissension underneath the surface. Some judges, such as the district court judge in *Cohen*, express discomfort with leveling down and seek ways to thwart it. Such an inclination is easy to understand if leveling down leaves some people worse off, and no one better off, in terms of access to benefits and resources.⁸⁴

Just such a utilitarian concern may have motivated the Court in one very early equal protection case to reject the plaintiffs' claim where the only remedy sought would have taken away benefits from the advantaged class. In *Cumming v. Richmond County Board of Education*,⁸⁵ a case decided over fifty years before *Brown v. Board of Education*,⁸⁶ African American taxpayers sued Richmond County,

82. 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

83. See *infra* notes 246-57 and accompanying text.

84. Again, this objection assumes that the saved resources from leveling down would not be put to better use, thereby effecting a net increase in the overall level of well-being.

85. 175 U.S. 528 (1899).

86. 347 U.S. 483 (1954). The Court in *Cumming* dodged the issue of whether the county's racial segregation of schools itself violated the equal protection clause, stating that, although the plaintiffs argued that it did in oral argument, "we need not consider that question in this case. No such issue was made in the pleadings." *Cumming*, 175 U.S. at 543. It was not until over half a century later that the Court was able to see the inherent inequality in the state-enforced racial segregation of the schools. That separate but equal was never really equal, however, was obvious to everyone even as far back as *Cumming*.

Georgia, seeking an injunction to prevent the county from spending taxpayer funds to support a public high school for white students without providing one for African American students.⁸⁷ Justice Harlan, writing for the Court, dismissed the claim, objecting that:

The substantial relief asked is an injunction that would either impair the efficiency of the high school provided for white children or compel the Board to close it. But if that were done, the result would only be to take from white children educational privileges enjoyed by them, without giving to colored children additional opportunities for the education furnished in high schools. The colored school children of the county would not be advanced in the matter of their education by a decree compelling the defendant Board to cease giving support to a high school for white children.⁸⁸

Justice Harlan suggested that, assuming the plaintiffs could prove an equal protection violation, an assumption about which he expressed skepticism,⁸⁹ the case might have succeeded had the plaintiffs sought to force the county to spend money on education for African American students rather than seeking to forbid spending for the established high school.⁹⁰ Justice Harlan's discomfort with

87. *Cummings*, 175 U.S. at 529-31. The plaintiffs' choice of remedy reflected the realistic assessment that a remedy seeking affirmative relief, requiring the county to establish and fund a high school for African Americans, would have been met with possibly greater resistance. Because a court order requiring integration was unthinkable at the time, the Court's rejection of the injunction against spending left the plaintiffs with no effective recourse.

88. *Id.* at 544.

89. Justice Harlan's discussion of the merits of the equal protection issue foreshadowed the Court's adoption of an intent standard much later in *Washington v. Davis*, 426 U.S. 229 (1976), as well as the subsequent criticism of that standard. In explaining the Board's decision to expand its primary education programs for African American children rather than offer a high school for African Americans, Justice Harlan blithely asserted that there was no bad intent behind the county's failure to offer a high school for African American students. *Cumming*, 175 U.S. at 544 ("We are not permitted by the evidence in the record to regard that decision as having been made with any desire or purpose on the part of the Board to discriminate against any of the colored children of the county on account of their race.").

90. *Cumming*, 175 U.S. at 545.

If, in some appropriate proceeding instituted directly for that purpose, the plaintiffs had sought to compel the Board of Education, out of the funds in its hands or under its control, to establish and maintain a high school for colored children, and if it appeared that the Board's refusal to maintain such a school was in fact an abuse of its discretion and in hostility to the colored population

the posture of the case might be read, in part, to suggest the perspective that equality law should strive to improve the situation of the disadvantaged group rather than take away benefits from the favored group.⁹¹

In discussing Justice Harlan's reluctance to endorse a leveling down remedy in an equal protection action, I do not mean to endorse either his conclusion or his reasoning. Justice Harlan focused primarily on the implications of a leveling down remedy for the advantaged group and its impact on the ability of white students to attend high school in the county. He also observed that the remedy sought would not help African American children in the county, but he offered only a superficial analysis of this point, limited to the material withholding of educational resources. As elaborated below, a central consideration in evaluating leveling down should be whether it fully remedies all of the injuries, material and nonmaterial, to the persons disadvantaged by inequality.⁹² Such an analysis should explore the expressive meaning of leveling down and the relational harms of inequality, from the perspective of the persons disadvantaged by the inequality, rather than engaging in a utilitarian calculus that factors in the well-being of the advantaged group and the costs of relinquishing inequality's privileges. Although flawed in its approach, Harlan's resolution of the case suggests an early recognition that equality law might be problematic if it allowed a leveling down response, and a possible openness to interpretations that limit such responses.

because of their race, different questions might have arisen in the state court. *Id.* Given the long and tortured history of the Court's ambivalence about affirmative remedies in the school desegregation context, however, this assessment reads more like a judicial platitude than a realistic appraisal of the plaintiffs' chances.

91. It also might reflect Justice Harlan's discomfort with an equal protection challenge to racially segregated schools and his own racial biases. Indeed, the tone of Justice Harlan's opinion expresses no shock or outrage that the county failed to provide any high school education for African Americans, suggesting that he found the school system sensible or at least understandable. See generally Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995) (discussing racial bias in judicial decision making); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1 (1994) (explaining that even those judges who try to make logical and impartial decisions cannot be completely free from the influence of personal biases).

92. See *infra* Parts II-III.

A more recent expression of the Court's ambivalence about leveling down is found in *Cannon v. University of Chicago*.⁹³ In *Cannon*, the Court ruled that Title IX contains an implied private right of action for persons injured by sex discrimination in federally funded education programs.⁹⁴ In support of this ruling, the Court cited the potential harshness of the express statutory remedy that would terminate federal funds to educational programs that engage in discrimination.⁹⁵ Justice Stevens, writing for the majority, observed that Title IX's purpose of providing individuals with effective protection against discrimination would not be well-served by holding the termination of funds to be the exclusive remedy.⁹⁶ As Justice Stevens explained, "it makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself, ... the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate."⁹⁷ This consideration counsels against leveling down remedies more generally. The implication is that a person who is harmed by discrimination and successfully prosecutes a discrimination claim should benefit from the suit and that persons should not be made worse off unnecessarily.⁹⁸

Although outside the mainstream of judicial discourse, these cases suggest at least some degree of judicial distaste for leveling down remedies. They provide no guidance, however, as to when leveling down is illegitimate, nor do they go so far as to suggest that leveling down conflicts with the mandate of equality law. Rather, the concerns seem to reflect a preference for solutions that raise, rather than lower, the material well-being of persons for reasons external to equality norms.

93. 441 U.S. 677 (1979).

94. *Id.* at 717.

95. *Id.* at 704-05. The statutory remedy is a type of leveling down response in that it deprives everyone of the benefits of federal funding rather than raising the treatment of the disfavored group to match that of the favored group.

96. *Id.*

97. *Id.* at 705. Justice Stevens cited Justice Harlan's opinion in *Cumming* to support a preference for a remedy that does not achieve uniformity of treatment by lowering the level of treatment for everyone, without any reference to the infamy of the case in its effective preclusion of legal challenges to racial segregation at the time. *Id.* at 705 n.39.

98. *Id.* at 705-06.

C. Seeds of Constraint

As the undertone of dissatisfaction with leveling down suggests, there is room within the case law for exploring doctrinal limits on leveling down. Indeed, concerns about the desirability of an interpretation of equality that results in leveling down have spurred judicial efforts to search for rationales for rejecting leveling down remedies. As yet, however, these rationales tend to be incompletely theorized and, with one exception, grounded in values distinct from equality.

1. The Significance of the Benefit

One potential limiting principle floated by the Court draws the line based on the importance of the benefit at stake, as weighed from the perspective of the majority. Even if the dictates of equality may be satisfied by taking away recreational benefits like public swimming pools, perhaps equality requires something more when a more important interest is at stake.⁹⁹ Justice Black's opinion in

99. Of course, if the interest at stake is one that the Court recognizes as implicating a fundamental right, state action that denies such a fundamental right receives strict scrutiny under the Due Process Clause. *See, e.g.,* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 415, 433 (6th ed. 2000). In a narrow class of cases, the Court has applied strict scrutiny under the Equal Protection Clause to state actions that are facially neutral, but which disparately burden the fundamental interests of some persons, even if the interest in question does not rise to the level of a fundamental due process right. *See, e.g.,* Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (invalidating state poll tax requirement for voting in state elections; even if the state is not constitutionally required to provide elections, a poll tax disparately burdens the poor in their exercise of the vote); Griffin v. Illinois, 351 U.S. 12 (1956) (invalidating state requirement that all criminal defendants pay for their trial transcripts in criminal appeals because, even if the state is not constitutionally required to provide criminal appeals, a fee requirement disparately burdens indigent defendants in appealing their convictions). At present, the list of such fundamental interests is short and not likely to expand any time soon. *See, e.g.,* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1972) (ruling that education is not a fundamental interest, and applying the rational basis test under the Equal Protection Clause to uphold a state funding system that disparately affected the education of poor children). Most of the Court's fundamental interest equal protection cases involve differential treatment of the interest at stake, suggesting that deprivations that equally deprive everyone of the interest are less likely to be objectionable under the Equal Protection Clause. *See, e.g.,* Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969) (invalidating state law permitting some residents but not others to vote in school district elections without a sufficiently weighty reason under Equal Protection Clause); Skinner v. Oklahoma, 316 U.S. 535 (1942) (invalidating state law sterilizing larcenists but not embezzlers under the Equal Protection Clause). Thus, the

Palmer suggested this as a potential limit by distinguishing the swimming pool closures in that case from prior cases involving school closures, which the Court did not permit as a remedy to unlawful segregation.¹⁰⁰ Among other distinctions, the Court noted the comparatively greater importance of education.¹⁰¹ Contrasting the two contexts, Justice Black emphasized that the Court has previously described public education as "perhaps the most important function of state and local governments."¹⁰² Justice Blackmun, concurring in *Palmer*, sounded a similar note in listing his reasons for upholding the pool closures.¹⁰³

The entirety of the Court's opinion, however, suggests that this distinction was ultimately less important than the Court's perception of the state's continuing involvement in segregated education and its contrary perception with respect to the city's role in *Palmer*.¹⁰⁴ The dissenters in *Palmer* explicitly disagreed with the majority's suggestion that inequality with respect to a relatively insignificant benefit might legitimize inequality that would otherwise violate equal protection, and their view has carried the day.¹⁰⁵ Subsequent cases have explained *Palmer* based on the lack

significance of the benefit as a potential limit on leveling down does not fit neatly within existing equal protection doctrine. The discussion here presupposes that the interest in question is more important than others and yet not so fundamental as to trigger strict scrutiny under existing equal protection or due process doctrine.

100. See *Palmer v. Thompson*, 403 U.S. 217, 221-23 (1971); *Griffin v. Sch. Bd. of Prince Edward County*, 377 U.S. 218 (1964) (holding that the county's decision to close public schools in response to a court desegregation order violated equal protection); *Bush v. Orleans Parish Sch. Bd.*, 187 F. Supp. 42 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961) (holding that state statutes authorizing the governor to close integrated schools were unconstitutional).

101. *Palmer*, 403 U.S. at 221 n.6. In addition, Justice Black distinguished the cases on the ground that a discriminatory motive was implicit from the statutes authorizing the closure of integrated schools, whereas, he implied, the motive behind the pool closures was more ambiguous. *Id.* ("Of course there was no serious problem of probing the motives of a legislature in *Bush* because most of the Louisiana statutes explicitly stated they were designed to forestall integrated schools.").

102. *Id.* (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

103. *Id.* at 229 (Blackmun, J., concurring) ("The pools are not part of the city's educational system. They are a general municipal service of the nice-to-have but not essential variety, and they are a service, perhaps a luxury, not enjoyed by many communities.").

104. *Id.* at 221 n.6 ("More important, the laws struck down in *Bush* were part of an elaborate package of legislation through which Louisiana sought to maintain public education on a segregated basis, not to end public education.").

105. *Id.* at 262 n.16 (White, J., dissenting) ("When a public agency furnishes a service—regardless of whether or not it is an 'essential' one—it must act in a nondiscriminatory manner with regard to that service."). Under current law, differences in

of differential treatment and the absence of proof of discriminatory purpose, without mentioning the relative significance of the benefit withheld.¹⁰⁶

In *Palmer*, the musings of Justices Black and Blackmun on the nature of the benefit may have given them some comfort in believing that there was a stopping point to the city's strategy. Leveling down might be more palatable if a city could get away with closing its pools to avoid integration, but not with taking similar action with respect to more important public services. As a limiting principle, reliance on the significance of the benefit has the advantage of restricting the harms of leveling down to the cases that do not matter so much, at least to the Court.¹⁰⁷ A limitation on leveling down based on the significance of the benefit at stake has a certain utilitarian appeal as well, in that any damage to the overall social welfare caused by leveling down would be minimized. This approach seems largely concerned with protecting the interests of the majority by preventing a self-inflicted wound carried out in a fit of spite.

Deciding the permissibility of leveling down based on the significance of the benefit at stake is not a limit that adequately accounts for the values protected by a substantive conception of equality. Benefits classified as relatively unimportant, such as swimming pools and perhaps even NHS ceremonies, may nonethe-

the nature of the benefit only make a difference where the discrimination does not target a suspect class and the only path to strict scrutiny is through fundamental interest analysis.

106. See *Shaw v. Hunt*, 517 U.S. 899, 923 (1996) (Stevens, J., dissenting) (citing *Palmer* to stand for the principle that differential treatment is the touchstone of an equal protection violation); *City of Memphis v. Greene*, 451 U.S. 100, 105-06 n.7, 107-08 nn.10-11 (1981) (citing *Palmer* to support the proposition that an action that does not involve differential treatment based on race and does not depend on an invidious purpose will not violate equal protection); *Washington v. Davis*, 426 U.S. 229, 242-43 (1976) (describing *Palmer* as holding "that the city was not overtly or covertly operating segregated pools and was extending identical treatment to both whites and Negroes," 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"); *McGinnis v. Royster*, 410 U.S. 263, 276-77 (1973) (explaining the result in *Palmer* based on the difficulty of discerning an impermissible legislative motive).

107. The Court's view of the relative triviality of what it saw at stake in *Palmer* comes through perhaps most clearly in its rejection of the plaintiffs' Thirteenth Amendment challenge: "[T]he Thirteenth Amendment is a skimpy collection of words to allow this Court to legislate new laws to control the operation of swimming pools throughout the length and breadth of this Nation" *Palmer*, 403 U.S. at 227.

less have a significant impact on social relationships and may serve as a vehicle for generating powerful stigmatizing effects. Even if the tangible effects of the deprivation are not as devastating as those that would result from the loss of more significant resources and services, the nonmaterial harms do not necessarily depend on the importance of the thing itself. Injuries to social status and expressive harms caused by leveling down may be just as powerful, regardless of the relative significance of the unequally distributed benefit.¹⁰⁸ As a potential limit on leveling down, a focus on the importance of the benefit merely ensures that the advantaged group does not achieve gains in status and relational privilege at too great a cost to itself. It does nothing to protect those disadvantaged by inequality from further injury.

2. Remedial Principles Favoring Extension of Benefits

A close reading of the case law reveals another possible limit fashioned by a set of loosely defined remedial principles that favor curing inequality through the extension, rather than withdrawal, of benefits where the inequality arises from an underinclusive statute. Both the source and content of these principles are unclear, however, as is the rationale for why they should apply in equality challenges. These principles seem to stem from utilitarian concerns similar to those that prompted attention to the significance of the benefit as a limit: a desire to avoid an outcome that may worsen the overall level of welfare.¹⁰⁹ Upon inspection, these remedial principles turn out to be very weak limits on leveling down, easily trumped by a clear statement of legislative intent to the contrary. Most importantly, they too are unconnected to any value relating to the underlying equality claim.

The most prominent reference to remedial principles that might set limits on leveling down is found in *Heckler v. Mathews*,¹¹⁰ an equal protection challenge by a male plaintiff to a provision in the Social Security Act (SSA) that allowed women, but not men, to receive certain spousal benefits without subtracting amounts

108. See *infra* Part II.B.

109. Again, such a calculation assumes that the losses from leveling down are not compensated for by the diversion of the saved resources into more socially beneficial uses.

110. 465 U.S. 728 (1984).

received in government pensions and without proof of financial dependency on their spouse.¹¹¹ Foreseeing that this gender-based classification might encounter equal protection challenges, Congress included a severability clause. In the event that a court found the provision unconstitutional, the benefits conferred by the statutory exemption were to be withdrawn from women rather than extended to men.¹¹²

Although the Court ultimately upheld the gender-based classification against the equal protection challenge,¹¹³ it discussed the permissibility of leveling down in the context of the male plaintiff's standing, at issue because success on the claim would not have raised men's benefits.¹¹⁴ The Court rejected the challenge to standing, explaining that the injury from the discrimination was not the lower level of benefits *per se*, but the noneconomic injury from the discriminatory treatment of similarly situated persons.¹¹⁵

111. *Id.* at 731-33. The issue in *Mathews* was complicated by the compound statutory background of the case. The SSA provision in question was part of a series of amendments to the Act in response to an earlier Supreme Court decision, *Califano v. Goldfarb*, 430 U.S. 199 (1977), striking down a gender-based presumption entitling wives and widows, but not husbands and widowers, to full spousal benefits without proof of financial dependency. After the *Goldfarb* decision in 1977, Congress amended the statute to eliminate the gender-based financial dependency requirement. *Mathews*, 465 U.S. at 730-32. To ensure fiscal solvency, the amendment required spousal benefits to be offset by the government pension monies and required proof of financial dependency. However, to protect the reliance interests of those who planned their retirement based on the earlier system, the amended Act revived the gender-based classification in one respect: it exempted those persons who were eligible to receive pension benefits prior to December 1982, and who would have been eligible to receive unreduced spousal benefits under the pre-*Goldfarb* system, from the pension offset and financial dependency provisions. *Id.* at 732-33. In effect, wives and widows who became eligible for government pensions within a five-year grace period could still obtain full spousal benefits without proof of financial dependency and without offsetting for other pension monies. *Id.* at 733-34. Husbands and widowers, however, did not have recourse to such a grace period.

112. *Id.* at 734.

113. The Court found that Congress had sufficiently weighty reasons for reviving the gender-based classification for a limited time to protect the reliance interests of persons near retirement, and that the use of the classification was sufficiently narrowly tailored to protect those interests. *Id.* at 750-51.

114. The district court had found the severability clause to be an invalid attempt by Congress to discourage challengers by defeating standing, and thus ordered the Secretary to extend benefits to the plaintiff class. *Id.* at 736-37. The Supreme Court disagreed. *Id.* at 737-40.

115. *Id.* at 739-40.

Justice Brennan, writing for a unanimous Court, explained the harm to the plaintiff as follows:

[D]iscrimination itself, by perpetuating "archaic and stereotypic notions" or by stigmatizing members of the disfavored group as "innately inferior" and therefore as less worthy participants in the political community ... can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.¹¹⁶

So framed, this noneconomic injury conferred standing on the plaintiff because the Court could redress it by ending the use of the more advantageous formula to calculate benefits for women.¹¹⁷

In the course of deciding that a withdrawal of benefits from women would redress the plaintiff's injury, the Court engaged in a more general discussion of the acceptability of leveling down remedies. In the decision below, the district court invalidated the severability clause as an effort by Congress to thwart possible discrimination claims by "making such a challenge fruitless."¹¹⁸ The

116. *Id.* (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)). See also *Orr v. Orr*, 440 U.S. 268, 272-73 (1978) (finding a male plaintiff had standing to contest an order requiring payment of alimony to his ex-wife under state gender-based alimony statute, even though the result might be to require similarly situated women to pay alimony, rather than to invalidate the order requiring plaintiff to pay). Numerous cases have cited *Mathews* for the principle that plaintiffs have standing to challenge discrimination even if they will not benefit tangibly from a successful challenge. See, e.g., *Apache Bend Apartments, Ltd. v. United States [IRS]*, 964 F.2d 1556, 1559-61 (5th Cir. 1992) (in equal protection challenge to exemptions to the Tax Reform Act of 1986, holding that plaintiffs had standing, even though the relief that they sought would eliminate tax breaks for others rather than reduce their own tax liability, because disparate treatment itself is a recognizable injury); *Cruz v. Bowen*, 672 F. Supp. 1300, 1304 (N.D. Cal. 1987); see also *N.E. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.").

117. *Mathews*, 465 U.S. at 740. The Court's recognition of nonmaterial injuries in equal protection cases provides fertile ground for exploring equality-based limits on leveling down. *Mathews* stops short, however, of recognizing that nonmaterial injuries may be furthered, rather than remedied, by leveling down. The Court's appreciation of the intangible injuries from discrimination was limited to injuries resulting from facially different treatment, without acknowledging that even facially neutral actions may inflict injuries of devaluation and stigma. As argued below, leveling down may conflict with equality's requirements where it expresses unequal concern towards the challengers of inequality. See *infra* Parts II.B, III.

118. *Mathews*, 465 U.S. at 736-37.

Supreme Court disagreed, stating that it had “never suggested that the injuries caused by a constitutionally underinclusive scheme can be remedied only by extending the program’s benefits to the excluded class.”¹¹⁹ Rather,

a court sustaining such a claim faces “two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.”¹²⁰

Indeed, the Court noted, it had “frequently entertained attacks on discriminatory statutes or practices even when the government could deprive a successful plaintiff of any monetary relief by withdrawing the statute’s benefits from both the favored and the excluded class.”¹²¹ Emphasizing the general consistency of leveling down with equality rights, the Court stated: “[W]hen the ‘right invoked is that to equal treatment,’ the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.”¹²²

So far, the Court’s discussion was fully consistent with the conventional understanding of leveling down as an acceptable fix for inequality. At this point, however, the Court’s opinion took an interesting turn. At the same time that it emphasized the overall permissibility of leveling down as a remedy in discrimination cases, it suggested that remedial principles might nonetheless place some

119. *Id.* at 738.

120. *Id.* (quoting *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring)). See also *Orr v. Orr*, 440 U.S. 268, 272 (1979) (“In every equal protection attack upon a statute challenged as under-inclusive, the State may satisfy the Constitution’s commands either by extending benefits to the previously disfavored class or by denying benefits to both parties”); *Stanton v. Stanton*, 429 U.S. 501, 504 n.4 (1977) (“[W]e emphasize that Utah is free to adopt either 18 or 21 as the age of majority for both males and females for child-support purposes. The only constraint on its power to choose is the principle ... that the two sexes must be treated equally.”).

121. *Mathews*, 465 U.S. at 739. See, e.g., *Orr*, 440 U.S. at 272; *Califano v. Webster*, 430 U.S. 313, 316 (1977); *Stanton v. Stanton*, 421 U.S. 7, 17-18 (1975); *Kahn v. Shevin*, 416 U.S. 351, 352 (1974).

122. *Mathews*, 465 U.S. at 740 (quoting *Iowa-Des Moines Nat’l Bank v. Bennett*, 284 U.S. 239, 247 (1931) (Brandeis, J., concurring)).

limit on leveling down. In a footnote to its discussion of the remedial flexibility of discrimination claims, the Court stated that the remedial choice between leveling up or leveling down is "within the 'constitutional competence of a federal district court,'" and that "ordinarily 'extension, rather than nullification, is the proper course.'"¹²³ The Court did not explain why a court should ordinarily prefer extension, and cited only one case in support of such a preference.¹²⁴ In the same breath, the Court emphasized that a court "should not, of course, 'use its remedial powers to circumvent the intent of the legislature,'"¹²⁵ directing courts instead to "measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation."¹²⁶ It found this to be a case where Congress had clearly expressed a preference for nullification rather than extension; therefore, the Court found that leveling down was not only permissible, but required.¹²⁷ As framed by the Court in *Mathews*, any preference for the extension of benefits only carries force when it does not conflict with a contrary legislative intent.

The source of the remedial preference asserted in *Mathews* for extension of benefits remains something of a mystery. The one case cited in *Mathews* in support of extension remedies, *Califano v. Westcott*,¹²⁸ does not add much to the understanding of why and when leveling down might be disfavored in an equality claim. In *Westcott*, the Court unanimously agreed that a federal provision authorizing benefits to families with unemployed fathers, but not unemployed mothers, violated equal protection, but split on the question of remedy.¹²⁹ Five Justices voted to extend the

123. *Id.* at 739 n.5 (quoting *Califano v. Westcott*, 443 U.S. 76, 89, 91 (1979)).

124. *Id.* (citing *Califano*, 443 U.S. at 91).

125. *Id.* (quoting *Califano*, 443 U.S. at 94).

126. *Id.* (quoting *Welsh v. United States*, 398 U.S. 333, 365 (1970) (Harlan, J., concurring)).

127. *Id.* The Court left open the door to a possible limit on leveling down remedies where "a legislative attempt to thwart a court's ability to remedy a constitutional violation would itself violate the Constitution." *Id.* The Court declined to address this argument, because it ultimately concluded that the Court's remedial powers were not thwarted by the severability clause, as leveling down would remedy the harm. Its treatment of the issue, however, left open the possibility that a legislative effort that does thwart a Court's remedial power might violate the separation of powers, a topic that is beyond the scope of this Article.

128. 443 U.S. 76 (1979).

129. *Id.* at 79-80, 89, 93-94. There were two defendants in the case, the Secretary of the

"unemployed father" benefits to families with unemployed mothers; the remaining four Justices would have enjoined the program until Congress amended the statute to cure the violation and to select its preferred remedial course.¹³⁰ The majority defended its choice of extension by characterizing prior equal protection cases as "suggest[ing] that extension, rather than nullification, is the proper course," citing two such cases,¹³¹ and noting that it had "regularly ... affirmed District Court judgments ordering that welfare benefits be paid to members of an unconstitutionally excluded class."¹³²

The decision does little to illuminate the source of, or justification for, a preference for extension of benefits. The selection of the remedy in *Westcott* turned more on the Court's view of congressional intent than any independent remedial principle favoring extension as a remedy to inequality. The Court cited "equitable considerations" in support of the extension remedy, highlighting the hardship that would befall the 300,000 children of unemployed fathers who would otherwise be denied AFDC benefits.¹³³ The Court, however, justified its attention to this concern because of "a congressional intent to minimize the burdens" on AFDC beneficia-

former U.S. Department of Health, Education and Welfare (HEW), and the Commissioner of the Massachusetts Department of Public Welfare. The federal defendant contested the finding on liability, but did not contest the remedy. In contrast, the state defendant accepted the liability finding but disputed the remedy, arguing that the violation could be remedied by adopting a gender-neutral "unemployed principal wage-earner" test. *Id.* at 78-79, 82-83 n.4. The issue, then, was whether to extend full benefits to families with unemployed mothers, or partially level down by providing benefits at an intermediate level. No party proposed leveling benefits all the way down to the level of the disadvantaged class, a remedy which would provide no benefits to any families with unemployed mothers or fathers, regardless of wage-earner status.

130. *Id.* at 93-94.

131. *Id.* at 89 (citing *Jiminez v. Weinberger*, 417 U.S. 628, 637-38 (1974) and *Frontiero v. Richardson*, 411 U.S. 677, 691 n.25 (1973)). This principle qualified the Court's acknowledgement that a court confronting an underinclusive statute has two remedial alternatives: extension or withdrawal of the benefits in question. *Id.* at 89 (citing *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring)).

132. *Id.* at 90.

133. *Id.* As the dissent notes, such a calculus can be difficult to gauge. *Id.* at 96 ("There is the possibility, not mentioned by the Court, that other hardships might be occasioned in the allocating of limited funds as a result of court-ordered extension of these particular benefits."). If utilitarian concerns about how best to maximize social welfare are the guiding principles courts use in setting limits on leveling down remedies, the dissent's separation of powers argument, that Congress and not the Court should set the balance, has some force. However, a limit on leveling down that stems from equality law, rather than general equitable considerations, would be properly implemented by a court.

ries in the event that part of the statute was found unconstitutional.¹³⁴ Thus, the existence, much less content, of any independent equitable consideration favoring extension remains unclear.¹³⁵ As in *Mathews*, the asserted remedial principle ultimately collapses into the Court's prediction of what the legislature would have wanted.¹³⁶

The pedigree and normative justification for the preference expressed in *Mathews* and *Westcott* are opaque at best. *Mathews* cited only *Westcott* in support of the remedial preference it espoused, and the two cases cited for this principle in *Westcott* merely select the remedial course of extension with no discussion.¹³⁷ These cases fall within a subset of cases involving equal protection challenges to underinclusive statutes where the Court has, with little or no discussion, opted for extending the more favorable treatment to the disadvantaged class.¹³⁸ In these cases, the Court has been guided by its *sub silentio* reading of legislative intent, as opposed to a clearly articulated remedial preference for leveling up.¹³⁹ This line of under-

134. *Id.* at 90.

135. In the end, the majority saw no need "to elaborate ... [upon] the conditions under which invalidation rather than extension of an underinclusive federal benefits statute should be ordered" because no party had presented that issue for review. *Id.* The Court's framing of the issue, however, as about the form the extension should take and not about nullification versus extension, was a bit facetious. Although it would not have leveled the benefits all the way down to zero, the state argued for a remedy that would have imposed some leveling down of benefits by tightening the requirements for receipt of such benefits. The state's position squarely presented the issue of whether a partial leveling down remedy is acceptable in an equal protection challenge to an underinclusive statute.

136. Although the majority purported to give Congress's specific intent less weight on the question of how to craft the extension at this stage, the Court's reading of legislative intent ultimately carried the day. *Id.* at 82-83, 90-91. While giving lip service to equitable concerns about needy families if additional criteria, such as breadwinner status, were imposed on otherwise eligible families, the Court again justified this concern by reference to Congress's intent. *Id.* at 91-92 (expressing doubt that Congress would approve of a remedy that incorporated a new dividing line, such as breadwinner status, into the benefits scheme).

137. *Id.* at 89 (citing *Jimenez v. Weinberger*, 417 U.S. 628 (1974) and *Frontiero v. Richardson*, 411 U.S. 677 (1973)).

138. See, e.g., BARBARA ALLEN BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY* 209 (2d ed. 1996) ("Without discussing the matter, the Burger Court mostly extended coverage of unconstitutional sex-based statutes to 'those who are aggrieved by the exclusion.'").

139. For example, in *Jimenez v. Weinberger*, 417 U.S. 628 (1974), cited in *Westcott*, the Court struck down a Social Security Act (SSA) provision that discriminated against illegitimate children, and remanded the case to give the plaintiffs a chance to show that they met certain judicially created criteria for receiving SSA benefits. In effect, the Court rewrote the statute to conform to what it viewed as Congress's rational purposes underlying the

theorized cases stands in contrast to other equal protection cases in which the Court has suggested that the choice between extension and invalidation should be decided exclusively based on legislative intent, without referring to any principle favoring the extension of benefits.¹⁴⁰ When one follows the thread of case law to *Mathews*, the general remedial principle cited turns out to be the proverbial emperor's new clothes.

One final reed of support for a remedial principle favoring extension lies in early Equal Employment Opportunity Commission (EEOC) guidance directing employers to cure any discrimination

statute, including the prevention of spurious claims and the provision of support for the dependents of a disabled wage earner, without explicitly discussing the rationale behind its remedial choice or other remedial alternatives. *Id.* at 634-37. Likewise, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), the other case cited in *Westcott*, the Court implicitly extended spousal benefits to servicewomen on the same terms as servicemen, without any discussion of a preference for extension over nullification, and without an acknowledgement of other possible remedial choices. *Id.* at 691 n.25 (invalidating the statutory scheme only insofar as it required a servicewoman to prove the dependency of her spouse). The Court seemingly viewed extension as consistent with Congress' purpose to attract career personnel through the provision of spousal benefits. *Id.* Although *Frontiero* cited three cases in support of the continuing validity of the remainder of the statutory scheme, none of these cases discuss, much less endorse, a general preference for extension remedies in equal protection cases. See *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164, 165 (1972) (holding state workers compensation law that discriminated against "unacknowledged illegitimate" children violated equal protection, and extending the right to recover to illegitimate children); *Levy v. Louisiana*, 391 U.S. 68 (1968) (holding unconstitutional a state wrongful death statute that permitted legitimate but not illegitimate children to recover in tort suit for wrongful death of parent, and extending the rights to recover to illegitimate children); *Moritz v. Comm'r*, 469 F.2d 466, 470 (10th Cir. 1972) (finding equal protection violation in tax code's gender-based denial of deduction for the costs of caring for taxpayer's dependent invalid mother where taxpayer is a never-married male, and finding extension "logical and proper, in view of [the deduction provisions] purpose and the broad separability clause in the act.>").

140. See, e.g., *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151-53 (1980) (declining to decide whether state statute that treated widows and widowers unequally in violation of equal protection should be cured by extending benefits to widowers or taking them away from widows, and remanding to state court to decide based on state legislature's intent); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (vacating on equal protection grounds a sterilization order in which the state statute in question sterilized persons convicted of larceny but not persons convicted of embezzlement, leaving it to the state to decide whether to broaden the statute so as to sterilize embezzlers as well); see also *Johnson Bros. Liquor v. Comm'r of Revenue*, 402 N.W.2d 791, 793 (Minn. 1987) ("When a statutory scheme has been declared unconstitutional, our primary goal in determining a remedy is, insofar as possible, to effectuate the intent of the legislature had it known the statutes were invalid."); *People v. Liberta*, 64 N.Y.2d 152 (1984) (finding gender-specific state rape statute unconstitutional, and extending statute's coverage to persons previously excluded, rather than striking down the conviction, based on belief that legislature would have preferred extension over invalidation).

that results from state-imposed special maternity benefits by extending such benefits to men, absent proof of business necessity.¹⁴¹ In this guidance, the EEOC interpreted Title VII to require that employers who provide certain benefits to women in compliance with state law must provide those benefits to male employees also, unless the employer can establish that business necessity precludes offering the benefits to both men and women.¹⁴²

Much like the Court in *Mathews*, the EEOC did not cite any reasons or legal precedent for its requirement that employers must, absent business necessity, comply with Title VII by extending the state-mandated benefits to men rather than withdrawing them from women. During the time when courts were grappling with possible conflicts between Title VII and state laws requiring the preferential treatment of maternity,¹⁴³ this portion of the EEOC guidance received a rather lukewarm reception in the courts.¹⁴⁴ Courts objected primarily that the state legislatures that passed laws requiring special benefits for women did not intend to burden employers with the requirement of extending similar treatment to

141. According to the regulation:

[a]s to other kinds of sex-oriented State employment laws, such as those requiring special rest and meal periods or physical facilities for women, provision of these benefits to one sex only will be a violation of Title VII. *An employer will be deemed to have engaged in an unlawful employment practice if:* ... (ii) *It does not provide the same benefits for male employees.* If the employer can prove that business necessity precludes providing these benefits to both men and women, then the State law is in conflict with and superseded by Title VII as to this employer. In this situation, the employer shall not provide such benefits to members of either sex.

EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(b)(4)(ii) (2003) (emphasis added).

142. *Id.* If that is the case, the employer may comply with Title VII by refusing to provide the benefits to either sex, in which case Title VII would preclude the conflicting state law. *Id.*

143. This period of uncertainty ended in the 1980s, when the Supreme Court upheld state statutes requiring preferential treatment for pregnant women as consistent with Title VII. *See* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987). By that time, other types of special treatment state employment laws not involving pregnancy were vulnerable under equal protection.

144. *See, e.g.,* Homemakers, Inc. v. Div. of Indus. Welfare, 509 F.2d 20 (9th Cir. 1974); Burns v. Rohr Corp., 346 F. Supp. 994 (S.D. Cal. 1972); Arkansas v. Fairfield Communities Land Co., 538 S.W.2d 698 (Ark. 1976); Vick v. Pioneer Oil Co., 569 S.W.2d 631 (Tex. Civ. App. 1978). *But see* Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir. 1972) (deferring to the EEOC Guidance and requiring the employer to pay its male employees overtime pay in order to comply with both Title VII and state law requiring female employees to receive overtime pay).

men.¹⁴⁵ Similar to the fate of the preference for extension cited in *Mathews*, the EEOC preference retained little or no force when confronted with judicial impressions of a contrary legislative intent.

Chasing down the source of a remedial principle favoring extension over the withdrawal of benefits in a discrimination claim, referenced so obliquely by *Mathews* and the EEOC, turns out to be like following a disappearing trail of breadcrumbs. In the end, all that is clear is that any such principle is not connected to the values of equality and is easily trumped by a contrary legislative intent.¹⁴⁶ Still, the various references to such a preference suggest a palpable, if inarticulate, receptivity to further development of judicial limits on leveling down. If such a limit is grounded in equality principles, it is not at all clear why a conflicting legislative intent should prevail, particularly if the source of the equality requirement is constitutional rather than statutory. Even if the source of the equality guarantee is statutory, it is not clear why legislative intent on the question of remedy would necessarily prevail if it conflicted with the meaning of the equality guarantee itself.¹⁴⁷

3. External Limits Fixing the Level of Treatment for One Class

One settled limit that does constrain leveling down, independent of any ties to equality principles, is the fixation of treatment for one group by some external principle so that a court can provide relief by equalizing benefits or burdens in only one direction.¹⁴⁸ Thus,

145. *Homemakers, Inc. v. Div. of Indus. Welfare*, 356 F. Supp. 1111, 1112-13 (N.D. Cal. 1973); *Burns*, 346 F. Supp. at 997; *Vick*, 569 S.W.2d at 634.

146. Of course, it is possible that the Court's reading of congressional intent as supporting extension itself reflects an implicit determination that a contrary reading of congressional intent would violate equality law, and that the legislature should be presumed to act with the intent to act constitutionally. That is not, however, how the Court has explained what it is doing.

147. This is especially true when the source of the equality guarantee is a federal statute, and the underinclusive statute is a state statute. Even if both the equality guarantee and the discriminatory statute are at the same level in the hierarchy of law, however, it is still not clear why the legislature's intent with respect to how to remedy the discriminatory statute should prevail. At a minimum, when the intent to permit only leveling down remedies conflicts with the intent to protect equality rights, such a conflict would require a determination of which competing intent should prevail. Generally, the more specific or most recently expressed legislative intent prevails, but conflicts between legislative intentions are notoriously difficult to resolve.

148. See Evan H. Caminker, Note, *A Norm-Based Remedial Model for Underinclusive*

where the level of benefits for the favored class is fixed, leveling up may be required as the only path to equal treatment. Of course, external principles may work in the other direction too, thereby precluding a court from raising the level of treatment for the disfavored group.¹⁴⁹

Welsh v. United States provides an example of the former situation.¹⁵⁰ In *Welsh*, a case most often cited for Justice Harlan's observations about the flexibility of equality in terms of possible remedies, the Court held that the federal conscientious objector statute violated the establishment clause by privileging religious opposition to war over non-religious belief systems.¹⁵¹ Rather than striking down the conscientious objector statute in its entirety, the Court reversed *Welsh's* conviction, thereby extending the statute's protection to the previously excluded group.¹⁵² Although the case was litigated under the Establishment Clause and did not involve an equality claim, the Court engaged in the same kind of analysis used to confront an underinclusive statute under the Equal Protection Clause.¹⁵³ In *Welsh*, however, the Court could not level

Statutes, 95 YALE L.J. 1185, 1187 n.8 (1986).

149. For example, in an equal protection challenge to a federal statute making citizenship automatic for the foreign-born children of citizen-mothers but not citizen-fathers, Justice Scalia observed that even if the Court had found an equal protection violation, it would not have been able to extend citizenship to the challenger because only Congress, not the Court, has that power. *Miller v. Albright*, 523 U.S. 420, 453-59 (1998) (Scalia, J., concurring). If Scalia is correct, the Court would have been precluded from imposing a leveling up remedy. *But see* *Wauchope v. United States Dept. of State*, 985 F.2d 1407, 1417-18 (9th Cir. 1993) (upholding district court's extension of U.S. citizenship to foreign-born offspring of citizen-mothers in equal protection challenge to gender-based citizenship statute); *Aguayo v. Christopher*, 865 F. Supp. 479, 486-88, 492 (N.D. Ill. 1994) (granting citizenship to foreign-born daughter of citizen-mother as remedy for unconstitutional gender-based statute conferring citizenship on foreign-born children of citizen-fathers but not citizen-mothers). For criticism of the Court's resolution of the equal protection challenge in *Miller*, see Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1 (discussing the majority's reliance on gender stereotypes about mens' and womens' parenting roles).

150. 398 U.S. 333 (1970).

Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion.

Id. at 361.

151. *Id.* at 340, 344.

152. *Id.* at 342-44.

153. *Id.* at 356-57 (describing the Establishment Clause as embodying a "neutrality

down to resolve the disparity of treatment among religious and nonreligious objectors because it could not retroactively convict similarly situated religious conscientious objectors without violating the constitutional prohibition against bills of attainder.¹⁵⁴ The extension of conscientious objector status to Welsh, therefore, was the only possible remedy.¹⁵⁵ This limit, and other possible due process limits, will prevent courts from imposing a leveling down remedy in a criminal case where a convicted person seeks relief through an equality claim.¹⁵⁶ External limits derived from other constitutional values also may limit leveling down remedies in civil cases.¹⁵⁷

External principles that preclude leveling down choices also may have statutory sources. Specifically, two federal antidiscrimination statutes contain provisions barring remedies that would take away benefits from the favored class. Both the Equal Pay Act and the Age Discrimination in Employment Act prohibit employers from lowering the wages of more highly paid workers in response to a lawsuit alleging pay discrimination against lower-paid workers.¹⁵⁸

principle" which requires "an equal protection mode of analysis" to "eliminate ... religious gerrymanders"); see also Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 254 n.68 (1994) (noting that the Establishment Clause contains a miniature equal protection clause).

154. 398 U.S. at 362.

155. If the action had been for prospective relief, such as a declaratory judgment, this constraint would not have applied. The Court would have approached the question by looking at statutory intent, as it does when underinclusive statutes are challenged under the Equal Protection Clause. *Id.* at 364-66 n.18 (Harlan, J., concurring).

156. *Cf. Taylor v. Louisiana*, 419 U.S. 522 (1975) (invalidating sex-based exclusion of non-volunteer women from jury venire and ordering state to include both women and men equally in the jury venire; because jury trials are guaranteed by the Sixth Amendment, the inequality could be cured only by including both men and women in the jury pool).

157. See, e.g., *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 817-18 (1989) (finding that a state tax treating retired state and local government employees differently from other retired employees violated equality requirement of intergovernmental tax immunity, but that a federal court may not remedy the inequality by increasing the tax burden on those treated more favorably because it lacks the constitutional power to directly impose state taxes). See also Caminker, *supra* note 148, at 1185 (conceding that the constitutional mandate of equal treatment does not itself dictate a preference for extending or withdrawing favorable treatment as a remedy to inequality, but arguing that other constitutional norms may impose limits on such a choice by the courts).

158. See Equal Pay Act, 29 U.S.C. § 206(d)(1) (2000) ("an employer who is paying a wage rate differential in violation of [the Act] shall not, in order to comply with the provisions of [the Act], reduce the wage rate of any employee"); Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(3) (2000) (forbidding employers "to reduce the wage rate of any employee in

These constraints were included in the legislation to mitigate concerns about the costs of equality if it resulted in lowering the standard of living for those privileged by inequality.¹⁵⁹ Currently, however, these statutory constraints are understood as distinct from the equality principle embodied in these statutory nondiscrimination guarantees.

Although external constraints may sporadically limit leveling down, they are exceptional and disconnected from any substantive value in equality law. As a result, they are not a substitute for an analysis of whether leveling down responses may conflict with equality principles themselves under some circumstances.

4. Leveling Down as a Cover for Continuing Discrimination

In addition to the discriminatory intent standard discussed above, and in contrast with the three potential limits just discussed, there is one existing limit on leveling down that does have its moorings in equality law. It too, however, falls short of providing an adequate account of leveling down in relation to equality law. This limit comes into play when the remedy does not actually lower the level of treatment all the way down to that experienced by the most disadvantaged. In such a case, the continuation of the discriminatory treatment violates equality law. The Court in *Palmer* recognized the presence of ongoing, if obscured, discrimination as a potential limit, although one that it thought not to be implicated in *Palmer* itself.¹⁶⁰ Several of the cases distinguished in *Palmer* can be understood as falling within this exception. In *Griffin v. School Board of Prince Edward County*, the Court held that Prince Edward County's decision to close its public schools, rather than comply with a desegregation order, violated the Equal Protection Clause.¹⁶¹ The Court explained its decision as based on the county's unconstitu-

order to comply with this chapter").

159. See, e.g., 109 CONG. REC. 9196 (1963) (the "lower wage rate must be increased to the higher level so that there will not be an adverse effect on already established wage patterns") (remarks of Congressman Thompson).

160. *Palmer v. Thompson*, 403 U.S. 217, 222-23 (1971) ("If the time ever comes when Jackson attempts to run segregated public pools either directly or indirectly, or participates in subterfuge whereby pools are nominally run by 'private parties' but actually by the city, relief will be available in the federal courts.").

161. 377 U.S. 218 (1964).

tional purpose: to stop children from attending integrated schools.¹⁶² In *Palmer*, however, which rejected an intent standard, the Court explained *Griffin* as a case where the county was covertly continuing to treat white students preferentially, despite the façade of neutral treatment constructed by the closure of public schools.¹⁶³ This reading of *Griffin* finds support in the Court's cases treating state support of private discrimination as discrimination by the state.¹⁶⁴ In other words, *Griffin* was not a true leveling down case because the county continued to subsidize the education of white students, who could attend publicly-subsidized "private" schools, but did nothing for black students, who had no such schools to attend.

Unlike the other limits described above, this constraint is grounded in equality law. Without a complete leveling down, the mandate of equal treatment is violated. Because it is limited to fulfilling an equal treatment principle, however, it does not impose any constraints where a complete leveling down of treatment has occurred. If the defendant in *Griffin* had truly leveled educational opportunities, by playing no role in assisting white students to

162. *Id.* at 231.

But the record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.

Id.

163. *Palmer*, 403 U.S. at 221-22 (explaining that the private schools in Prince Edward "were in fact run by a practical partnership between State and county," and that there were "many facets of state involvement in the running of the 'private schools.'"); see also *id.* at 225 (explaining *Griffin* as a case not based on motive, but the reality that "the State was in fact perpetuating a segregated public school system by financing segregated 'private' academies").

164. See, e.g., *Norwood v. Harrison*, 413 U.S. 455 (1973) (holding state's provision of textbooks to private discriminatory schools violated equal protection); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding state court's enforcement of racially restrictive covenant violated equal protection); see also *Evans v. Newton*, 382 U.S. 296, 302 (1966) (holding that Macon, Georgia could not transfer its city park from public to private hands in order to avoid desegregation, because the city continued to maintain the park and thus was implicated by the "private" park's exclusion of African Americans). But see *Evans v. Abney*, 396 U.S. 435 (1970) (affirming the Georgia Supreme Court's decision that the trust given to Macon, Georgia in Senator Bacon's will failed after the Supreme Court's decision in *Evans v. Newton* because the testator had clearly expressed an intent that the park remain segregated, so that the land reverted to the state under Georgia state property law, and would not be used as a public park).

obtain a private education, it could have avoided this check. The only remaining equality-based limit under existing doctrine that could have challenged the school closure is the discriminatory intent standard, which, as discussed above, is an inadequate constraint on leveling down. Like the intent limit, the limit on partial leveling down assumes a narrow conception of equality that requires only equal treatment and the absence of a discriminatory motive. Accordingly, it does not fully account for the ways in which leveling down may perpetuate inequality.

D. Room for Further Development of Equality-Based Limits

Despite rumblings of doctrinal limits, courts typically approve leveling down with minimal constraints. In addition, the constraints that do exist are either unmoored from the principles of equality law or grounded in an overly narrow and formalistic conception of equality. As currently conceived, existing doctrine does not adequately account for the ways in which leveling down can perpetuate and compound inequality. Still, the Court has not foreclosed additional limits on leveling down that are grounded in a more substantive conception of equality. As precedent, *Palmer* is a case that is sorely outdated, perhaps more a reflection of the Court's reluctance to squarely overrule prior cases than a continuing approval of the substantive result.

Similarly, the Court's acceptance of the leveling down remedy in *Mathews* does not foreclose the rejection of leveling down in other cases. *Mathews* accepted leveling down in a case where the injury was limited to differential treatment and where the leveling down would not have contributed to the social inequality of men or stigmatized them in relation to women.¹⁶⁵ The Court's stated preference for extension remedies suggests that the Court may be amenable to the further development of limits to leveling down.

Nor does the shift to a discriminatory intent standard in *Washington v. Davis*¹⁶⁶ foreclose a more searching inquiry into the potential tension between leveling down and equality norms. At the point of evaluating a leveling down response, discrimination has

165. See *infra* notes 294-96 and accompanying text.

166. 426 U.S. 229 (1976).

already occurred. The Court's institutional concerns in *Davis* about frequent clashes with other branches of government in reviewing limitless challenges to facially neutral policies should be less pressing once a violation of equal protection has been established. With discriminatory intent or facially different treatment having already been established once, leveling down in response to that discrimination deserves a more critical look.¹⁶⁷ Once leveling down enters the picture, the focus should be on whether it remedies the full extent of the injuries cognizable under equality law. Nothing in *Davis* precludes a more critical approach to leveling down as a remedy to inequality.

Although inadequately theorized, the recurrent judicial expressions of dislike for leveling down suggest an openness to closer scrutiny of the conventional wisdom that inequality can always be remedied in this manner. To begin a more complete analysis of leveling down and its relationship to equality, we should revisit the question of whether equal treatment is indeed, as courts often assume, the only norm to be reckoned with in equality law.

II. A MORE CRITICAL PERSPECTIVE ON LEVELING DOWN AND EQUALITY

An evaluation of the legitimacy of leveling down requires a more precise look at the normative content of equality law and the injuries from which it protects.¹⁶⁸ Although some injuries cognizable

167. In related contexts, once a violation of rights is established, the burden of proof shifts to the defendant to prove that some other nondiscriminatory reason actually caused the harm to the plaintiff. See, e.g., Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (2000) (amending Title VII so that once plaintiff proves discrimination was a "motivating factor," a violation is established, and defendant's proof that it would have made the same decision anyway limits the remedy); *Teamsters v. United States*, 431 U.S. 324 (1977) (finding that once plaintiffs prove systemic disparate treatment, defendant has the burden of proof at the remedy stage with respect to individual relief to show that the harm to any particular plaintiff was not caused by discrimination); *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (holding that once plaintiff shows that exercise of rights was a "motivating factor" in decision not to rehire him, defendant has burden to prove that it would have reached the same decision even in the absence of the plaintiff's protected conduct). An analogous rule would be that if the defendant responds by leveling down once discrimination has occurred, the defendant has the burden to prove the absence of a discriminatory intent behind the action.

168. Cf. Gewirtz, *supra* note 32, at 585, 587 ("The function of a remedy is to 'realize' a legal norm").

under equality law are of the equal treatment order, others are not. The permissibility of leveling down should depend on its responsiveness to the injuries of discrimination. Where the injury inheres in the materially dissimilar treatment of persons otherwise similarly situated, it may be remedied by eliminating the differential treatment either by leveling down, leveling up, or setting a baseline at some point in between. Where the injuries from discrimination transcend the material consequences of differential treatment and are social or relational in nature, however, leveling down may exacerbate the injuries of discrimination and is not consistent with equality law.

A. Equality as Equal Concern

The meaning of equality depends on one's perspective, as there is no inherent meaning discoverable in the Equal Protection Clause or in statutes that prohibit discrimination based on certain criteria.¹⁶⁹ With countless books, articles, and essays grappling with the meaning of equality, the purpose of this discussion is to make the more limited point that equal treatment is not the only, nor even the most predominant, norm in equality law. To be sure, equality law as it has developed is concerned with the unequal treatment of persons deemed to be similarly situated. This unequal treatment includes both different treatment and facially neutral treatment with a discriminatory purpose. Although superficially treating people the same, the latter type of treatment still involves an equal treatment principle. The prohibition on discriminatory intent seeks to ensure the equal treatment of persons in the decision-making process, so that they are not treated less favorably than they would have been absent an impermissible reason.¹⁷⁰ Thus, both facially neutral classifications based on a discriminatory purpose and facially discriminatory classifications violate an equal treatment

169. Cf. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 107-08 (1976) (remarking upon the need for a mediating principle to add content to the Equal Protection Clause).

170. As currently construed by the Court, the discriminatory intent requirement for facially neutral treatment protects against certain kinds of animus in the decision-making process, such as race or sex bias. See, e.g., *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

principle unless they are adequately justified by their relationship to a sufficiently weighty and acceptable purpose.

Although unequal treatment does violate equality law where insufficiently justified, it does not follow that the normative content of equality law is fully exhausted by an equal treatment mandate. Rather, when unequal treatment violates equality law, it is only because it violates the more fundamental principle of equal concern.¹⁷¹ Perhaps the most well-known proponent of equal concern as the guiding normative theory of equality is Ronald Dworkin.¹⁷² According to Dworkin, "the right to treatment as an equal is fundamental, [while] the right to equal treatment [is] derivative."¹⁷³ In other words, the right to be treated as an equal may not always require or be satisfied by equal treatment. When unequal treatment violates equality law, it does so not because equality always requires treating similarly situated people the same, but rather because the unequal treatment in question violates the more fundamental principle of equal concern.¹⁷⁴

171. A wide variety of scholars have identified the overriding norm of equality law as the principle that all human beings deserve to be regarded with equal concern and respected as equals. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272-73 (1977) (discussing equality in political morality as meaning not just equal treatment, but the more fundamental principle of equal concern); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 82 (1980) (embracing Dworkin's concept of equal concern); KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER AND RELIGION* x (1993) (explaining his premise that legal guarantees of equality in U.S. law are based on a principle of "equal citizenship," such "that every individual is entitled to be treated by the organized society as a respected and responsible participant"); ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 98 (1996) (identifying as the central theory of antidiscrimination law, "the denial of the belief that some persons deserve less concern and respect because of their race," and subsequently applying this principle to gender and sexual orientation in addition to race); Paul Brest, *The Supreme Court 1975 Term, Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6, 7 (1976) (explaining the antidiscrimination principle as a prohibition on race-dependent decisions because of their propensity to "reflect the assumption that members of one race are less worthy than other people," and "are likely in fact to rest on assumptions of the differential worth of racial groups"); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 13-18 (2000) (discussing and elaborating a principle of equal concern as the guiding principle for deciding equal protection cases); Lawrence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1072 (1980) (framing equality principle as "equal respect in which we as a society aspire to hold each individual").

172. See DWORKIN, *supra* note 171, at 272-73.

173. *Id.* at 227.

174. *Id.* at 273 ("[T]he right to treatment as an equal must be taken to be fundamental under the liberal conception of equality, and ... the more restrictive right to equal treatment

Dworkin's version of equal concern has been the subject of much commentary and criticism by feminist scholars who have justly criticized it for positing a neutral observer whose "concern" is dispassionate and at arm's length, and who implicitly adopts the perspective of the persons in power who are obligated to exercise equal concern, rather than the perspective of those who are the object of concern.¹⁷⁵ As a mediating principle, however, equal concern should, and is broad enough to, encompass a more active and connected kind of concern that is empathetic and relational.¹⁷⁶ Rather than defining equal concern from the perspective of a neutral actor who is obligated to act with equal concern, an enlarged perspective should include that of the persons for whom the obligation attaches.¹⁷⁷ Equal concern should value the connections between people, not just their interests as atomistic individuals.¹⁷⁸ It should insist upon an openness to forming connections with persons as equal members of a shared community, and take responsibility for relational injuries to persons' self-conceptions by following Patricia Williams' instruction to account for the damage that occurs when we disregard those persons whose "lives qualita-

holds only in those special circumstances in which, for some special reason, it follows from the more fundamental right").

175. See, e.g., MARTHA MINOW, MAKING ALL THE DIFFERENCE 151-52, 194 (1990) (critiquing legal liberalism for regarding persons as separate and autonomous individuals instead of in the context of social relationships); Catharine A. MacKinnon, "Freedom from Unreal Loyalties": On Fidelity in Constitutional Interpretation, 65 FORDHAM L. REV. 1773 (1997) (criticizing Dworkin's theoretical approach to equality as overly abstract and ungrounded in the lives of those who are subjected to inequality); Robin West, Foreword: Taking Freedom Seriously, 104 HARV. L. REV. 43, 69, 71-72, 75-76 (1990) (criticizing Dworkin for contributing to an "atomistic focus on rights" and an "insulation" of the persons claiming rights, such that citizens are constructed with "almost none of the so-called 'civic virtues': mercy, compassion, public involvement, fellow-feeling, sympathy, or, simply, love").

176. See, e.g., Linda C. McClain, "Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. CAL. L. REV. 1171, 1219-20, 1223-25 (1992) (arguing that Dworkin's equal concern has been given an overly narrow and atomistic reading in some feminist criticism, and that equal concern "is not myopic with regard to differences among people and their needs," that it "combines notions of both reciprocity and response," and that it is sensitive to community membership in determining obligations and responsibilities).

177. *Id.* at 1220 (interpreting Dworkin's equal concern as incorporating a perspective in which "one does not merely substitute oneself for the other but engages in perspective taking that attempts to see the other in the other's own terms").

178. Cf. Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987) (seeking to reconstruct rights as sensitive to social relationships and community membership, rather than as instruments held by atomistic, insular individuals).

tively depend on our regard."¹⁷⁹ Under such a reading, equal concern does not allow those in power to sever some persons from the community or devalue them for their differences.¹⁸⁰ In short, equal concern should include an obligation to act with equal empathy for our shared humanity, rather than a dispassionate weighing of the interests of abstracted individuals from the perspective of those doing the weighing. It is this view of equal concern that I endorse here.

Such a reconstruction of equality law is perhaps not so far out of reach under existing law as one might suppose. The Court's own case law leaves room for an equality that is larger than equal treatment, one that is grounded in an equal concern based on respect and empathy for persons as members of a shared community. As a starting point, the Court's justifications of its most revered equal protection rulings support the conclusion that the constitutional guarantee of equality is, at bottom, about more than equal treatment. In *Brown v. Board of Education*¹⁸¹ itself, the Court rejected state-enforced racial segregation, notwithstanding its far-fetched and hypothetical assumption of tangible equality, in language that places equal concern at the forefront of an equal protection analysis.¹⁸² Similarly, in *Strauder v. West Virginia*,¹⁸³ the Court spoke of the state's exclusion of African Americans from jury service as "a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice

179. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 151 (1987). See also Seyla Benhabib, *The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Moral Theory*, in WOMEN AND MORAL THEORY 164, 169 (Eva Federer Kittay & Diana T. Meyers eds., 1987) (defining an equal concern principle that makes each "entitled to expect and to assume from the other forms of behavior through which the other feels recognized and confirmed as a concrete, individual being with specific needs, talents, capacities").

180. See, e.g., Drucilla Cornell, *Toward a Modern / Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 365-69 (1985) (formulating a feminist account of equal respect that does not ignore or trivialize persons' differences, but refuses to attach normative significance to them).

181. 347 U.S. 483 (1954).

182. *Id.* at 494 ("To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

183. 100 U.S. (10 Otto) 303 (1880).

which the law aims to secure to all others.”¹⁸⁴ In *Loving v. Virginia*,¹⁸⁵ the Court looked beyond the state’s facially symmetrical prohibition on interracial marriage to see it as a “measure ... designed to maintain White Supremacy.”¹⁸⁶

The Court’s more recent equality decisions also give voice to an equal concern principle. For example, the Court’s decision in *Romer v. Evans*¹⁸⁷ might stand for the principle that the state must respond to the needs of gay and lesbian persons with equal concern. In that decision, the Court viewed the amendment to Colorado’s state constitution that prohibited local governments from enacting antidiscrimination measures guarding against sexual orientation discrimination as an expression of unequal concern.¹⁸⁸ Even more recently, the opinion in *Lawrence v. Texas*¹⁸⁹ reads like an equal protection case dressed up in due process garb, with the value of equal concern showing up prominently in admonitions about the need for gays and lesbians to “retain their dignity as free persons,” and the recognition that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”¹⁹⁰ The Court explicitly suggested a linkage between its due process reasoning in *Lawrence* and the values implicated by the Equal Protection Clause:

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.¹⁹¹

184. *Id.* at 308.

185. 388 U.S. 1 (1967).

186. *Id.* at 11.

187. 517 U.S. 620 (1996).

188. *Id.* at 634-35.

189. 539 U.S. 558 (2003).

190. *Id.* at 574-77.

191. *Id.*

Although the Court used the terminology of equal treatment, the underlying value protected was one of equal concern, with attention to the state's role in fomenting prejudice by others.

This principle of equal concern may be violated even without facially different treatment or proof of a conscious discriminatory intent, as selective empathy and indifference can violate equal concern as much as an intentionally discriminatory act.¹⁹² The Court's stricter formulations of the discriminatory intent standard notwithstanding, it has periodically recognized that the acting out of stereotypes or unconscious bias is a form of disparate treatment that violates statutory equality guarantees.¹⁹³ In the equal protection context, the Court settled on an intent standard not so much because it set the limits or scope of constitutional equality, but rather for institutional reasons, to avoid what it perceived would be incessant clashes with other branches and levels of government under an alternative discriminatory effects standard.¹⁹⁴ Even in the equal protection context, the intent standard is not always applied consistently or strictly.¹⁹⁵

Understanding why equality law concerns itself with unequal treatment at all requires us to look deeper at the content of equality,

192. See Brest, *supra* note 171, at 1, 7-8 (contending that selective empathy and indifference, and not just conscious animus, violates equal concern).

193. See, e.g., *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (treating worker leave policies that are premised on stereotypes about the allocation of family duties between men and women as a form of sex-based discrimination in violation of the Fourteenth Amendment); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

194. See *Washington v. Davis*, 426 U.S. 229, 248 (1976) (drawing the line at discriminatory intent out of concern that an alternative discriminatory effects standard would "raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes"); Strauss, *supra* note 52, at 935, 954-56 (contending that *Washington v. Davis* "tamed" *Brown* by cutting short the scope of the equal protection principle in deference to the Court's fears of getting more deeply enmeshed in policing inequality); see also Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (explaining that, for institutional reasons, courts do not always accord the full normative scope of legal guarantees and distinguishing between the content of the law and the extent to which a court is willing to enforce it).

195. See, e.g., Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065 (1998) (arguing that the stringency of the intent requirement in equal protection cases varies significantly by context); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989) (arguing that in contexts where liberal political theory permits nonmarket allocations, such as voting, jury selection, and sometimes education, a strict intent standard is not applied as a serious requirement in equal protection challenges).

and to examine why some kinds of unequal treatment are unobjectionable while others are suspect. As American law has developed, unequal treatment is only problematic when it is based on characteristics that signal likely bias without a legitimate basis for penalizing people.¹⁹⁶ Thus, race, sex, and, increasingly, sexual orientation, are more suspect as bases for unequal treatment than height, intelligence, income, or other personal and social characteristics. While there is a vast quantity of literature attempting to make sense of why some classes but not others are treated as suspect, a common understanding is that the criteria selected for higher scrutiny reflect the Court's judgment that these classifiers correspond to the kind of systemic disadvantaging and unjustified discrimination likely to indicate a violation of equal concern.¹⁹⁷ Without reference to a norm of equal concern, equal treatment would not make sense as a guiding theory, as it would have nothing to say about which types of equal treatment are more suspect than others. If equal treatment alone were the guiding principle, equality law would be an ahistoric mandate about consistency in applying the correct rules of decision to all similarly situated persons.

As further proof that equal treatment is not coextensive with constitutional or statutory guarantees of equality, these guarantees permit different treatment among members of suspect classes in certain situations, and occasionally even require something more than mere identical treatment. An example of the former comes from the Court's recent decision upholding race-based affirmative action at the University of Michigan Law School. In *Grutter v. Bollinger*,¹⁹⁸ the Court upheld the university's policy permitting the

196. Of course, equal concern does not require that all persons be accorded equal respect, regardless of their actions. Cf. *Conn. Dept. of Pub. Safety v. Doe*, 538 U.S. 1 (2003) (holding that Connecticut's sex offender registry requirement did not violate due process when the public registry requirement was based on prior conviction and not current or future propensity for dangerousness). Rather, it requires a substantive theory about what kinds of identities must be equally respected. When grounded in democratic theory, it would make sense that equal concern should respect those aspects of identity that are central to personhood and autonomy, so as to enable people to make the kinds of choices that further their development as human beings with the responsibility for self-governance.

197. See, e.g., Holly Dyer, *Gender-Based Affirmative Action: Where Does it Fit in the Tiered Scheme of Equal Protection Scrutiny?*, 41 KAN. L. REV. 591, 595 (1993) (explaining that the Court justifies the tiered system of scrutiny on a theory of group treatment where the group lacks access to the political process and has historically been subjected to discrimination).

198. 539 U.S. 306 (2003).

limited use of race in admissions decisions against an equal protection challenge. To begin the equal protection analysis, the Court made an uncharacteristically emphatic statement about the importance of context: "Context matters when reviewing race-based governmental action under the Equal Protection Clause."¹⁹⁹ The context that mattered in that case included how the university used diversity and why it was important to do so. In upholding the plan, the Court emphasized the role of racial diversity in producing cultural transformation, as it "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"²⁰⁰ In other words, it fosters, rather than undermines, the precept of equal concern. Although Justice O'Connor's opinion made reference to a "norm of equal treatment"²⁰¹ in emphasizing the importance of time limits to protect the equal protection rights of the program's non-beneficiaries, her opinion defies such a limited understanding of the equal protection principle's scope. Indeed, even the reference to equal treatment as an underlying norm reveals a larger and overriding norm embodied within equality law:

The requirement that all race-conscious admissions programs have a termination point "assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself."²⁰²

Thus, equality itself must be about something larger than equal treatment.

While the Michigan plan could be said to violate a principle of equal treatment, it did not violate the more fundamental norm of equal concern. In *Grutter*, the overarching principle of equal concern that animated the opinion was relational, recognizing the interdependence of persons of all races, encouraging shared responsibility for correcting racism, and validating the benefits to all in doing so. The Court has taken a similar approach to statutory prohibitions on

199. *Id.* at 326-29.

200. *Id.* at 330 (quoting App. to Pet. for Cert. 296a).

201. *Id.* at 342 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989)).

202. *Id.*

discrimination by allowing occasional departures from equal treatment in the service of the more fundamental principle of equal concern.²⁰³

Likewise, the Court has justified its selection of strict scrutiny for race-based affirmative action with reference to a norm of equal concern, stating that strict scrutiny is necessary to ensure that a racial classification is truly benign and not based on "illegitimate notions of racial inferiority."²⁰⁴ Although, in my view, strict scrutiny as applied to racial affirmative action is a very poor proxy for a norm of equal concern, its use does not prove that the equal protection principle has been reduced to formally equal treatment.

Not only does equality law permit departures from equal treatment in the service of equality, it may sometimes require more than the same treatment. Equal concern may sometimes forbid formally equal treatment where it gives effect to, or exacerbates, an expression of unequal concern towards some persons by others. The celebrated (if puzzled over) equal protection cases of *Shelley v. Kramer*,²⁰⁵ *Palmore v. Sidoti*,²⁰⁶ and *Loving v. Virginia*²⁰⁷ can all be understood as cases where formally similar treatment did not satisfy equal protection. In *Shelley*, the state claimed to treat all persons the same in enforcing private racially restrictive covenants.²⁰⁸ In *Palmore*, the state could claim that it treated all parents the same in avoiding custodial decisions that would subject children to prejudice or other harm against their best interests.²⁰⁹ In *Loving*, the state claimed that it treated African American and white citizens alike in forbidding their intermarriage.²¹⁰ The Court

203. See, e.g., *Cal. Fed. Sav. & Loan Ass'n. v. Guerra*, 479 U.S. 272 (1987) (holding that the Pregnancy Discrimination Act (PDA) did not conflict with a state statute granting a limited right to unpaid leave and reinstatement for pregnant workers but not for other workers temporarily disabled from working, and that PDA did not require equal treatment in all instances, but set "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."); *Johnson v. Transp. Agency*, 480 U.S. 616 (1987) (permitting limited affirmative action program benefiting women under Title VII).

204. *Adarand Contractors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (O'Connor, J., plurality)).

205. 334 U.S. 1 (1948).

206. 466 U.S. 429 (1984).

207. 388 U.S. 1 (1967).

208. *Shelley*, 334 U.S. at 21.

209. *Palmore*, 466 U.S. at 431.

210. *Loving*, 388 U.S. at 7-8.

saw through each of these claims of formally similar treatment by striking down each action because it gave further expression to racism and unequal concern for African Americans. *Romer v. Evans*²¹¹ continues this rejection of formally equal treatment. In *Romer*, Colorado prohibited any person, straight or gay, from obtaining protection from sexual orientation discrimination through the normal political process.²¹² The Court easily dismissed the state's claim of formally neutral treatment by finding a clear message of inferiority and a lack of equal concern for gay and lesbian persons.²¹³ In each of these cases, equal concern required more than mere formal equality: it required the state to avoid otherwise neutral actions that gave added effect to private prejudice.²¹⁴

Even disparate impact law, most prominent in Title VII litigation,²¹⁵ may be understood as a doctrine that serves as a proxy

211. 517 U.S. 620 (1996).

212. *Id.* at 629.

213. *Id.* at 635.

214. See KOPPELMAN, *supra* note 171, at 24-31, 43-47 (arguing that antidiscrimination law must address the government's role in furthering the cultural bias of supposedly private actors in order to ensure that the outcomes of the democratic process comply with a norm of equal concern).

215. Disparate impact without proof of discriminatory intent is not actionable under the Equal Protection Clause. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976). Disparate impact was first recognized as a basis for liability in the statutory context of Title VII litigation. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); see also 42 U.S.C. § 2000e-2(k)(1)(A) (2000) (1991 Civil Rights Act, amending Title VII, and subsequently incorporated into various other antidiscrimination statutes). See, e.g., Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2000); Voting Rights Act, 42 U.S.C. § 1973(a), (b) (2000); Fair Housing Act, 42 U.S.C. §§ 3601-3631 (2000); Americans with Disabilities Act, 42 U.S.C. § 12112(b)(3), (6) (2000). By judicial interpretation, disparate impact claims are not actionable under certain other antidiscrimination statutes. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001) (Title VI regulations); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983) (Title VI of the Civil Rights Act of 1964); *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982) (42 U.S.C. § 1981). Under certain other antidiscrimination statutes, such as the Age Discrimination in Employment Act and Title IX of the Education Amendments of 1972, the fate of disparate impact doctrine remains uncertain. See, e.g., *Adams v. Fla. Power Corp.*, 255 F.3d 1322 (11th Cir. 2001) (holding that disparate impact theory is not available under the ADEA), *cert. granted*, 534 U.S. 1054 (2001), *cert. dismissed as improvidently granted*, 535 U.S. 228 (2002); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999) (holding that disparate impact claims are cognizable under the ADEA); Katherine Connor & Ellen J. Vargyas, *The Legal Implications of Gender Bias in Standardized Testing*, 7 BERKELEY WOMEN'S L.J. 13, 42-43 (1992) (arguing that Title IX, unlike Title VI, is not necessarily limited to the reach of the Equal Protection Clause and should encompass disparate impact claims).

for unequal concern. The selection of qualifications that have a markedly disparate impact without a sufficient relationship to job performance gives reason to suspect selective empathy or indifference to the group that is disproportionately affected—a violation of equal concern.²¹⁶ Although disparate impact is not a proxy that the Court has adopted in the equal protection context, the use of disparate impact doctrine in limited statutory contexts suggests that the specific rules giving teeth to an equal concern norm may exceed an admonition to treat likes alike.

The goal here is not to spell out the full content of an equal concern principle, or even to argue that it is the best or only plausible interpretation of legal equality guarantees.²¹⁷ Rather, my agenda is to show that, descriptively, equality law embraces the principle of equal concern, and to seek to hold the law to its promise.²¹⁸ Once equal concern is understood as the animating principle of equality law, leveling down no longer fits so comfortably. The assumption that leveling down adequately remedies inequality is based on a narrow understanding of equality as equal treatment. If equality law requires equal concern and not just equal treatment, leveling down requires closer scrutiny. In some circumstances, leveling down may represent the antithesis of equal concern, a refusal to connect or to broaden the boundaries of community to share its privileges. Such a determination requires further study of the expressive meaning of leveling down and attention to its social context.

B. An Expressive Meaning Approach to Leveling Down

If equal concern is the guiding principle of equality law, actions that signal or express unequal concern become problematic. Recent scholarship on the expressive dimension of law and other government action demonstrates that the expressive meaning of an action

216. See Krieger, *Cognitive Bias*, *supra* note 52, at 1251, 1293-98 (discussing how cognitive bias unintentionally affects selection of qualifications for measuring "merit").

217. See generally Robin West, *The Meaning of Equality and the Interpretive Turn*, 66 CHI.-KENT. L. REV. 451 (1990) (acknowledging that constitutional guarantees of equality, like any text, require interpretation, and discussing various constraints on such interpretation).

218. Cf. MacKinnon, *supra* note 175, at 1773, 1775 (discussing the relationship between legal guarantees of equality and constitutional legitimacy, and seeking to "hold the Constitution to its promise, for the first time if necessary").

is critical in determining whether it comports with the normative requirements of the governing law.²¹⁹ The expressive meaning of an action exists wholly apart from its material consequences.²²⁰ Even if leveling down treats everyone the same in material respects, it may express selective disdain or disregard for some persons. In some contexts, leveling down may reproduce inequality through its expressive meaning, in violation of equal concern.

Like many actions, leveling down the more favored treatment in response to inequality contains a social meaning (used here interchangeably with expressive meaning).²²¹ If an action may be understood as a text, then the social meaning of an action is the product of a combination of text and context, or "the collection of understandings or expectations shared by some group at a particular time and place."²²² The expressive meaning of an action is socially constructed and heavily dependent on context.²²³ Relevant

219. See, e.g., Andrew Altman, *Expressive Meaning, Race, and the Law: The Racial Gerrymandering Cases*, 5 LEGAL THEORY 75 (1999); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Hellman, *supra* note 171; Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PENN. L. REV. 2021 (1996) [hereinafter Sunstein, *On the Expressive Function of Law*]; Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996) [hereinafter Sunstein, *Social Norms*]; see also Lawrence, *supra* note 52 (proposing a "cultural meaning" test for determining equal protection violations).

220. See Anderson & Pildes, *supra* note 219, at 1527, 1531, 1542 (explaining that an action may have an expressive meaning that is harmful, regardless of the material consequences of that action).

221. See, e.g., Lessig, *supra* note 219, at 951 n.20 (noting the similarity between Lessig's definition of social meaning and Pildes's discussion of the "expressive dimension" of action); Sunstein, *Social Norms*, *supra* note 219, at 925 (describing social meaning as the expressive dimension of conduct in a relevant community, a product of social norms, context and culture). Although most actions do have social meaning, some actions have little or no social meaning. Among the latter classes of actions, Lessig gives the example of a man turning over in his sleep. Lessig, *supra* note 219, at 954.

222. See Lessig, *supra* note 219, at 958. Lessig further defines "social meaning" as "the semiotic content attached to various actions, or inactions, or statuses, within a particular context." *Id.* at 951. As he explains, these actions "have associations with other actions, or meanings, and these associations are constitutive of what I am calling their semiotic content." *Id.* at 954.

223. See Anderson & Pildes, *supra* note 219, at 1525. Lessig gives examples of tipping and flying the confederate flag as actions which have a particular, context-dependent, social meaning. Lessig, *supra* note 219, at 952-54.

features of context include how an act is understood in light of surrounding social practices, how it is justified, and how it will be perceived and understood by those persons affected.²²⁴ As with much interpretation, there is no single, unambiguous social meaning for any given action as interpretive choices are required. Yet, the need for interpretation does not mean that any action is open to an endless and unlimited set of possible social meanings.²²⁵

If leveling down expresses unequal concern, it should be understood as incompatible with the mandate of equality law. Expressive meaning matters, and should matter, in an equality analysis.²²⁶ Satisfying the normative content of equality law requires that the actions of those actors governed by the law express norms consistent with equal concern.²²⁷ The social meaning of an action may inflict

224. Andrew Altman, for example, contends that the social meaning of an action depends on four criteria:

- (1) the motives or traits of character that explain the act,
- (2) the constitutive social rules and practices in terms of which an act is understood,
- (3) the ways in which the act can best be justified by those seeking to defend it, and
- (4) the causal consequences of the act for the interests of those affected by it, insofar as those consequences are mediated by perception of one or more of (1)-(3).

Altman, *supra* note 219, at 77.

225. See Lessig, *supra* note 219, at 955 ("Even if there is no single meaning, there is a range or distribution of meanings, and the question ... is how that range gets made, and, more importantly, changed.").

226. See, e.g., Anderson & Pildes, *supra* note 219, at 1533-45 (arguing that modern equal protection law is best understood as regulating expressive harm, in the sense that the Court views the expressive meaning of government action as critical to its constitutionality); Hellman, *supra* note 171, at 13-18 (arguing that the core value of equal protection is to protect against state action that expresses a message of unequal concern). Cf. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1210-13 (1989) (arguing that sexual harassment should be unlawful if it conveys a dismissive message that devalues women as employees).

227. See Altman, *supra* note 219, at 80-99 (agreeing that the Court did, and should have, tested the government action in *Shaw v. Reno* under an expressive harms theory, but disagreeing with the Court's interpretation of the expressive message in *Shaw*, because the district could have been justified as a response to the recognition that private prejudice reduces minority voting strength, so as to be consistent with equal concern); Anderson & Pildes, *supra* note 219, at 1508-10; Pildes & Niemi, *supra* note 219, at 506-11 (explaining *Shaw v. Reno* as a vindication of a theory of expressive harms); see also Sunstein, *Social Norms*, *supra* note 219, at 963-64 (contending that government action enforcing a norm of women as domestic caregivers would violate equal protection because it conflicts with the requirement of equal concern).

expressive harms that are cognizable, and the refusal to acknowledge another as an equal violates the requirements of equal concern even if unaccompanied by tangible differences in treatment.²²⁸ This understanding of equal protection is consistent with the animating principle of *Brown v. Board of Education*, that the state's segregation violated equal protection because it expressed a message of racial inferiority.²²⁹

Equality claims are largely about challenges to existing social meaning and the reconstruction of social relationships based on changes in social meaning.²³⁰ The current debate over same-sex marriage and the social meaning of marriage starkly illustrates this point.²³¹ Expressive meaning plays an important part in the process of negotiating social relations. Expressions of regard or disregard toward persons construct the social relationships between them, as "social relations are partially constituted by mutual acknowledge-

228. That is not to say that material inequalities and unequal allocations of tangible benefits are less important in an equality analysis. The point here is that expressive meaning and harms to social status are also important. Cf. NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION* (1997) (arguing that social justice movements must attend to both distributional inequality in material goods and social status harms from cultural meaning).

229. This is essentially the view of *Brown* taken by Professor Charles Black, in his classic defense of the decision. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960) (describing "the social meaning of segregation" as "putting ... the Negro in a position of walled-off inferiority"). Taking a similar approach, Professors Elizabeth Anderson and Richard Pildes argue that the Court's much-criticized use of social science data in *Brown* to show the negative effects on African American children was beside the point. In other words, the expression of inferiority was itself a constitutionally recognized harm, regardless of the tangible consequences. Anderson & Pildes, *supra* note 219, at 1542-43.

230. See, e.g., Ross, *supra* note 54, at 16-17 n.55 (1990) (discussing legal rhetoric of race in *Plessy v. Ferguson* and quoting passages from the plaintiffs' briefs describing the Louisiana segregation law as "amount[ing] to a taunt by law of that previous condition of their class [slavery]—a taunt by the State, to be administered with perpetually repeated like taunts in word....").

231. See Mary Becker, *Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two Are Better Than One*, 2001 ILL. L. REV. 1, 54-55 (discussing the "status difference" between civil unions and same-sex marriage, and endorsing the view that to extend civil unions but not marriage to same-sex couples "is to engage in an act of pure stigmatization"); Opinions of the Justices to the Senate, 802 N.E.2d 565, 570-71 (Mass. 2004) (ruling that a bill proposed by the Massachusetts Senate that would offer civil unions, but not marriage, to same-sex couples would violate the Massachusetts Constitution because "it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.... and the Massachusetts Constitution does not permit this type of labeling.").

ment of the terms on which people are relating to one another."²³² Since social meaning is always being constructed, successful equality claims challenge existing social meaning and have the potential to forge new social relationships based on new social meanings.²³³

Such a challenge to existing social meaning can set in motion what Professor Larry Lessig has termed a "defensive construction" of "social meaning"—actions seeking to preserve existing social meanings.²³⁴ Professor Lessig uses the enactment of antimiscegenation laws in response to the abolition of slavery and attacks on Jim Crow laws as examples of how communities engage in the defensive construction of social meaning:

A social meaning is challenged by an emerging practice, and to preserve the old meaning, the emerging practice is prohibited or opposed. This resistance is a kind of social meaning construction because it aims to resist what would otherwise be an evolving social meaning. It "changes" the social meaning because but for the intervention, the meaning would become something else. Thus ... whites resist intermarriage to preserve the loyalty and sensibility of "whiteness."²³⁵

One social meaning that is often contested in equality claims is the status of persons who are members of certain social groups.²³⁶ When an equality claim challenges existing status hierarchies and the social meanings that have held them in place, struggles over status ensue. Once social groups that have been ranked lower in social status achieve some success in narrowing the status hierar-

232. Anderson & Pildes, *supra* note 219, at 1550.

233. See Lessig, *supra* note 219, at 962 (explaining that "social construction proceeds by breaking up the understandings or associations at a particular time or built into a relatively uncontested context and upon which social texts have meaning").

234. *Id.* at 987.

235. *Id.* at 991.

236. In speaking of social groups, I do not mean to imply that such groupings are in any way inherent or static. Rather, I use the term to signify the social reality that in the United States, certain markers of identity, including race, sex, and sexual orientation, are socially significant in that they both affect the self-constructed identities of persons who share them and are given social significance by outsiders. See generally Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 703 (2000) ("The fact that reality is a social construction does not mean that it is not there; it means that it is there, in society, where we live.").

chy, the response by higher-status groups is often a "rearguard" effort to reassert traditional hierarchies in other ways, or to use Lessig's terminology, a defensive construction of social meaning.²³⁷

An application of the defensive construction of social meaning is readily apparent in the leveling down context. When an equality claim is asserted successfully, the existing social meaning is threatened and in danger of being replaced by a new understanding of social relationships. In such a case, leveling down may effectively thwart such changes by excluding the challengers from what was previously valued, and by expressing a preference for losing the benefit rather than broadening the community of persons sharing in it. Thus, the separateness and social inequality of challenger and challenged is preserved. For example, Cazares's challenge to the school board contested the social meaning of pregnancy and unwed motherhood. At the same time, her actions questioned the community's expectations of honor students, and even the definition of "honor" itself. In response to this challenge to existing social meaning, the school board engaged in a defensive construction of social meaning, reasserting its definition of honor as one which excludes young women like Cazares.²³⁸

As a defensive construction of social meaning, leveling down may be understood as a practice that perpetuates social stratification.²³⁹ Equality law, which strives to regulate the social practices that sustain group inequality, has often failed to account for the ways in which the practices and meanings that sustain group inequality evolve as they are contested.²⁴⁰ Discrimination is a social practice

237. See J. M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2335 (1997). On the other hand, Professor Balkin explains that when status hierarchies are rigid and largely unchallenged, those advantaged by them can afford to blur the lines somewhat between lower and higher status groups without jeopardizing their position. *Id.* at 2333. This leads to what Balkin terms the "paradox of status hierarchy": that societies with relatively rigid status hierarchies "tend to appear relatively stable and peaceful on the surface." *Id.* at 2333-34.

238. See *supra* notes 8-15.

239. See Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 77-78 (2000) [hereinafter Siegel, *Discrimination*] (defining social stratification as the status inequality among social groups that arises out of the interaction of social structure (social institutions or practices) and social meaning); see also Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997) [hereinafter Siegel, *Equal Protection*].

240. See Siegel, *Discrimination*, *supra* note 239, at 78 (stating that "a commitment to

that evolves over time and has no fixed form, and therefore, discriminatory social practices can be expected to assume more accepted forms as their legitimacy is contested over time.²⁴¹ To borrow a term from Professor Reva Siegel, leveling down may be understood as a form of "preservation-through-transformation" that, depending on the social and historic context in which it occurs, may serve to sustain social stratification despite, and perhaps even because of, its abandonment of differential treatment.²⁴² By preserving the unequal status relationships that were previously enforced by differential treatment, leveling down may simply represent a transformation in the form of the discriminatory practice that it replaces. In a case like *Palmer*,²⁴³ for example, leveling down serves the same function as the prior segregation: it perpetuates social hierarchy and racial separation by preventing whites and blacks from sharing city pools as equals. The shift to a facially neutral form should not obscure the role that leveling down plays in the continued enforcement of social stratification.²⁴⁴

In the contest over social meaning, part of the power of leveling down comes from its assertion of the privilege to change the rules and shift the terrain on which equality is negotiated. Implicit in leveling down is the determination that the benefit that had been allocated unequally suddenly has become unworthy of preservation if it must be shared on equal terms with those previously excluded. One example of how efforts to achieve equality can lead to shifts in the value of what is pursued, thus reproducing inequality, comes from the experience of efforts to integrate the workforce. When marginalized groups enter the ranks of previously exclusive professions, it often results in the devaluation of the field, rather

alleviating stratification is and has been central to the project of antidiscrimination law since the beginning of the Second Reconstruction").

241. Siegel, *Equal Protection*, *supra* note 239, at 1113 (arguing that after Jim Crow was challenged and defeated, it was replaced by new practices and principles such as the trope of colorblindness and the intent requirement that have sustained new social practices that preserve much of the prior stratification); *id.* at 1142 (noting that "status-enforcing state action is mutable in form").

242. See Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178-87 (1996) [hereinafter Siegel, "The Rule of Love"].

243. *Palmer v. Thompson*, 403 U.S. 217 (1971).

244. See generally CHAMALLAS, *supra* note 6, at 10 (discussing feminist legal scholarship on the reproduction of dominance, and discussing how changes can occur without altering basic gender hierarchies, or, "the more things change, the more they stay the same").

than meaningful equality in the workforce. As Professor Martha Chamallas has explained, "gains' in integrating occupations can easily be offset by counter-trends, including the reconfiguration of jobs.... The net result may be that even as women successfully enter formerly male-dominated fields, they remain disadvantaged as workers relative to men."²⁴⁵ As a form of leveling down, this example illustrates how redefinitions of value can operate to preserve inequality.

The potential for leveling down to affect social status and social meaning, thereby preserving existing social arrangements, helps explain why persons in power may be willing to impose some material cost on themselves in order to stave off attacks on the social order. Social groups compete not just for material rewards and resources, but also for status.²⁴⁶ For example, work by critical race scholars demonstrating a property interest in race shows the importance of social status in determining a social group's welfare. As professor e. christi cunningham explains, persons whose racial identities are subsidized by the state accumulate "identity capital."²⁴⁷ Status, or identity capital, plays a key role in maintaining a group's social position. Status inequality between groups is sustained by a system of social meanings that assigns one group "relatively positive associations and another correspondingly negative associations."²⁴⁸ The status of social groups is relational, therefore status hierarchies create zero sum games, in that a change

245. *Id.* at 10-11; see also Marina Angel, *The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure*, 50 J. LEGAL EDUC. 1 (2000) (discussing research showing that the entry of more women into the legal academy has coincided with a shift away from tenure and toward short-term contracts and lower status jobs).

246. See Balkin, *supra* note 237, at 2326. For a discussion of how law helps constitute status and social roles, see Sunstein, *Social Norms*, *supra* note 219, at 923. See also Richard Y. Bourhis, *Power, Gender, and Intergroup Discrimination: Some Minimal Group Experiments*, in 7 THE PSYCHOLOGY OF PREJUDICE: THE ONTARIO SYMPOSIUM 173, 201 (Mark P. Zanna & James M. Olson eds., 1994) (discussing social power as determined by "the degree of control that one group has over its fate and that of outgroups").

247. See e. christi cunningham, *Identity Markets*, 45 HOW. L.J. 491, 507 (2002); see also Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1713-14 (1993).

248. See, e.g., Balkin, *supra* note 237, at 2323. While Professor Balkin recognizes that the status of individuals within a group varies widely, he focuses on that component of status that is identified with membership in a social group. *Id.* at 2321-22.

in the meanings associated with one social group affects the relative positioning of another.²⁴⁹

The significance of social status explains why groups at the top of a status hierarchy may be willing to impose some material cost on members of their own group in order to preserve a status hierarchy. In competition among social groups, status is important for its own sake, wholly apart from whatever material goods are attached to status at a given moment.²⁵⁰ Symbols and social meaning, not just material resources, determine the status of competing social groups. In fact, a group's relative social power may be more important even than its pecuniary resources in advancing its social position.²⁵¹ Consequently, a material loss is not a sufficient deterrent to persons who discriminate against others at some cost to themselves for the sake of relational gains in status.²⁵² As long as the expressive message is one that supports the existing hierarchy, the loss of benefits to the advantaged group may not be a sufficient deterrent to leveling down when it functions as a practice that enforces status hierarchy.

Indeed, leveling down may be a particularly effective way to enforce status hierarchies for the very reason that the higher status group has deprived itself of a material benefit in order to preserve existing status differentials. Where the leveling down signals a refusal to share resources or benefits with a lower status social group, the action may be understood as a defensive effort to fight off

249. See, e.g., Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1031 (1995); see also cunningham, *supra* note 247, at 512 ("In identity markets, the value of any particular racial identity is measured against the value of all other racial identities in the market.").

250. See, e.g., Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089, 1100-05 (2002).

251. See Bourhis, *supra* note 246, at 195. See also Adams, *supra* note 250, at 1102-03 (discussing research on social identity theory showing that individuals tend to engage in discriminatory behavior that advances their social group even when they do not stand to gain directly from the discriminatory behavior, if the discrimination enhances the status of their social group).

252. See JIM SIDANIUS & FELICIA PRATTO, *SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION* 18-19 (1999) (discussing research on social identity theory showing the tendency of persons to make allocation decisions that maximize status differentials favoring their own social group, even at some material costs to their own social group); McAdams, *supra* note 249, at 1063 ("The discriminator does bear a cost in discriminating—forgoing otherwise beneficial trade with the objects of the discrimination—but that cost is an *investment* in the production of status.").

challenges to the boundaries of social group identity.²⁵³ The deprivation of the benefit to the socially advantaged group may make the across-the-board denial of benefits especially effective toward this end. Insults to social groups are particularly effective when they do not otherwise coincide with the self-interest of the group imposing the insult.²⁵⁴ The material cost of leveling down is thus part of what makes it an effective means of signaling low esteem. The refusal to share benefits on equal terms, precisely because it comes with the cost of denying benefits to the in-group, may be even more effective in preserving status inequality than outright differential treatment.²⁵⁵ This account demonstrates the fallacy of Justice Jackson's faith in the political process as an adequate check on the unjustified extension of burdens to members of the majority.²⁵⁶ Justice Jackson's account fails to acknowledge the importance of status in maintaining social arrangements that privilege majority group members.²⁵⁷

In addition to its importance in maintaining status hierarchies and social inequality, attention to the social meaning of leveling down is important for another reason. When the expressive force of law and other government action shapes social meaning, this influence on social meaning may affect individual and collective behavior wholly apart from the sanctions of law enforcement.²⁵⁸ Law

253. Cf. *cunningham*, *supra* note 247, at 497-514 (explaining how, historically, maintaining property value in race and racial identity markets has depended on the state's role in policing the boundaries of race as a meaningful social category).

254. *McAdams*, *supra* note 249, at 1048 (discussing research showing that insults to other groups are particularly effective where they do not otherwise coincide with the self-interest of the competing social group).

255. Professor *McAdams* makes this argument with respect to discrimination generally, since the discriminator forgoes market efficiency for the benefit of enhancing his or her own group's status. As he explains: "By definition, the discriminator makes a material sacrifice (giving up an otherwise favorable trade or engaging in costly behavior) as a means of lowering the status of the victim." *Id.* at 1076. Leveling down imposes a distinct material deprivation in addition to whatever sacrifice the discriminator makes in carrying out the underlying discrimination.

256. *See Ry. Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

257. *See id.*

258. For example, Professor Sunstein argues that laws against littering shape social norms against littering and thereby influence behavior even when violations are not punished through the legal process. *See Sunstein, On the Expressive Function of Law*, *supra* note 219, at 2030.

and other government actions play a role in “norm management” by functioning to encourage shifts in social norms.²⁵⁹ To the extent that law shapes norms through its expressive force, equality law’s uncritical acceptance of leveling down as a remedy to inequality has the potential to undermine the construction of equality norms and their power to shape behavior. If antidiscrimination law seeks to enforce a social norm of equal concern and respect, then the acceptance of leveling down when it signals a lack of equal concern may dilute the expressive force of the equal concern norm.²⁶⁰ By accepting a conflicting message at the end-stage of an equality claim, the overriding take-home message may be one of unequal concern for the group challenging the inequality. To the extent that the law’s role in shaping social norms affects discriminatory behavior,²⁶¹ we may expect additional expressions of unequal concern as the social norm favoring equal concern is weakened.²⁶² If

259. See *id.* at 2045; Sunstein, *Social Norms*, *supra* note 219, at 957. On the relationship between social norms and social meaning, see Sunstein, *Social Norms*, *supra* note 219, at 914 (defining social norms as “social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done”); *id.* at 928 (explaining that social norms are influenced by the social meaning of actions and the social role of the actor, and at the same time play a role in determining that social meaning).

260. Cf. Sunstein, *On the Expressive Function of Law*, *supra* note 219, at 2044 (“Antidiscrimination law is often designed to change norms so as to ensure that people are treated with a kind of dignity and respect that discriminatory behavior seems to deny.”).

261. Social psychology research confirms that social norms governing the acceptability of discrimination do influence discriminatory behaviors. See, e.g., Fletcher A. Blanchard, et al., *Condemning and Condoning Racism: A Social Context Approach to Interracial Settings*, 79 J. APPLIED PSYCHOL. 993 (1994) (describing research showing that the social influence of hearing someone else condemn or condone racism strongly affected the subject’s own reactions to racism, and citing other research on inter-group relations finding that norms favoring egalitarian interracial behavior are important in fostering interracial harmony); Alexander M. Czopp & Margo J. Monteith, *Confronting Prejudice (Literally): Reactions to Confrontations of Racial and Gender Bias*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 532, 533 (2003) (describing the powerful effect that norm-saliency has on people, and stating, “[i]n fact, several studies have suggested that when norms of egalitarianism are made salient, people become less likely to provide prejudiced responses”); Jane Goodman-Delahunty, *Civil Law: Employment and Discrimination*, in PSYCHOLOGY AND LAW: THE STATE OF THE DISCIPLINE 325 (Ronald Roesch et al. eds., 1999) (discussing preliminary studies of racism and sexual harassment finding that when norms for appropriate nondiscriminatory behavior are clearly defined, persons exhibit less prejudice and fewer discriminatory behaviors).

262. See Sunstein, *Social Norms*, *supra* note 219, at 907 (arguing that “behavior is pervasively a function of norms”); Sunstein, *On the Expressive Function of Law*, *supra* note 219, at 2043 (“If a discriminatory act is consistent with prevailing norms, there will be more in the way of discriminatory behavior. If discriminators are ashamed of themselves, there is likely to be less discrimination.”). But see Robert E. Scott, *The Limits of Behavioral Theories*

a primary project of antidiscrimination law is to end the state's encouragement of private discrimination and cultural bias, then equality law should not permit leveling down when it undercuts that agenda.²⁶³

The few limits on leveling down under existing law do not begin to recognize adequately the extent to which leveling down may implicate the very concerns which equality law purports to address. Doctrinal efforts focused on the significance of the benefit, remedial principles favoring extension, and a fixed level of treatment for one group, are grounded in external norms, distinct from equality, and typically driven by utilitarian concerns to maximize the level of benefits for the greatest number of persons. The approach advocated here looks to equality for the normative basis for limits on leveling down, focuses on how acts expressing unequal concern function to maintain social inequality, and is notably not grounded in efficiency or utilitarian values.²⁶⁴ Such a focus better suits the remedial purpose of equality law than centering the analysis on efficiency and utility, values not thought to be appropriately enforced by equality law.²⁶⁵

of *Law and Social Norms*, 86 VA. L. REV. 1603, 1605-06 (2000) (questioning the assumptions of expressive theorists and their belief that the expressive effects of law stimulate changes in human behaviors). The concern suggested in the text, that uncritical acceptance of leveling down weakens equality law's normative force, possibly leading to more discrimination, would apply to other weak applications of equality law as well. A strict intent requirement, for example, would also be subject to this criticism.

263. See KOPPELMAN, *supra* note 171, at 4 (arguing that cultural transformation is, and should be, the central project of antidiscrimination law).

264. Indeed, utilitarian objections to leveling down are complicated by the instability that arises from trying to measure preferences and levels of welfare when social norms are in flux. The utilitarian premise is that the identity of those persons whose welfare is being measured remains stable under the alternatives explored. However, as Professor Lessig has explained, when social meaning is contested, changes to social meaning may affect persons' determinations of whether they are "better off," and even their very identity, insofar as it depends on stable preferences. See Lessig, *supra* note 219, at 1003. For example, whether whites are better off from the pool closure in *Palmer* than they would be with integrated pools turns on conceptions of social status that are affected by social meaning. Because social meaning itself depends on social context, however, the very possibilities evaluated under utilitarian norms may affect the identity and preferences of the persons whose welfare is being measured.

265. See Lessig, *supra* note 219, at 1005; see also Sunstein, *Social Norms*, *supra* note 219, at 954 (noting that where social norms are part and parcel of a caste system, such that they turn a morally irrelevant characteristic like race or gender into "a signaling device with respect to social role and associated norms," then the norms, roles, and meanings that perpetuate the caste system should be altered).

The two doctrinal limits that are tied to equality, specifically the failure to level all the way down and leveling down premised on a discriminatory intent, do not fully capture the potential for leveling down to violate the principle of equal concern. The first continues to assume that differential treatment is the only harm that equality law addresses. As explained above, however, actions that express unequal concern and solidify status differentials have the power to perpetuate social inequality even without resorting to differential treatment.²⁶⁶ Indeed, they may be particularly effective in doing so. A limitation that requires only that differential treatment be leveled all the way down, if at all, is blind to the ways that the social meaning of leveling down can reproduce inequality.

The intent doctrine also is ill-suited to capture the potential for leveling down to conflict with the norm of equal concern. If the intent doctrine evaluates an actor's subjective intent as the focal point for measuring compliance with equality mandates, the search for intent is not likely to uncover the expressive meaning of an action.²⁶⁷ It is the action's public meaning that counts, not what the actor intends to express.²⁶⁸ The expressive meaning of an action is not necessarily a function of the actor's intent; rather, it is the socially constructed meaning that is recognizable by the community, exercising interpretive judgment.²⁶⁹

A test that focuses on subjective intent is likely to prove especially obtuse as applied to leveling down actions that violate equal concern. Constructions of social meaning, including defensive constructions to preserve an existing social hierarchy, are likely to be the most successful when they are viewed not as a direct attempt to regulate social meaning, but as predicated on some other purpose.

266. See *supra* notes 236-57 and accompanying text.

267. As Professor Deborah Hellman has explained, the search for expressive meaning is closer to a search for what some scholars call an "objective intent," as opposed to a "subjective intent." See Hellman, *supra* note 171, at 31-35. Objective intent focuses on the message that an action conveys, as distinct from the subjective motivations underlying the action, and is often used interchangeably with "social meaning" and "expressive content." *Id.* at 34-35. An expressive meaning test also is distinct from discriminatory effects. Not all actions that disproportionately harm a systemically disadvantaged social group necessarily express unequal concern toward persons in that social group. *Id.*

268. Anderson & Pildes, *supra* note 219, at 1512-13; see also *id.* at 1513 ("[U]ltimately it is a question of law, and hence of external normative judgment, whether the state action does indeed express impermissible purposes or values.").

269. *Id.* at 1525.

In other words, such actions are most effective at preserving contested social meanings when their expressive objective is obscured.²⁷⁰ For this reason, the dynamic of status competition is particularly resistant to a motive-centered inquiry. Status competition does not necessarily involve animus or dislike of a competing group, but is opportunistic in the sense that the higher-status group acts to preserve its privileged status.²⁷¹ Research in social psychology suggests that disparities in social power may play a greater role in inter-group discrimination than the dispositions of individuals who carry out the discrimination.²⁷² Indeed, the drive to secure status is often linked to the express denial of a prejudiced motivation. Strategies to further one's own group status are therefore less effective when they are admittedly or transparently designed toward that end.²⁷³ As a result, decision makers can be expected to attribute leveling down decisions to pragmatic determinations about resources and general welfare, rather than to a desire to preserve existing social inequality or a lack of concern for the group challenging the discrimination. Because the disavowal of a discriminatory or a self-interested motive is necessary for an effective quest for status, a judicialized search for the desire to harm another group out of "naked self-interest" will often prove futile.²⁷⁴ Yet, even when

270. Lessig, *supra* note 219, at 1042.

271. See Balkin, *supra* note 237, at 2332.

272. See, e.g., Karen A. Hegtevdt & Karen S. Cook, *Distributive Justice: Recent Theoretical Developments and Applications*, in *HANDBOOK OF JUSTICE RESEARCH IN LAW* 93, 97 (Joseph Sanders & V. Lee Hamilton eds., 2001) (describing research on the salience of status difference and competition between groups as explaining the propensity for groups to pursue in-group enhancement at the expense of fairness); Richard N. Lalonde & James E. Cameron, *Behavioral Responses to Discrimination: A Focus on Action*, in 7 *THE PSYCHOLOGY OF PREJUDICE: THE ONTARIO SYMPOSIUM* 257, 259 (Mark P. Zana & James M. Olsen eds., 1994) (criticizing the tendency to see discrimination as the behavioral component of prejudice, and stating "[a] definition of discrimination is correct when it states that individual prejudice is not a necessary precondition for acts of discrimination"); Adams, *supra* note 250, at 1093 (citing social science research describing racial inequality as "grounded in notions of group identity and group conflict," and not individual prejudice); Lu-in Wang, *The Complexities of "Hate"*, 60 OHIO ST. L.J. 799, 880-83 (1999) (discussing social science research emphasizing the role that social status and social solidarity in one's own social group plays in promoting "gay-bashing").

273. See McAdams, *supra* note 249, at 1032-43 (discussing research showing that individuals are more likely to articulate a material motive, unrelated to furthering their own status or esteem, to justify their role in struggles over symbols and status).

274. *Id.* at 1060 ("When one seeks to gain status by lowering the status of others, it is all the more important to deny that one is degrading others in order to look better by

individuals claim to be motivated by material ends, they may really be struggling over status and social meaning.²⁷⁵

By failing adequately to address expressive harms and injuries to social status—injuries more likely to be borne by members of marginalized social groups—the uncritical acceptance of leveling down incorporates an implicitly biased conception of the injuries from discrimination.²⁷⁶ The injuries most likely to be experienced as discriminatory by the members of dominant social groups, those injuries grounded in the materially different treatment of persons based on suspect criteria, are fully remedied by the existing approach. The conventional understanding privileges a view of discrimination and its remediable injuries that coincides with the interests of relatively dominant groups while marginalizing the interests of outsiders and members of socially subordinated groups. This understanding is not preordained by the meaning of equality, but merely reflects a choice to prioritize the injuries of the more powerful while rendering the interests of others invisible. In this respect, the acceptance of leveling down is part of the broader problem—that remedies to discrimination often neglect the interests of the persons most in need of them.²⁷⁷ A more complete understanding of leveling down and its relationship to equality is needed to

comparison.”).

275. *Id.*

276. *Cf.* CHAMALLAS, *supra* note 6, at 18, 43-44, 48-49 (discussing how a primary goal of much feminist scholarship is to identify and seek recognition for injuries experienced by women that are not yet recognized under existing law, and in particular applying this critique to show that the conceptualization of equality as identical treatment reflects an implicit male norm).

277. Derrick Bell's criticism that even the implementation of equal protection remedies has been marked by exclusion has a particular resonance here:

The central issue in remedying past discrimination commonly has been conceived in the following terms: “Conceding that blacks have been harmed by slavery, or segregation, or discrimination, which groups of whites should pay the price or suffer the disadvantage that may be incurred in implementing a policy nominally directed at rectifying that harm?” This question, which focuses on the cost to whites of racial remedies rather than on the necessity of relief for minorities, obviously has been framed by whites for discussion with other whites. Their attitude is not unlike that of parents who, in the old strict-upbringing days, might have hushed a protesting offspring with a curt, “Keep quiet. We are talking about you, not to you.”

Derrick Bell, Jr., Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3-4 (1979).

reconstruct equality law so that it better represents the interests of those whom it purports to protect.²⁷⁸

III. APPLYING AN EXPRESSIVE MEANING APPROACH

Under the approach advocated here, not all leveling down responses should be viewed in the same light. The legitimacy of leveling down as a response to inequality depends on its expressive meaning, which turns on social context.²⁷⁹ In some settings, a refusal to share benefits with a previously excluded group contains social meanings incompatible with equal concern. In others, the expressive meaning may have more to do with constraints on resources and social priorities wholly apart from status hierarchies and relations between social groups. An approach focused on the expressive meaning of leveling down and its relationship to equality law must examine leveling down in each particular case and ask whether it remedies or reasserts the challenged inequality. The examples that follow illustrate how an expressive meaning approach might apply in this area.

A. Three Examples Where Leveling Down Conflicts with Equality Law

Returning to *Palmer*,²⁸⁰ the city's decision to close the pools as the remedy to the unlawful segregation contains an expressive message counter to equal concern. Even if, as the Court implied in subsequent interpretations of *Palmer*, the city's decision to close the pools could not be proven to rest on a subjective animus against African Americans, an examination of the justifications for the pool closure and the social context for the decision reveals an expressive message of unequal concern. The city's proffered justification, the greater

278. Cf. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 68-72 (1988) (encouraging a "[r]econstructive feminist jurisprudence" that seeks to "explain or reconstruct the reforms necessary to the safety and improvement of women's lives in direct language that is true to our own experience and our own subjective lives").

279. Cf. Balkin, *supra* note 237, at 2351 (explaining that not all status hierarchies offend equality law, nor do all attempts to increase one group's status come at the expense of another, and framing the critical question as "whether state power has been harnessed to maintain or perpetuate an unjust hierarchy of social status").

280. *Palmer v. Thompson*, 403 U.S. 217 (1971).

financial costs it would take to ensure public safety in integrated pools, falls flat in light of the city's failure to introduce evidence of a serious public safety threat that would have required significantly greater expenditures.

Even if some greater expenditure would have been necessary, it is unlikely that the public meaning of the pool closure in Jackson, Mississippi at that time would have been understood as based on fiscal concerns, informed by an equal concern for providing city benefits to all residents at a reasonable cost. Having determined public expenditures sufficiently worthwhile to justify providing access to segregated pools, the city, assuming it had equal concern for its African American citizens, should have been willing to spend money to provide pool access for everyone on equal terms. Of course, it is possible that the expenditure of funds needed to ensure safety in integrated pools and to counter the threat of violence by those opposed to integration would at some point become so great that the city would be unwilling to provide pools for any of its citizens at such a high price. However, even then, we must ask whether the city would allow such a heckler's veto to thwart public benefits deemed important for whites, instead of spending additional money to stem the tide of lawlessness and violence that threatened such interests. For example, if significant numbers of white citizens desired to use public parks, but felt threatened by the presence of crime, would the city shut down the parks to avoid paying the cost of crime control? Or, would the city spend the money to provide police surveillance and other crime control measures in order to make a desirable city resource usable for its citizens because it values the preferences of those citizens? Significant expenditures on crime control efforts to constrain persons, who are disproportionately black, from interfering with the quality of life of other citizens tend to suggest that local governments typically take whatever measures they feel necessary to protect their citizenry from criminal interference.

Rather than a simple concern for cost, the greater intimacy involved in sharing swimming pools probably explains the city's reluctance to maintain integrated swimming pools, despite its willingness to integrate its public parks. The Court in *Palmer* took the city's willingness to integrate its public parks as an indication that city officials did not have an across-the-board resistance to

integration, and that the swimming pool context posed unique challenges. The Court's narrow focus on the parity of treatment led it to disregard the particular social context that shaped the expressive meaning of the city's decision. To a greater extent than sharing a park, sharing a swimming pool involves a degree of closeness and intimacy that signals a measure of social equality. The physical exposure from wearing swimsuits and the intimacy of sharing the same water are important in understanding the city's resistance to integrated pools.

In some respects, the threat to the social order posed by integrated pools was similar to the threat posed by interracial sexual relationships. At the heart of the antimiscegenation statutes, as the Court correctly understood in striking down such statutes, was the expressive message of unequal concern.²⁸¹ The policing of the boundaries of intimate relationships between persons of different races is fundamental to the preservation of existing racial hierarchies. In light of this social history, so clearly illustrated by the history of antimiscegenation statutes in Mississippi itself, the pool closure may have partly reflected concerns about summer romances between African American males and young white females.²⁸² The

281. See Hellman, *supra* note 171, at 15 (discussing *Loving v. Virginia*, 388 U.S. 1 (1967)).

282. Mississippi's criminal prohibition on interracial marriage between white and black persons dates back to 1865. Act of Nov. 25, 1865, ch. 4, § 3, 1865 Miss. Laws (stating that it shall not be lawful for any freedman, free negro or mulatto to intermarry with any white person; nor for any white person to intermarry with any freedman, free negro or mulatto; and any person who shall so intermarry shall be deemed guilty of felony, and on conviction thereof, shall be confined in the State Penitentiary for life.). In 1890, a prohibition on interracial marriage was added to Mississippi's Constitution. MISS. CONST. of 1890, art. 14, § 263 ("The marriage of a white person with a negro or mulatto, or person who shall have one-eighth or more of negro blood, shall be unlawful and void."). Mississippi Supreme Court Justice Ethridge explained the necessity for this section as follows:

The purpose of this section is to prevent race mixtures and avoid the evils that invariably follow such marriages. It proceeds upon the idea that the separation of the races as far as reasonably possible will promote the public peace and welfare.... It seems that race deterioration invariably follows such mixtures, usually the offspring of mixed marriages partake of the vices of both races and inherit but little of their virtues.... God's plan is for each race to live its own life and develop its own civilization, and in the providence of God civilizations have been divergent and radically different.

GEORGE H. ETHRIDGE, MISSISSIPPI CONSTITUTIONS 453-54 (1928). Mississippi's prohibition on interracial marriage continued to exert its influence in the courts even in 1968, the year after the Supreme Court's decision in *Loving v. Virginia*, and only three years before the Court's decision in *Palmer*. See *Vetrano v. Gardner*, 290 F. Supp. 200, 202-03 (N.D. Miss. 1968).

choice of pool closure over the operation of integrated pools underscored the message that whites and blacks should not associate together in a social setting such as swimming that involves intimacy and physical proximity. Rather than remedying the message of unequal concern contained in the initial segregation, the decision to close the pools further intensified that message by showing the lengths to which whites were willing to go in order to police the social boundaries of race.²⁸³

Palmer is also an example of a case where leveling down was a particularly effective strategy for lowering another group's status in relation to the socially privileged group. Status hierarchies depend on preserving the boundaries that differentiate social groups.²⁸⁴ In circumstances where a sharing of benefits would dilute the boundaries between the groups, as in *Palmer*, leveling down is a singularly poor remedy for inequality. By closing the pools instead of sharing them, whites in Jackson signaled lower esteem for blacks and reinforced a status differential that forbade the sharing of space in such an intimate setting. The infliction of the material deprivation on whites themselves reinforced the depth of the insult. By enforcing separation and exclusion rather than expressing connection and equal membership in the community, the response in *Palmer* violated the norm of equal concern.

Cazares provides a second example of a case in which the leveling down decision violated the norm of equal concern.²⁸⁵ The social meaning of the school's decision to cancel the NHS induction was to

(upholding the denial of Social Security benefits to children of an African American mother and white father where the parents had been unable to legally marry under a Mississippi statute that made "all bigamous, incestuous, or miscegenate marriages" void).

283. Of course, it is quite possible that the Court would have settled on a different interpretation of the expressive message of the pool closure had it embarked on such an inquiry. Justice Blackmun, who concurred in the Court's decision, insisted: "I cannot read into the closing of the pools an official expression of inferiority toward black citizens, as Mr. Justice White and those who join him repetitively assert." *Palmer*, 403 U.S. at 229 (Blackmun, J., concurring). As Professor Lessig has observed, "we can speak of social meaning[s] ... without believing that there is a single, agreed-upon point for any social act." Lessig, *supra* note 219, at 954-55. The inevitability of disagreement about any particular expressive meaning is not a sufficient reason for sidestepping the inquiry. Interpretations bearing on equality will always be contested.

284. Cf. *McAdams*, *supra* note 249, at 1045 ("Not only do people compete for esteem by investing in subordination of previously defined groups, but people invest in preserving group boundaries to maintain their position in a high-status group.").

285. See *supra* notes 8-15.

further the status differentiation enforced by the initial discrimination. Any plausible explanation for the school's decision would necessitate an expression of unequal concern for Cazares and young women who performed their sexual and gender identities in similar ways.²⁸⁶ The decision to cancel the induction ceremony was not based on the cost of adding one more person. Instead, the cancellation sought to underscore a definition of honor and community that excluded and devalued Cazares in relation to her peers. The action conveyed the message that the very presence of Cazares would debase the values being honored in the ceremony. Far from remedying the dishonor inflicted on Cazares from her initial exclusion, cancellation further dishonored her by demonstrating the depth of commitment about her worth. The conventions about inclusion in such ceremonies, which have as their very purpose the expression of appreciation and honor for the persons included, reaffirmed this message. In all likelihood, Cazares herself, as well as other young women in her situation, understood the cancellation as an act that devalued Cazares, the antithesis of an expression of equal concern.

The school district's decision in *Cazares* also can be understood as a contest in a struggle to maintain the lower social status of "bad" girls—young women whose race, class and/or sexuality brand them as less deserving of esteem than young women who are more privileged. In Cazares's situation, it was not simply that she was a young Native American woman who became pregnant; of equal or greater significance was the fact that she was unmarried and not engaged to or living with the father of her child.²⁸⁷ Her pregnancy made her visible as a sexual actor, and her independence from any visible male partner in her life challenged the status of men as

286. For a discussion of "identity performance," where a person "performs" his or her identity in a way that calls attention to their membership in a subordinated group and causes discomfort to those in power, and its function as a trigger for discrimination, see Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 701-03 (2001), and Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1276-78 (2000).

287. The complexity of the subject of discrimination is an omnipresent feature in equality law, and Cazares' status as a young Native American woman who did not live with the father of her child involves multiple intersecting lines of discrimination that affect the construction of her social group. See generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 141-50 (1989).

heads of households, protectors, and providers.²⁸⁸ Under these circumstances, permitting Cazares to share the stage with other students would not only signal her worthiness as an honoree on equal terms with her peers, it would challenge the status hierarchy of gender. Rather than honoring Cazares as an equal, the school preferred to deprive all students of such honors. Presumably, enough parents and students who would otherwise have benefited from the ceremony went along with this decision, despite some cost to themselves, so as to enable such a response. As the theory of status competition explains, in doing so, they reaffirmed the lower status of persons like Cazares and at the same time preserved their own higher status.

After the cancellation, the message of unequal concern sounded by the initial exclusion was not silenced by the end of the differential treatment; it was amplified by the "equal" deprivation of the ceremony inflicted on other students. In language loosely borrowed from Kenneth Karst, when the school made the initial determination to exclude Cazares from the ceremony, it drew the boundaries of community and placed Cazares and others like her outside of it.²⁸⁹ When this practice was identified as unlawful discrimination, the school's response was to relinquish that particular site of community rather than to broaden it to include Cazares. In the battle over social meaning, the value of the honor society to the student population at large took second place to the value of denying Cazares equal concern.

As with *Palmer*, an inquiry into whether the leveling down response in this case was motivated by an animus towards members of Cazares's social group would have been fruitless. The school's decision makers could have claimed (quite honestly, in all likelihood) that they were motivated only by a desire to promote positive social values and not any hostility towards Cazares or young women similarly situated.

288. Cf. KARST, *supra* note 171, at 141-46 (discussing the importance of symbolism and social meaning in the debate over welfare benefits to unmarried female heads of households).

289. *Id.* at 88 (discussing the expressive meaning of Jim Crow, and stating that much of the Jim Crow system was "symbolic speech," drawing the boundaries of community and placing black people outside") (footnote omitted).

For a slightly different set of issues presented in a leveling down response, consider the case of the Virginia Military Institute.²⁹⁰ If VMI had proceeded with a plan to become a private university, instead of opening its doors to women, it would have also deprived men of a public military-style education. Even though male cadets would have retained access to a private VMI, they would have lost the benefits of attending a state-sponsored VMI. For example, tuition for VMI cadets presumably would have increased with the loss of state support. VMI ultimately rejected this path not because of any qualms about its legality, but for financial considerations. Such a response, however, should not have been accepted as complying with equal protection. Although not acknowledged at the time, VMI's plan failed even to remedy the differential treatment in the case. The state's centuries of investment could not be wiped out overnight, therefore a newly reconfigured private VMI would still extend to men the state-subsidized benefits made possible by the state's prior relationship with VMI.²⁹¹ A newly private VMI would have continued to provide men, but not women, with the legacy of a state-subsidized VMI education, so that the state would have effectively continued to indirectly subsidize a VMI education for the school's male cadets.

The VMI example underscores a cautionary note that the determination of whether leveling down complies with equality should not be made from an ahistorical perspective that focuses only on the precise moment in time that the remedy is implemented. In this respect, VMI's proposal to privatize should be invalid even under existing precedent where the Court has recognized other allegedly neutral responses as thinly veiled efforts to hide ongoing state-sponsored discrimination.²⁹² These cases suggest that the VMI proposal to go private should have been rejected under traditional equal protection doctrine even without attention to social meaning and its relationship to a norm of equal concern.

Even if VMI's proposal had truly leveled the treatment for everyone by closing its doors entirely and depriving both men and women of a VMI education, public or private, such a response would

290. See *supra* note 24 and accompanying text.

291. These benefits included the existing grounds and facilities, as well as the intangible qualities of reputation and tradition.

292. See *supra* Part I.C.4.

still conflict with the norm of equal concern. As suggested by the preceding discussions of *Palmer* and *Cazares*, such a response would have preserved the status differential enforced by the initial exclusion of women from VMI, and possibly even enhanced it. A decision to continue to keep women out of VMI, even at great cost to men, would have signaled the extent to which women were devalued, to the point where the very presence of women would debase a VMI education. Such a decision would have functioned to preserve men's social roles as warriors and citizens, protecting the masculine ideal of VMI from being diluted by the visibility of women who performed the role of VMI cadets. As Kenneth Karst explains, "[b]ecause manhood has no existence except as it is expressed and perceived, the pursuit of manhood is an expressive undertaking, a series of dramatic performances."²⁹³ A leveling down decision in this context would have functioned to preserve the social meaning of masculinity and its linkage with civic virtue and VMI's "citizen-soldier" ideal.

B. Three Examples Where it May Not

While the previous examples all point in the same direction, not all leveling down remedies necessarily violate equality law. There are at least three kinds of situations where leveling down in response to inequality may be consistent with the value of equal concern. First, where the injury from the inequality is a formal equality injury, adequately redressed by the end to differential treatment, leveling down may not necessarily signal a lack of equal concern for those who challenged the inequality. Second, where the level of treatment for the favored class has been inflated by unjust privilege, such that it has been set based on an exclusionary norm, some leveling down may be necessary to extend the benefit on an equal basis. Finally, there may be some instances in which inequality cannot be leveled up because the nature of the benefit itself is so exclusionary that it cannot be extended to outsiders, such that equality must be achieved by the elimination, not extension, of privilege. These are not completely distinct categories, but they are

293. See KARST, *supra* note 171, at 113.

detailed separately to illustrate the variety of cases in which leveling down may be compatible with an equal concern norm.

An example of the first situation is found in *Heckler v. Mathews*,²⁹⁴ in which the Court upheld standing for male plaintiffs challenging the SSA's interim provision allowing wives and widows, but not husbands or widowers, to receive full spousal benefits without first having to show financial dependence on a spouse or offset other government pension funds.²⁹⁵ In upholding standing despite a severability clause that would have limited the remedy to a withdrawal rather than an extension of benefits, the Court explained that the injury in an equality claim inheres in the stigma from the discriminatory treatment and not the deprivation of the material benefit itself. The Court found that the injury was redressable because the differential treatment could be eliminated by denying benefits to women rather than extending them to men.

Although the Court's appreciation of the stigmatic injury from discrimination did not fully capture the expressive meaning of leveling down, the Court correctly concluded that any injury in that case was limited to the stigma that attached to the differential treatment itself, and would be cured by equalizing the level of benefits provided to men and women. The injury to the male plaintiff in *Mathews* was a formal equality injury, the failure to treat similarly situated persons similarly. Had the plaintiff prevailed,²⁹⁶ the subsequent leveling down of benefits for women would not have signaled the low social status of men or expressed unequal concern for men.

To the extent that men experienced an expressive harm from the disadvantageous treatment, it too would be remedied by the leveling down of benefits to women. By providing men with less generous social security spousal benefits, the provision reflected the traditional view of men as breadwinners, with the expectation that their pensions would serve as the primary source of retirement money. This expectation values a traditional version of masculinity while it

294. 465 U.S. 728 (1984).

295. *Id.* at 730-40. This case is discussed in greater detail *supra* Part I.C.2.

296. As discussed above, the Court upheld the provision as a valid interim measure designed to protect the social security system's financial solvency and the reliance interests of those persons who planned their retirement under the prior gender-based system. See *supra* note 113 and accompanying text.

marginalizes other kinds of masculinity in which men do not serve as the primary financial providers for their families. To the extent that the challenged law inflicted expressive harm on the male plaintiffs by devaluing nontraditional masculinities, a shift to equal treatment redresses this harm. With the differential expectation of men's and women's breadwinning roles excised, the statute would no longer express the expectation of a particular socially-preferred male role or marginalize nonconforming men.

Likewise, to the extent that the double-edged sword of gender stereotypes inflicted an expressive harm on women, it too would be remedied by the elimination of the differential treatment. By not counting women's government pensions to offset spousal benefits, the challenged rule treated social security spousal benefits for women as a handout, not linked to women's participation in the workplace, reflecting the expectation that women's pensions would not amount to enough to warrant offsetting them against spousal benefits. This expectation reinforced the invisibility of women as workers, treating their place in the workplace as peripheral. This harm too would end with the uniform treatment of social security spousal benefits for men and women. Leveling down in this case would not devalue men or women in relation to each other, nor would it reinforce an expectation of men as breadwinners that marginalizes non-conforming men. Indeed, the withdrawal of automatic benefits from women, by declining to subsidize women's presumed financial dependence on men, could be read as contributing to a construction of relationships between men and women based on a new benchmark of social and financial equality. In short, the expressive harm from the stereotypes underlying the statute ended along with the differential treatment.

The second type of situation where leveling down may satisfy a principle of equal concern is where the level of treatment reflects an inflated privilege that was set using an exclusionary standard. In such a case, some leveling down may be necessary to find a sustainable and inclusive level of treatment that is consistent with equal concern. To return to the Title IX setting, some leveling down of male athletic privilege may be necessary to extend athletic opportunities to women on an equal basis. The baseline for the treatment of male athletes has been set partially in reliance on notions of male privilege. In particular, some of the privilege associated with being

a male football or basketball player in a highly esteemed sports program has been inflated by the privileging of masculinity. Expenditures on the most highly valued men's college sports, football and basketball, continue to escalate at shocking rates.²⁹⁷ It is no coincidence that these two most highly funded sports are also the sports that most closely fit a cultural ideal of masculinity that emphasizes brute force, explosive speed and a male body type that is highly differentiated from the feminine. The extraordinary levels of spending for these sports have been set based on an understanding that they would not extend across the athletic program to female athletes, or even to male athletes in less valued sports. It would break the bank to extend this level of funding to women athletes, and it is not required by the principle of equal concern. Rather, equality law should permit some leveling down to find a baseline that is not based on male privilege.

It should be emphasized, however, that although this rationale may justify cuts in the inflated standard of living for some men's sports teams, it does not necessarily support cuts in the opportunities for lesser-valued men's sports as an alternative to adding sports for women. A proposal to do just that was offered by Brown University as an attempt to comply with Title IX in the challenge brought by female athletes seeking additional athletic teams.²⁹⁸ Rather than finding a sustainable level of funding so that equal numbers of women could share in the benefits of sports, this proposal would have preserved the more highly privileged status of the most-valued male athletes, while sacrificing lesser-valued male athletes, in order to avoid making room for greater numbers of female athletes. The expressive message from such an action is that women athletes are not worth the resources necessary to support even those opportunities that had been provided to lesser-valued male athletes, much less the reallocation of excess resources provided to the most privileged male athletes.

Brown University's leveling down proposal was particularly problematic because it proposed to cut even more men's sports than necessary to fund the additional opportunities that it would take to

297. See Brake, *supra* note 30, at 13, 76-77, 124 n.575, 125 n.581 (documenting disparities in spending on men's and women's sports and large increases in spending for men's so-called revenue producing sports).

298. See *supra* notes 67-80 and accompanying text.

comply with Title IX.²⁹⁹ As the district court explained, Brown proposed cutting 200 men, even though it only needed to add about 40 new spaces for women in order to comply with Title IX. Yet, the First Circuit chastised the district court for rejecting this proposal, holding that Title IX's equality mandate could be satisfied either by adding sports for women or by cutting them for men. The court did not engage in the kind of interpretive inquiry advocated here. Had it done so, it may well have found that the expressive meaning of Brown's action was to devalue female athletes as less worthy than male athletes of receiving sports opportunities and the resources that support them.³⁰⁰ Indeed, Brown's proposal to cut enough men so that it could comply without adding a single woman to its athletic programs was so severe as to contain a punitive message, namely, that it does not pay for women to challenge inequality in sports. As these messages conflict with the principle of equal concern, the court should have rejected the proposal as inconsistent with Title IX's nondiscrimination mandate.

A similar issue of how to remedy inequality in benefits when the baseline has been inflated by privilege surfaced in a pair of Supreme Court cases addressing sex-based differentials in pension plans. In these cases, the Court struck down the use of sex-based tables that disadvantaged women in pension premiums and benefits as a violation of Title VII.³⁰¹ The Court, however, refused to allow "retroactive relief," as that would have disrupted the settled expectation of employers and plan managers to pay out a certain level of benefits based on past premiums.³⁰² The Court assumed that

299. See *supra* note 73 and accompanying text (explaining the differences between these numbers and why the smaller number of added opportunities for women would have complied with Title IX).

300. This kind of devaluation of women's athletic opportunities in relation to men's was also ubiquitous in the popular culture at the time of the litigation. See Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL'Y 51, 91 (1996) (describing a *New York Times* article reporting on the *Cohen v. Brown University* litigation which characterized the potential loss of men's opportunities as "more important" than the potential for prompting new claims for additional women's teams). It continues today in popular debates over Title IX's effect on men's opportunities and the work of the Secretary's Commission on Opportunity in Athletics. See *supra* note 30 and accompanying text.

301. *Ariz. Governing Comm. for Tax Deferred Comp. Plans v. Norris*, 463 U.S. 1073 (1983); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

302. See *Norris*, 463 U.S. at 1091-94; *Manhart*, 435 U.S. at 721-23.

a leveling up remedy that calculated future pay-outs based on premiums already paid into the system, without regard to sex-based differentials, would require pension plans to pay women an amount matching the higher payments to men. The Court was unwilling to impose such a remedy for those premiums already paid into the system because of the financial burden of imposing unanticipated costs on employers and their pension plans.³⁰³ Instead, the Court required only a remedy for premiums prospectively paid into the system, leaving unremedied inequality in pensions based on amounts already paid into the system. As some scholars have noted, the Court assumed wrongly that the only option was to elevate women's pensions to the higher benefit level that had been paid to men under the sex-based tables modeled on the average male worker.³⁰⁴ That level of benefits, however, was artificially inflated by an exclusionary ideal because it had been based on a sex-specific model using the average male worker as the norm. The Court failed to consider an alternative choice that would have complied with equal concern: leveling the amount of benefits to a baseline for a gender-inclusive worker with an average, gender-neutral life expectancy. This choice might have eased the Court's fear of bankrupting pension plans, while still complying with a principle of equal concern.

A third and final example of situations where leveling down may comply with equal concern is where the benefit at stake is so exclusionary in nature and so distorted by privilege that it defies restructuring on an inclusive basis.³⁰⁵ In such cases, equality law may require the elimination of the privilege rather than extending it to others. To return to the athletics context, certain privileges accorded male athletes fall into this category. At the prestigious level of NCAA Division I-A football, for example, it is a common

303. See *Norris*, 463 U.S. at 1091-94; *Manhart*, 435 U.S. at 721-22.

304. See *BABCOCK ET AL.*, *supra* note 138, at 465-68 (quoting Professor Susan Deller Ross).

305. Cf. *CHAMALLAS*, *supra* note 6, at 101 discussing literature on white privilege, and stating:

Some of these everyday privileges—for instance, the ability to shop in a department store without being followed by security personnel—are justified and should be accorded to everyone. Others—like the ability to ignore people of lesser status—are unjustified and constitute what Martha Mahoney describes as “unearned power that is systematically conferred.”

Id.

practice to have the football team housed in a hotel the night before *home* games. The rationale typically rests on the difficulty of otherwise controlling and disciplining the players to avoid the kind of behavior that would hurt their game performance. The practice is based on a model of a male athlete who embodies a ruggedly uncontrollable masculinity and it is applied uniquely to football players. Extending such a practice to female athletes, at least on the same rationale, would make little sense. Instead, equality should require readjusting the athletic model upon which the practice is based to a gender-inclusive standard that holds all athletes responsible for their own behavior.

Other privileges afforded elite male athletes also fit this model. For example, as the recent controversy at the University of Colorado has highlighted, male athletes on the most valued men's sports teams often escape standard disciplinary consequences for a wide variety of misbehavior, including, at the extreme, rape and sexual assault of female students.³⁰⁶ Their virtual exemption from institutional disciplinary structures is based on a decidedly male ideal of an athlete embodying a particularly virulent form of hyper-masculinity. Equality does not require the extension of such privileges to female athletes, and is best served by eliminating them completely.

Another example of a case where an exclusionary benefit may defy restructuring on an inclusive basis, and one toward which I confess a greater degree of ambivalence than the prior examples, comes from a case involving the cancellation of a school play thought to be limiting in its roles for African American students. In *Mayberry v. Waverly Public Schools*, the school district cancelled the school play once it learned of the drama teacher's decision not to cast an African American student in a theatrical production of "Arsenic and Old Lace."³⁰⁷ The teacher's reason for not casting the student was "that she did not think the audience would accept an interracial family set in the 1930s or 1940s."³⁰⁸ Instead of reversing the teacher's decision when it was challenged, the school district

306. See Kirk Johnson, *Boulder Rattled By Charges Against Football Team*, N.Y. TIMES, Feb. 20, 2004, at A12; see also Brake, *supra* note 30, at 93-102 (discussing male athletic privilege in college and university sports programs).

307. *Mayberry v. Waverly Pub. Sch.*, No. L89-50091-CA, 1990 U.S. Dist. LEXIS 10249, at *1.*2 (W.D. Mich. Aug. 3, 1990).

308. *Id.*

cancelled the play and decided to seek out other theatrical opportunities for the student, both in the school district and at other schools and private institutions.³⁰⁹ The court held that this was an appropriate remedy to the discrimination by the teacher, based on its assumption that leveling down is an acceptable remedy to an equality claim.³¹⁰ As the court explained, "all students were treated equally with regard to participation in the play."³¹¹ If the court is right, however, that this remedy corrects the prior inequality, it is not merely because all students are treated the same with respect to the school play. Rather, it is because the selection of this particular school play, in which roles for African American students are inadequate or nonexistent, confers a privilege on students of other races that cannot be restructured on an inclusive basis. If there were truly no theatrically appropriate roles for African American students in the play, the expressive meaning of the play's cancellation would be to recognize that it is wrong to offer such a benefit that cannot be shared with African American students. The cancellation then would be an appropriate elimination of white privilege, consistent with equal concern.

My ambivalence about this example comes from my strong skepticism that the benefit in question could not have been made available to African American students on an equal basis. If the drama teacher's decision was itself based on biased notions of proper racial roles in the play and in society at large, or reflected an accommodation of audience racism, then the cancellation of the play may be read as endorsing racial prejudice in a way that furthers the expressive harm of the discrimination in casting. It would have been more consistent with equal concern to challenge fixed notions about racially appropriate roles, using the play as a teaching tool to challenge racism both in the society in which the play was set and in contemporary audience expectations. Read in this light, the decision to cancel the play, rather than adopt a racially inclusive approach to casting, preserved and reinforced the outsider status of African American students in the broader school community. In the final analysis, whether the cancellation was an appropriate remedy

309. *Id.* at *2-*3.

310. *Id.* at *8-*9.

311. *Id.* at *8.

to inequality or furthered the expressive harm of the discrimination turns on the expressive meaning of the cancellation, which is itself subject to dispute.

A final example that raises the question of what privileges should be eliminated, as opposed to restructured on an inclusive basis, comes from the controversy over same-sex marriage as it played out recently in Benton County, Oregon.³¹² In my view, the county's decision to temporarily suspend all marriage licenses pending resolution of the validity of state marriage law did not violate equal concern, given the particular social context of that situation. First and foremost, the leveling down occurred not as resistance to the equality challenge by gays and lesbians to the state's marriage laws, but in furtherance of it. Having first announced that it would begin issuing marriage licenses to same-sex couples, county officials acted to suspend all marriage licenses only after a lawsuit was filed to block the extension of marriage to same-sex couples.³¹³ In this situation, the leveling down decision was not a defensive construction of social meaning designed to reinforce a status hierarchy disparaging gay and lesbian couples. Instead, it was a tactic designed to challenge that status hierarchy and hasten the extension of marriage to gay and lesbian couples by equalizing the status of their relationships. Importantly, the measure was understood by members of the gay and lesbian community as breaking down, rather than reinforcing, status differentials between gay and straight couples.³¹⁴ Finally, it is significant that the leveling down of marriage was designed as a temporary measure, as part of a larger strategy to ultimately extend the privilege of marriage to same-sex couples.³¹⁵

312. See *supra* notes 27-28 and accompanying text.

313. Zernike, *No License*, *supra* note 27.

314. See *id.* (stating that "Oregon gay rights advocates see powerful—and somewhat delicious—symbolism," and quoting one advocate as saying, "[i]t's not altogether bad for a heterosexual couple that has always thought of marriage as an inalienable right to be told no. It might make them think about how same-sex couples get told no all the time."); *Oregon Gay Marriage Case Consolidated*, THE FRONTRUNNER, Mar. 25, 2004 (describing Benton County's decision to temporarily suspend issuance of all marriage licenses until the Oregon Supreme Court rules on the validity of Oregon's marriage law limiting marriage to one man and one woman, and stating "[t]he decision has found favour with pro-gay marriage activists who argue that at least it sends a clear message that everyone is entitled to equal rights.").

315. See Zernike, *No License*, *supra* note 27.

However, that answer, relying on the particular fact pattern in Benton, Oregon, begs the larger question of whether a successful equality challenge to marriage's exclusion of gay and lesbian couples could, or should, be remedied by the elimination of marriage altogether. This is a more difficult question. Some gay and lesbian rights activists have argued that marriage is a fundamentally heterosexist and patriarchal institution that should be undermined and destabilized, rather than extended to same-sex couples.³¹⁶ If accepted, their argument would lead to the conclusion that marriage is an unjust privilege that defies restructuring on an inclusive basis, such that equality is best served by eliminating rather than extending it. However, other feminist scholars and gay and lesbian rights advocates have argued that marriage could and should be restructured on an inclusive and equal basis, and that the inclusion of same-sex couples would help shape marriage as a more just and valuable social institution.³¹⁷ I tend to agree with these scholars and believe that the elimination of marriage, as a response to a successful equality challenge by same-sex couples, would violate equal concern, and that equal concern would be better served by the restructuring of marriage so that its benefits are available to all couples regardless of gender.

As these last examples suggest, difficult interpretive questions may arise in distinguishing between leveling down as a legitimate reassessment of privilege and leveling down as an expression of unequal concern. Yet, engaging in such an analysis has the advantage of taking into consideration the kinds of questions that should be important to equality law rather than assuming that all leveling down responses are the same and fully satisfy equality norms.³¹⁸ It also has the advantage of causing us to think more

316. See, e.g., Diane Post, *Why Marriage Should Be Abolished*, 18 WOMEN'S RTS. L. REP. 283 (1997); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535 (1993); see also Becker, *supra* note 231, at 37-38 n.401 (collecting sources arguing for the abolition of marriage).

317. See, e.g., Becker, *supra* note 231, at 31-56 (arguing for a restructuring of marriage based on an ideal of promoting pair-bonding, and for extending marriage to include same-sex couples); *id.* at 46-47 n.474 (collecting sources arguing for the restructuring of marriage to include same-sex couples); Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27 (1996).

318. For this reason, I find Professor Epstein's complaint about the difficulty of discerning social meaning to be unpersuasive. See Richard Epstein, *FORBIDDEN GROUNDS: THE CASE*

deeply about inequality and discrimination by recognizing the existence of unjustified privilege, and the failure to extend justified privilege, as lapses of equal concern, wholly apart from the existence of differential treatment.³¹⁹

IV. ADVANCING THE DEBATE OVER EQUALITY'S NORMATIVE VALUE

The approach taken here contrasts sharply with scholarly accounts of leveling down in the legal literature debating equality's normative appeal. In contrast to the inattention to leveling down in other areas of legal scholarship, leveling down has figured prominently in the ongoing debate about whether the ideal of equality has any independent meaning or normative appeal. The critics of equality cite the permissibility of leveling down in support of their overall critique of equality rights. Equality's defenders respond to the leveling down objection either by arguing that leveling down is not as problematic as the critics assume, or by contending that it is not quite so unlimited a response as equality's critics contend. Neither the critics nor the defenders of equality, however, grapple sufficiently with the expressive meaning of leveling down in concrete cases or the impatience of social context in determining the compatibility of leveling down with equality rights. As a result, both sides of the debate are too sanguine about the flexibility of equality rights in accepting leveling down and stop short of fully

AGAINST EMPLOYMENT DISCRIMINATION LAW 498-99 (1992) ("the best way to take into account the full range of symbols, good and bad, noble and vain, is for the legal system to *ignore* them all—mine and yours alike."). The alternative of narrowing the equality principle to recognize only facially differential treatment and actions premised on a provable, subjective discriminatory intent is highly unsatisfying, and leaves out much of what is at stake in an equality claim: contest over social hierarchies and expressive meaning. *See supra* notes 219-63 and accompanying text.

319. For literature on white privilege and arguments that discrimination law should be understood as addressing questions of privilege, see Barbara J. Flagg, "*Was Blind But Now I See*": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Tina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or other isms)*, in STEPHANIE WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 87 (1996); Martha R. Mahoney, *Segregation, Whiteness and Transformation*, 143 U. PA. L. REV. 1659 (1995); Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881 (1995).

acknowledging the possibilities for equality-based limits on leveling down.

A. Equality's Critics and the Leveling Down Objection

Peter Westen first launched the debate in legal circles over equality's moral value with the publication of his article, "The Empty Idea of Equality."³²⁰ As the title suggests, Professor Westen took the position that equality as a normative principle has no independent content—that it does not prescribe any way of acting that is not also compelled by other, noncomparative norms.³²¹ Westen's later writing qualified his initial thesis to some extent,³²² but many of the questions raised in his initial critique continue to percolate in legal scholarship. Numerous scholars responded by arguing that the ideal of equality does have normative force and that it should continue to hold a prominent place in law and morality.³²³

In recent years, a revised critique of equality drawing on and extending Westen's initial thesis has generated new interest in the question of whether equality is an empty or objectionable ideal. Christopher Peters has presented a complex argument that goes beyond Westen's more limited critique of equality to advocate the abandonment of prescriptive equality in legal and political rhetoric.³²⁴ Peters, more so than Westen, objects specifically to what

320. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). Although Westen was among the first legal scholars to take this position in his scholarship, he drew on a body of works in moral and political theory that had raised similar objections to equality as a normative principle.

321. *Id.* at 542.

322. Westen's later book takes a more tentative stance on the question of whether equality is in fact empty by focusing on what Westen sees as the confusing and derivative character of equality rights. See PETER WESTEN, *SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF "EQUALITY" IN MORAL AND LEGAL DISCOURSE* (1990).

323. See, e.g., Steven J. Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136 (1982); Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983); Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983).

324. See Christopher Peters, *Equality Revisited*, 110 HARV. L. REV. 1210 (1997) [hereinafter Peters, *Equality Revisited*] (arguing that "prescriptive equality [is] an illusion ..., a shadow cast by principles that in fact have nothing to do with equality"); Christopher Peters, *Slouching Towards Equality*, 84 IOWA L. REV. 801 (1999) ("[P]rescriptive equality—the

he views as the inherent acceptability of leveling down in response to assertions of equality rights. In his indictment of equality, Peters contends that to the extent that equality has any independent normative force, it lacks normative appeal because it requires absurd results.³²⁵ Peters agrees with Westen that, if equality is defined as "treat likes alike," it is reduced to a tautology and empty of any normative content.³²⁶ Peters, however, argues that equality has a nontautological meaning in that when one person or group has received better treatment than what is deserved under the relevant substantive criteria, a similarly situated person or group may assert an equality right to that same treatment, which is also incorrect under the relevant substantive criteria. Peters labels this kind of equality "nontautological prescriptive equality."³²⁷ He concedes that this version of equality has normative content and is not empty. Yet, he contends that it is "worse than empty; it is both incongruous and inherently unjust, and thus it is morally invalid."³²⁸

It is in this context that Peters addresses leveling down as a response to inequality. Peters views the acceptability of leveling down as symptomatic of what is wrong with prescriptive equality: when one group has been wrongly denied a benefit under the relevant criteria, a similarly situated group that has properly enjoyed that benefit under the relevant criteria nonetheless may be brought down to the incorrect level of the first group.³²⁹ In discussing this problem, Peters starts from the premise that an actor who is constrained by an equality principle may always comply with that principle by lowering the level of treatment for those who are better off to the level of those who are worse off.³³⁰ For Peters, the right to equality is satisfied by equal treatment in either direction.

Using this reasoning, Peters launches a two-fold attack on equality rights. On the one hand, he argues, prescriptive equality is

directive to treat likes alike *merely because they are alike*—has no moral validity.”).

325. See, e.g., Peters, *Equality Revisited*, *supra* note 324, at 1237-39 (describing the absurd result prescriptive equality can mandate in conditions of scarcity).

326. *Id.* at 1215.

327. *Id.* at 1222-24.

328. *Id.* at 1257. By defining prescriptive equality in a way that does have meaning beyond a mere tautology, Peters observes that he parts ways with Westen, whose first article on the topic claimed that equality, defined as "treat likes alike," is always tautological. *Id.*

329. See *id.* at 1237-39 & n.46.

330. See *id.*

meaningless in that it says nothing about how to determine the proper level of treatment for anyone. The substantive criteria for determining who deserves what level of treatment must be derived from external substantive rules, independent of equality.³³¹ For example, the substantive rule of treatment for Jackson city services might be that all city residents deserve access to any public swimming pool. If Jackson then provides public pool access to some but not to other residents, it has violated this substantive rule. Equality rights, under this argument, are devoid of content in that they merely piggy-back on the guiding substantive rule, without having any input into the content of the underlying substantive rule. Under this reasoning, if some city residents are denied access to pools, in violation of the substantive rule, they should be able to secure the proper treatment under that substantive rule without resort to equality rights.

On the other hand, Peters argues, to the extent that prescriptive equality does have meaning, that meaning is unjust. Although prescriptive equality says nothing about the content of the substantive rule, it may serve as the reason for extending incorrect treatment to additional persons. For example, if some city residents have been incorrectly denied access to public pools under the relevant substantive criteria, prescriptive equality might serve as the basis for extending that incorrect treatment to those city residents who had been properly permitted access to city pools. Accordingly, Peters argues, prescriptive equality is worse than meaningless; it is unjust.³³² To Peters, the permissibility of leveling down supports the rejection of equality rights altogether.

As an example of how equality rights produce harmful and unjust consequences, Peters invokes *Palmer v. Thompson*.³³³ As Peters reads *Palmer*, the Court endorsed the egalitarian premise that the unjust denial of a benefit to one group warrants the further unjust denial of that benefit to a similarly situated group. Peters views this premise as the remedial conclusion to be drawn from prescriptive equality, which he defines as treating one person or group in a

331. See *id.* at 1256-57.

332. See *id.* at 1257.

333. *Id.* at 1263 n.84; see 403 U.S. 217 (1971).

certain way as a sufficient reason for according the same treatment to a similarly situated group.³³⁴

Another example Peters uses to illustrate the leveling down objection to equality rights comes from litigation challenging inequality in school funding.³³⁵ In response to a New Jersey Supreme Court ruling that the state constitution requires equal funding for public schools,³³⁶ then-Governor Christine Whitman proposed a remedial plan to lower spending in richer districts to the level of funding for poorer districts. Although Governor Whitman ultimately retreated from this proposal in response to pressure from irate parents, Peters cites the incident as an example of the harmful and unjust consequences of prescriptive equality.³³⁷

To Peters, *Palmer* and the New Jersey school funding cases demonstrate the harm of applying prescriptive equality for its own sake. Peters contends that the very real possibility that one group may become worse off simply because the same fate has befallen a similarly situated group warrants the rejection of prescriptive equality as a principle of justice. Peters draws on scholars in other fields, such as philosophy and political science, who have likewise invoked the problem of leveling down as a reason for rejecting equality as an independent norm. Like Peters, these scholars claim that equality is not defensible if it results in a leveling down of benefits that makes the favored group worse off and the disfavored group no better off.³³⁸

The expressive meaning approach to leveling down advocated here contrasts sharply with the treatment of leveling down by Peters and the critics of equality. Both approaches share an assessment that leveling down in response to inequality raises issues that are more problematic than generally acknowledged. Peters's objection to leveling down, however, stems from utilitarian calculations rather than a concern for remedying injuries of the persons asserting equality rights. Under the expressive meaning

334. Peters, *Equality Revisited*, *supra* note 324, at 1263.

335. See *supra* note 25 and accompanying text.

336. *Abbot ex rel Burke*, 643 A.2d 575 (N.J. 1994); *Abbot v. Burke*, 575 A.2d 359 (N.J. 1990); *Robinson v. Cahill*, 358 A.2d 457 (N.J. 1976); *Robinson v. Cahill*, 351 A.2d 713 (N.J. 1975).

337. Peters, *Equality Revisited*, *supra* note 324, at 1263 n.84.

338. See, e.g., DEREK PARFIT, *EQUALITY OR PRIORITY?* (1995).

approach, the problem with leveling down is not the utilitarian one of diverting social resources from their presumptively most beneficial use.³³⁹ Rather, it is that leveling down may express unequal concern and solidify social inequality. More significantly, Peters's approach concedes too readily that leveling down always satisfies equality rights, based on a cramped definition of equality as limited to protection from differential treatment. Peters focuses on the injustice of compounding one wrongful material deprivation with another, as in *Palmer*, without fully considering whether the leveling down exacerbated the injuries of the African American residents of Jackson and violated the principle of equal concern.

Peters's equating of *Palmer* and the New Jersey school funding cases is symptomatic of a narrow view of equality as equal treatment. Peters assumes that the two cases are alike in that both leveling down responses fully satisfy equality rights. If the animating principle in an equality right is equal concern, however, then the two cases differ significantly. As elaborated above, the leveling down in *Palmer* expressed unequal concern and functioned as a last-ditch effort to preserve the existing social meanings of race and the attendant racial hierarchy. The message and the resulting stigma from the pool closures cut to the heart of an equality right. In the New Jersey funding case, on the other hand, it is not so clear that the leveling down in funding conflicts with equal concern. Peters laments the unfortunate state of affairs that would occur if one school received less funding than it otherwise would have simply because another school received less funding than it should. Although such a result may indeed be regrettable from the perspective of the children attending the wealthier school, it may or may not be problematic as measured against a principle of equal concern. If the level of funding for richer districts could not be sustained if the state had to ensure equal funding to all other districts, equal concern may require resetting the baseline in order to share the resources at a sustainable level. The implementation of funding reductions that are necessary to set a sustainable baseline for all school districts would diminish, rather than entrench, social stratification and status differentials among persons in relatively wealthier and poorer districts.

339. See *supra* notes 267-69 and accompanying text.

Of course, social context matters. If Governor Whitman's proposal lowered the richer district's funding more than necessary and set a baseline lower than the average level of wealth, her proposal would be more problematic. In that case, setting the baseline below an average sharing of the wealth would punish the plaintiffs by minimizing the gains from their equality challenge, and express unequal concern by signaling that children in wealthier districts deserve all the money available for their education, while children in poorer districts are less worthy of maximized educational resources.

Peters's failure to engage a norm of equal concern that is sensitive to expressive meaning and its role in reproducing inequality leads him to the conclusion that the inherent acceptability of leveling down in response to equality rights weighs in favor of abandoning equality rights altogether. Leveling down is more often in tension with equality law and the principle of equal concern, however, than Peters recognizes. An expressive meaning approach that is sensitive to the social setting in which inequality occurs would limit leveling down responses more than equality's critics acknowledge.

B. The Treatment of Leveling Down by Equality's Defenders

Unlike equality's critics, legal scholars who have weighed in to defend equality rights do not view leveling down as a reason for rejecting equality as a principle of justice. Their responses, however, also concede too much remedial flexibility to equality, albeit not quite as much as equality's critics. The defense of equality could be strengthened by a greater attention to the expressive meaning of leveling down, and how that expressive meaning may conflict with a requirement of equal concern.

Numerous legal scholars have responded to the critique of equality described above.³⁴⁰ Responses to the leveling down objective, in particular, tend to take one of two forms. One approach concedes that leveling down is a permissible response to the assertion of equality rights, but argues that it is not as problematic

340. See, e.g., Kent Greenawalt, "Prescriptive Equality": *Two Steps Forward*, 110 HARV. L. REV. 1265 (1997); Joshua D. Sarnoff, *Equality as Uncertainty*, 84 IOWA L. REV. 377 (1999); Joshua D. Sarnoff, *I Come to Praise Morality, Not to Bury It*, 84 IOWA L. REV. 819 (1999); Kenneth W. Simons, *The Logic of Egalitarian Norms*, 80 B.U. L. REV. 693 (2000).

as equality's critics contend. The other approach argues that the permissibility of leveling down is overstated, and seeks to elaborate the conditions under which leveling down is an acceptable response to the assertion of equality rights. This second approach has the most in common with the expressive meaning approach advocated in this Article. Even here, however, the defenders of equality stop short of recognizing the full extent of the potential incompatibility between leveling down and equality rights. The following discussion focuses on the work of Professor Kenneth Simons, the legal scholar who has most extensively addressed the leveling down objection in his defense of equality. Professor Simons's defense illustrates both approaches to the leveling down objection.³⁴¹

In his defense of equality, Professor Simons makes the first type of argument when he contends that equality's critics have overstated the undesirability of leveling down responses.³⁴² He argues that leveling down may avoid the stigmatic harm that comes from unequal treatment, thereby creating a better state of affairs than the initial inequality. He explains, "[L]eveling down is not always troubling. If the benefit in question is not of great importance, and the seriousness of the equality violation depends significantly on the invidiousness of the trait (as in cases of racial discrimination), then the leveling down is not problematic."³⁴³ Simons offers the example of a hypothetical university president who greets every attendee at an alumni reception with a voice greeting but only shakes the hands of white alumni.³⁴⁴ Leveling down all interaction to simple vocal greetings and not shaking any hands would be an appropriate remedy, Simons claims, because it would discontinue the stigma to blacks from the prior practice.

Unlike equality's critics, Professor Simons recognizes the importance of stigma as a significant harm from inequality. He assumes too readily, however, that leveling down remedies that stigma, and views the stigma as tied to the differential treatment. As discussed previously, even facially neutral treatment can inflict expressive harm and stigma, and leveling down may actually exacerbate the expressive harms of the prior unequal treatment. To

341. See generally Simons, *supra* note 340.

342. *Id.* at 765-66.

343. *Id.* at 765.

344. *Id.* at 752-53, 765 n.246.

use the handshake example, Professor Simons's analysis does not allow for the possibility that the refusal to shake anyone's hand as a remedy to the inequality may magnify rather than reduce the stigma. The legitimacy of the refusal to shake hands depends on its expressive meaning. In my view, the refusal to shake hands with anyone in response to an equality claim challenging racially selective handshakes sounds alarmingly similar to the refusal by whites to share pools with blacks in *Palmer*. Simons's qualification of limiting leveling down's acceptability to cases in which the benefit at issue is not of great importance does not allay this concern. The expressive harm of leveling down may exist regardless of the significance of the benefit, if the across-the-board withdrawal of the benefit is premised on a message of disregard and unequal concern.

Perhaps one reason why Professor Simons is not as troubled by leveling down as equality's critics is that he has greater faith in the political process to provide sufficient protection against the harms of leveling down. As he explains:

[A]n important political constraint often, as a practical matter, limits the scope and severity of both the multiplication of wrong and the leveling down objections. Equality rights are often invoked by minorities. If government responds [sic] to a violation by multiplying the wrong or by leveling down (in the sense of depriving a larger group of an entitlement), this will burden, or deny a benefit to, a larger class of persons—possibly a *much* larger class. This larger class might well employ the political process to ensure that the problem is remedied by government eliminating [sic] rather than multiplying the wrong, by leveling up instead of down.³⁴⁵

As explained above, however, when leveling down occurs as a defensive construction of social meaning, this faith in the political process is misplaced.³⁴⁶ It rests on a mistaken assumption that the

345. *Id.* at 766. Simons approvingly cites Justice Jackson's concurrence in *Ry. Express Agency v. New York*, 336 U.S. 106, 112-13 (1949), in which Jackson articulates a critique of underinclusive statutes that carve out a select group of citizens from a statute's negative effects, thus achieving a degree of political insulation from persons who would otherwise be opposed to the law. *Id.* For my response to Justice Jackson's perspective as it relates to leveling down, see *supra* Part II.B.

346. See *supra* Part II.B.

majority concerns itself with only material goods, and ignores how the relational aspects of leveling down can function to preserve unequal social arrangements. While equality's critics are too quick to invoke the harmfulness of leveling down as a reason for abandoning equality altogether, equality's defenders are not as troubled by it as they should be. Neither the remedying of stigma linked to differential treatment nor the opportunity for politically based limits are sufficient answers to leveling down's propensity to leave persons worse off for asserting equality rights.

Notwithstanding his argument that the political process can check leveling down, Professor Simons is troubled enough by the prospect of leveling down that he devotes a great deal of space to elaborating equality-based limits on it.³⁴⁷ This work falls under the second type of argument in response to the leveling down objection: that equality's critics overstate the permissibility of leveling down. Professor Simons grounds this discussion in his broad definition of equality rights as including "not just the tangible benefits and burdens distributed by a decision maker, but the deeper and more subtle question of how a distributional decision affects the status of different social groups."³⁴⁸ Professor Simons then locates the limit on leveling down at the line between what he terms "pure" and "impure" equality rights.³⁴⁹ A "pure" equality right is satisfied either by leveling up or leveling down,³⁵⁰ while an "impure" equality right is asymmetrical and permits remedying the inequality in only one direction.³⁵¹ This definitional framework serves as the primary

347. Simons, *supra* note 340, at 765-66; *see also* Greenawalt, *supra* note 340, at 1289 & n.65 (declining to weigh in on the question of whether "the principle of equality should authorize giving people worse treatment than they otherwise deserve.").

348. Simons, *supra* note 340, at 713. Simons' elaboration of the equality principle also draws on Ronald Dworkin's distinction between superficial equal treatment and a deeper "equal concern" or "treatment as an equal." *Id.* at 720-21 & n.97. Like Dworkin, Simons's principle of equality encompasses the broader conception of treatment as an equal. *Id.*

349. *Id.* at 715-20.

350. This is true even if the reason for leveling down is nothing other than "a simple desire to level down to rectify the inequality." *Id.* at 716-17 n.84.

351. *Id.* at 715-16. Simons explains that impure equality rights are still genuine equality rights, and still flexible in the sense that the decision maker could have avoided the problem by not offering unequal benefits in the first place. For example, in dealing with an impure equality right under the Equal Pay Act, although the initial decision to raise wages is discretionary, once the employer raises wages for men it must also increase wages for women to comply with the statute.

vehicle for explaining whether a particular equality claim permits leveling down as a remedy to inequality.³⁵²

Simons offers several examples to add content to his distinction between pure and impure equality rights. As examples of impure equality rights, Simons points to discrimination statutes that explicitly reject leveling down remedies and the presence of principles external to equality that set a fixed level of treatment.³⁵³ In contrast, Simons mentions the Equal Protection Clause as an example of a pure equality right which may be satisfied either by leveling up or by leveling down. In addition to these examples, Simons offers one more suggestion for how to distinguish a pure equality right from an impure equality right. He contends that impure equality rights are more plausible where the inequality is premised on an impermissible trait.³⁵⁴ He explains this distinction by looking at the nature of the injury from the equality violation. Where inequality is based on a suspect trait, according to Simons, the injury often involves the harm of stigma. In such cases, he acknowledges, a leveling down remedy may not cure the stigma. Instead, it may add injury to insult by taking away material benefits, whereas leveling up would at least offer "the salve of tangible benefits."³⁵⁵ In contrast, Simons continues, when a pure equality right is violated, the injury consists solely of the inequality

352. Simons states that whether an equality right is "pure" or "impure" depends in part on whether its underlying justification is teleological (the belief that inequality is an intrinsically bad consequence, regardless of who bears the brunt of it), in which case it must be a pure equality right, or deontological (recognizing moral concerns other than the intrinsic badness of inequality itself), in which case it may be either pure or impure. *Id.* at 717. For those equality rights grounded in deontological (as opposed to teleological) justifications, this distinction does not indicate whether leveling down is permissible or not. Because the majority of equality rights can be justified in both teleological and deontological terms, this classificatory scheme provides little guidance for deciding when leveling down violates equality norms.

353. *Id.* at 716, 718-19. As an example of the former, Simons mentions the Equal Pay Act and the Age Discrimination in Employment Act, both of which forbid leveling down remedies to wage discrimination. *See supra* Part I.C.3. As an example of the latter, Simons discusses several contexts where the level of treatment is fixed, such that a benefit that has been distributed unequally is vested, and cannot be taken away from persons who have received it.

354. Simons, *supra* note 340, at 719.

355. *Id.* at 720.

of tangible benefits. In such cases, leveling down by redistributing resources may adequately address this harm.³⁵⁶

This is the part of Simons's analysis that comes the closest to pinning down why and under what circumstances leveling down conflicts with equality. Still, the analysis does not fully explore the relationship between leveling down and equality from the perspective of an expressive meaning approach. Depending on the social context, leveling down may not only *fail to remedy the stigma* from discrimination based on impermissible traits, it may actually *exacerbate and intensify that stigma*. Where Simons views leveling down in such cases as adding injury (in the form of withholding benefits) to insult (in the form of stigma from the differential treatment), it would be more accurate to say that it adds insult (additional stigma) to injury (the preexisting deprivation of benefits). Leveling down in a case like *Palmer* inflicts additional injury in that the preexisting denial of benefits is now accompanied by further stigma. This is more than a matter of semantics. The expressive harm of leveling down inflicts a status-based stigma that compounds the stigma from the previous differential treatment. In *Palmer*, the closure of the pools may have been even more stigmatizing than the initial segregation. The message that blacks are unfit to swim with whites was compounded by the demonstration of the depth of feeling with which this view was held.

More fundamentally, the presence or absence of a suspect trait should not in itself determine whether leveling down is compatible with equality rights. Leveling down has very different implications for the equality right in a case like *Mathews* than *Cazares*, even though both cases involve responses to sex-based discrimination. The critical difference in the two cases is how the social meaning of leveling down works to solidify status hierarchies and structure social relations.³⁵⁷

In the end, Simons's framework for setting equality-based limits on leveling down turns on a somewhat elusive distinction between pure and impure equality rights. This emphasis on the classification of the equality right as determinative of the permissibility of leveling down does not fully engage the reasons why leveling down

356. *Id.*

357. *See supra* Part III.

may or may not satisfy equality law. For example, although Simons is clearly correct in his examples of statutory rights that fit his definition of impure equality rights, it is not so clear that equal protection is a pure equality right such that it may always be remedied by leveling down. If the underlying norm of equal protection is not equal treatment, but equal concern, the determination of whether leveling down remedies an equal protection violation must be context-dependent.³⁵⁸

Simons's analysis of impure equality rights as a constraint on leveling down remains an important recognition in the literature that leveling down is not always a permissible response to inequality. Rather than requiring the classification system for pure and impure equality rights to perform the analytical work of determining leveling down's compatibility with equality law, however, the analysis would be furthered by a context-driven analysis of the expressive meaning of leveling down and its consistency with the principle of equal concern. If, as Simons recognizes is sometimes the case, the injury from inequality is not limited to the material deprivation itself, but extends to social relations and the relative standing of social groups,³⁵⁹ then the acceptability of leveling down

358. It is not at all clear that Simons would disagree with this, even though he classifies equal protection as a pure equality right, because he acknowledges that some facially neutral actions not premised on a conscious discriminatory intent may still violate equality's requirement of equal respect and concern. For example, Simons views *Palmer* as a case where the formally similar treatment rested on selective sympathy, in violation of equal concern. Simons, *supra* note 340, at 721. From this, it is clear that Simons believes that the pool closure in *Palmer* conflicted with the equality guarantee, but it is not clear why, since he otherwise identifies equal protection as a pure equality right. Presumably, Simons would not view the pool closure as a true leveling down response, but rather as an example of a case where the greater concern afforded white residents in Jackson was not leveled all the way down to the very low level of concern shown for blacks. *Id.* at 722. But this meaning of leveling down, as referring to the level of concern rather than the level of treatment, differs from how Simons defines leveling down elsewhere as the leveling of treatment. *Id.* at 707 (stating that a genuine equality right may be remedied either by extending benefits to all relevant persons or by uniformly denying benefits to all relevant persons). Using a treatment-focused definition of leveling down, Simons states that a genuine equality right may always be cured by a uniform denial of benefits unless it is an impure equality right. *Id.* The leveling down objection as framed by equality's critics also generally presupposes a leveling of treatment, not necessarily of concern.

359. *Id.* at 710 n.60 (citing and quoting from David Miller, *Arguments for Equality*, 7 MIDWEST STUD. PHIL. 73 (1982)) (noting that "egalitarian arguments for equality are all sensitive to relational factors and 'concerned not merely with how well off individuals are, measured along some dimension, but with the relative standing of different people on that

as a response to inequality should depend on whether it remedies or exacerbates the relational injuries with which equality is concerned.³⁶⁰

C. How Attention to Social Context and Expressive Meaning Would Enrich the Debate

Both sides of the debate over equality's normative appeal fall short of fully accounting for the ways in which leveling down may conflict with equality rights. The understanding of leveling down is ultimately distorted by the artificiality of the types of examples typically used, and suffers from a highly abstracted logical and moral reasoning that is common to this genre of scholarship.³⁶¹ The equality under discussion is largely a bloodless and rarefied equality about children deprived of dessert and Rhodes scholars denied fellowships. Kenneth Karst's contribution to this debate is atypical in this respect, relying heavily on social context and history to explain why equality is meaningful, although he does not address the leveling down objection specifically.³⁶² Other than an occasional reference to *Palmer*, it is difficult to get a sense of how leveling down actually works in the legal system to solidify and perpetuate social relationships of inequality. The ahistorical and abstract nature of the debate detracts from a complete understanding of what is at stake in leveling down and its relationship to equality law.

As an illustration of how hypothetical examples ungrounded in the case law may influence the analysis, consider an example used by Professor Simons of inequality in a parent's allocation of dessert

dimension"); *id.* at 713 ("Equality rights can demand quantitatively identical treatment of classes, but they can also require the reduction or minimization of inequality."); *id.* at 739-40 (discussing stigma and status-based harms of discrimination).

360. Although Simons offers a nuanced and contextual analysis of the relational aspects of equality norms, he does not follow these insights to their full conclusion at the remedial stage of the analysis, and so overstates the remedial flexibility of equality norms. *Id.* at 711 (stating that comparative equality rights "may be flexibly satisfied," and offering as an example: "If a court finds that someone has committed an equal protection violation, it may, consistent with the egalitarian norms embodied in the equal protection clause, permit him to respond either by extending or by denying the benefits to both classes.>").

361. Cf. Gewirtz, *supra* note 32, at 587-89 (criticizing highly abstracted, counter-realistic scholarship on remedies).

362. See KARST, *supra* note 171, at 245-50.

to his children. In his discussion of the criteria that define pure equality rights, Simons invokes a parent's promise that if one child is permitted to have dessert, both children will be permitted to have it.³⁶³ Simons observes that if one child is given dessert but the other is not, the harm from the inequality is not limited to the incorrect denial of the dessert to the deprived child. At the same time, he notes, the harm may be remedied by depriving both children of dessert.³⁶⁴ The outcome of this example may be correct.³⁶⁵ If it is correct, however, its correctness lies in its social context, not in any inherent feature of equality rights generally. In this example, the denial of dessert to both children only remedies the harm of the inequality if the injury amounts to a formal equality injury, limited to the differential treatment. As long as the stigma to the dessertless child inheres in the differential treatment itself, it is cured by the end of the differential treatment. In that case, the parent's remedial decision to deny both children dessert would not represent a move to preserve the social dominance of the dessert-eating child or to devalue the dessert-deprived child as unworthy in a way that reinforces the higher status of the first child. Nor, presumably, would the resulting denial of dessert to both children express a desire to punish the second child for asserting a right to be treated on the same terms as the first child. If we change the social context to one where status differentials and social stratification matter, however, it is not at all clear that a uniform denial of a benefit satisfies the equality right. The disparate dessert example may be analogous to the male plaintiff's challenge to the differential treatment in Social Security benefit calculations in *Mathews*—a formal equality injury—but it is a far different case from the injury

363. Simons, *supra* note 340, at 706.

364. *Id.*

365. A discussion with my colleague, Tom Ross, caused me to question whether even this seemingly trivial example of leveling down really remedied the injury from the inequality. Unless there was not enough ice cream to go around, the parent's response in withholding ice cream from both children who are, as the hypothetical assumes, equally deserving of it, seems harsh and uncaring. The expressive meaning of this response may be to punish the second child for asserting an equal claim to ice cream, or reaffirm the favored status of the first child by denying the second child the chance to share in the gift of ice cream and the affection it represents. The expressive message to the second child seems capricious at best and hostile at worst. If equal concern requires a commitment to caring and respect on equal terms, this response may well violate equality's mandate.

to status and the exclusionary meaning of the school's cancellation of the honor society in *Cazares*.

CONCLUSION

A more nuanced understanding of leveling down and its relationship to equality, an understanding grounded in the reality of leveling down as it plays out in actual cases, would further the debate over equality's value in important respects. A more critical approach to leveling down that focuses on whether its expressive meaning comports with equal concern would support an understanding of equality that is less formalistic, more situational, and more sensitive to status and social relations. It would shape equality as a worthy and valuable legal construct, not one that permits absurd results—like the pool closure in *Palmer*—which we know, at a gut level, to be wrong. Equality should not leave everyone worse off, particularly the very persons whom the law aspires to make whole. To a modest degree, such a rehabilitation of equality law would help make equality rights worth fighting for. Although equality law is frequently unsuccessful in performing its aspirational work, and woefully inadequate as a litigation tool in challenging entrenched discrimination, these shortcomings stem from the diluted version of equality embodied in much of current antidiscrimination doctrine, and not in any inherent limitation in an equality principle *per se*.

A legal system's commitment to remedying inequality says a great deal about the kind of equality to which that system subscribes.³⁶⁶ The uncritical acceptance of leveling down as a remedy to inequality reinforces a particular version of equality that does less than it should for those in need, and makes the assertion of equality rights unpopular and unappealing. Nothing in American law, or in the nature of equality rights generally, requires such an approach.

This Article has sought to shed greater light on leveling down's potential to thwart discrimination claims and preserve entrenched inequalities, in the hope that a greater understanding of the

366. See generally Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (discussing the importance of "commitment" to law, and how that commitment itself creates legal meaning).

problem will spur new efforts to secure a more meaningful equality that does not punish those who seek it. The problem of leveling down calls for greater reflection on the meaning of equality as it is guaranteed in law, and a greater appreciation of the nonmaterial injuries of inequality. An understanding of equality that transcends a limited right to equal treatment, and protects against the expressive and relational injuries of inequality, would grant much less room for leveling down than the conventional understanding has allowed.