LAW IN AN ELEVATOR: WHEN LEVELING DOWN REMEDIES LET EQUALITY OFF IN THE BASEMENT

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> *I have promised my children that if I permit either one of them to have dessert, I will permit the other to have dessert, too. . . .*
>
> . . . .
>
> *. . . Here, equality plays a . . . fundamental role. The very point of the principle is to achieve equality. Unequal distribution of benefits necessarily violates the principle, while equal distribution does not. But equal distribution satisfying the equality principle can consist either of equally conferring or equally denying the benefits. It is consistent [with regard to equality] for me to give dessert to both children, or to neither.*
>
> – Kenneth W. Simons[1]

"A little later, from among a group of friends, she heard his rich, vibrant voice saying: '[A]nd, therefore, the noblest conception on earth is that of men's absolute equality.'"

– Ayn Rand[2]

I. INTRODUCTION

When fifteen-year-old Elisa Cazares was not nominated for membership to her high school's chapter of the National Honor Society, she and her teachers were surprised.[3] As the "brightest student" her math

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1. Kenneth W. Simons, *The Logic of Egalitarian Norms*, 80 B.U. L. REV. 693, 706, 708 (2000).
2. AYN RAND, THE FOUNTAINHEAD 265 (Signet 1952) (1943).
3. *See* Nat Hentoff, Editorial, *The Moral Education of a Native American*, WASH. POST, Sept.

teacher had "seen come through" Tohono O'Odham High School, Cazares was one of four members of the student government, had been on the honor roll for every report period, and was active in a number of student activities.[4] Arguing that the selection committee declined to nominate her because she was pregnant, unwed, and not living with the father of her future child, Cazares claimed that her equal protection rights had been violated and brought suit in federal district court.[5] In holding that Cazares's exclusion constituted a violation of her equal protection rights, the district court mandated that "no student . . . [could] be inducted into the National Honor Society unless and until Elisa Cazares [was] among them."[6] To achieve compliance with the district court's instructions, Tohono O'Odham canceled the induction ceremony, remedying the violation by denying both Cazares and the students the selection committee had already nominated access to the Society.[7]

The district court had intended not that the school would remove the National Honor Society, but that the school would include Cazares:[8]

> The district court assumed that the school administration would hold the ceremony and include Cazares because it did not want to harm the other students who were to be inducted. In their earlier filings with the court, school officials had stated their desire to hold the ceremony without delay to benefit the selected students and to get off to a good start with the National Honor Society in its first year of affiliation.[9]

On appeal, however, the only issue in dispute was whether the district court's decision to award attorney's fees to the plaintiff based on a finding

22, 1990, at A25. The story of Cazares is also featured in the introduction to Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 517 (2004).

4. Hentoff, *supra* note 3.

5. *Id. See* Brake, *supra* note 3, at 517 (discussing Cazares v. Barber, 959 F.2d 753, 755 (9th Cir. 1992)). Although no provision of the Constitution says that the federal government cannot deny equal protection of the laws, equal protection applies to the federal government through the due process clause of the Fifth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954). "It is now well settled that the requirements of equal protection are the same whether the challenge is to the federal government under the Fifth Amendment or to state and local actions under the Fourteenth Amendment." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 643 (2d ed. 2002). Since Tohono O'Odham was operated by the Federal Bureau of Indian Affairs of the Department of the Interior, Cazares brought a lawsuit under the Fifth Amendment. Hentoff, *supra* note 3.

6. Hentoff, *supra* note 3, at A25.

7. *See Cazares*, 959 F.2d at 755.

8. *See id.*

9. *Id.*

of bad faith was clearly erroneous.[10] The school's choice to remedy the violation by denying the privilege of access to the National Honor Society was not directly at issue; in fact, in criticizing the majority's decision to affirm the award, which the dissent apparently perceived as an ill-suited attempt at discipline for what was actually a constitutional course of action, the dissent pointed out that "[i]t doesn't matter, of course, why a party chooses one of two permissible ways of complying with a district court's order."[11] The disapproval of the district court, the Ninth Circuit's affirmation of that disapproval, and the conspicuously absent analysis of why attorney's fees were the harshest disciplinary measure available to the courts with respect to that disapproval illuminates an important tension in equality law. The antidiscrimination principle that gives force to "equality" laws such as the Equal Protection Clause can seemingly be honored by a removal of inequality. The question is whether the discrimination can be eliminated by removing the benefit from all (leveling down) or whether it can only be eliminated by extending the benefit to all (leveling up). Both remedies result in formal equality. The uncontested lawfulness of leveling down in antidiscrimination cases, and the paradoxical disapproval of that same leveling down, can be further illuminated by invoking the seminal objection to egalitarianism: the Leveling Down Objection.

The Leveling Down Objection assumes that a general commitment to equality's intrinsic goodness entails a commitment to the intrinsic goodness of *all* equality.[12] The Objection points out that a commitment to equality's intrinsic goodness entails a position so universally unsavory that it renders such a commitment untenable and incoherent.[13] In turn, it follows from such a commitment that an equal distribution of any amount is preferable to an unequal distribution of any amount. Even when the choice is between a situation in which everyone has equal amounts of nothing and a situation in which everyone has unequal amounts of overabundance, a commitment to formal equality ostensibly necessitates a finding that the former circumstance is superior. The intuition, thus, that equality is intrinsically good entails a commitment to a potentially unacceptable result.[14]

10. *Id.* at 754.

11. *Id.* at 756–57 (Kozinski, J., dissenting).

12. *See* Derek Parfit, *Equality or Priority?* (1995), *reprinted in* THE IDEAL OF EQUALITY 98 (Matthew Clayton & Andrew Williams eds., 2002).

13. *See* THOMAS CHRISTIANO, THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS (2008); Parfit, *supra* note 12, at 98–99; Larry Temkin, *Equality, Priority and the Levelling Down Objection* (1998), *reprinted in* THE IDEAL OF EQUALITY 131–32 (Matthew Clayton & Andrew Williams eds., 2002).

14. Parfit, *supra* note 12, at 98.

Just as a commitment to equality might compel a preference for an outcome declared unsatisfactory by unanimous vote, such a commitment does not allow for a preference for equal distributions of higher amounts over equal distributions of lower amounts.[15] The Objection, when construed in this manner, has clear implications for antidiscrimination cases that are made flesh by cases like *Cazares v. Barber*.[16] When primacy is given to formal equality, that is, when formal equality is viewed as sufficient to cure discrimination, courts must treat the violation as if it were a broken promise of rainbow sherbet to be served upon sufficiently thorough consumption of supper's featured green beans, and remedy it accordingly: either by extending the benefit to the plaintiff, or by denying the benefit to everyone. Whatever underlying violation that resulted in the liability judgment of discrimination can be remedied, and the discrimination eradicated completely—and equally completely—by any remedy that equalizes distribution.

Cases like *Cazares* stand in contrast with another cadre of cases which implicitly reject the coextensivity of discrimination removal and leveling down to formal equality. These cases instead adopt a remedial principle that rejects formal equality generally in favor of one that emphasizes removal of discrimination. Given that the precedent supports both forms of remedial action, and that the decision whether a remedy passes constitutional muster is left to the discretion of the courts,[17] courts are in the powerful position to determine in a given case which remedy best honors the antidiscrimination principle embodied in equality laws. Intuitively, where an instance of discrimination resulting in a liability judgment is more like the denial of a favorite dessert to a child, it likely will be effectively cured by leveling down. Where, in contrast, the instance of discrimination consists in an injury to status or connotes an exclusionary or discriminatory meaning, leveling down may be insufficient to cure the violation. Cases like *Cazares* reveal the difficulty courts face in intuitively recognizing that a violator's subsequent actions are unfair and in reconciling that with a perceived limitation on their powers.

This Note argues that an overview of remedies accepted as sufficient to cure violations of antidiscrimination principles reflects the absence of

15. *See id.* at 84.

16. *Cazares*, 959 F.2d 753.

17. Discussion of when a court goes outside the bounds of its discretion in fashioning a remedy in the first place is for the most part beyond the scope of this Note. For discussion and reference to further reading on this topic, see Evan H. Caminker, *A Norm-based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1190 n.17 (1986).

comprehensive guidelines enabling courts to determine when such violations can be cured by leveling down and when they should be cured by leveling up, and that a lack of these guidelines reflects a deeper confusion about what role equality should play in the removal of discrimination. The provision of such directives would encourage courts to level up more often and under befitting circumstances, but would recognize that neither leveling up nor leveling down is coextensive with removal of discrimination and, accordingly, would allow for leveling down when formal equality can sufficiently cure the discrimination.

Pursuant to procuring these advisories, Part II of this Note introduces the Leveling Down Objection to illustrate the tension generated by a remedial principle that emphasizes removal of discrimination by restoring formal equality without assessing other aspects of the discrimination. Part III invokes Deborah L. Brake's analysis of leveling down, providing an overview of several antidiscrimination cases and instances that best illustrate the tension, and continues to explain the general preference and authorization for, and complexity of, leveling up.[18] Part IV draws on two approaches to leveling down, one in the field of egalitarianism and the other in legal scholarship, and examines the consequences of each of these should they be employed by the courts as guides in crafting remedies for violations of antidiscrimination principles. Finally, Part V weaves together insights emergent in the approaches discussed in Part IV and incorporates these insights into a test that will provide courts faced with instances of discrimination resulting in liability judgments with guidance in determining what role equality of distribution should play in the removal of that

18. This Note will not delve into the particularities of specific laws, such as the Equal Protection Clause or various congressional acts that seek to eliminate discrimination; nor will it endorse, to the exclusion of others, one of the many models offered by commentators attempting to define, for example, equal protection. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 669 n.10 (3d ed. 2006). Rather, it generalizes, categorizing these laws and some instances of discrimination/inequality removal that have not been codified or brought to court as "antidiscrimination principles" or "equality laws" for the purposes of illustration. Broadly, what I mean when I say "equality laws" or "antidiscrimination principles" are those laws that seek to remove discrimination against individuals belonging to certain specified categories. Moreover, although this Note generalizes the laws it discusses as embodying an antidiscrimination principle based on the enactment of the Fourteenth Amendment as a response to widespread discrimination against former slaves, *see, e.g.*, *id.* at 13, 668, it acknowledges the original basis of many of our earliest laws, such as the Declaration of Independence, as reflecting longstanding notions of equality of personhood promoted by John Locke. *See* Natural Rights, in U.S. History Encyclopedia, http://www.answers.com/topic/natural-right (last visited Aug. 12, 2008). Thus, a further debate is what these laws originally were intended to protect and whether it is equality or antidiscrimination that should be the guiding principle. In light of emphasis on discrimination removal by courts, I will address the narrow issue of what role equality should play in the removal of that discrimination.

discrimination.

II. THE LEVELING DOWN OBJECTION ILLUSTRATES THE POTENTIAL RAMIFICATIONS OF A COMMITMENT TO EQUALITY

Cases like *Cazares* evoke a paradoxical unease. First, the result in *Cazares* seems counterintuitive, given that the court allowed the school district to remedy an equal protection violation in a way that not only did not improve the situation of the winner of the suit, but also resulted in an injury to those innocent beneficiaries of National Honor Society membership perks who were not parties to the suit. As uncomfortable as the court seemed to be with this outcome, however, it evidently found the alternate possibility—requiring that the school induct Cazares—even more disquieting. Thus, even as the court acknowledged that arriving at formal equality by leveling down would be inferior in some sense to achieving that same equality by leveling up, it apparently did not see this intuition as sufficient to authorize leveling up as the only remedy that would honor the antidiscrimination principle that the school violated.

A. EGALITARIANISM AND THE LEVELING DOWN OBJECTION

The doctrine of egalitarianism can be invoked to explain what animates the perplexing way in which courts simultaneously express disapproval of leveling down and yet continue to allow it, treating it as a vaguely regrettable, yet inevitable, element of antidiscrimination jurisprudence.[19] According to egalitarianism, inequality is *in itself bad*.[20] "It is in itself bad if some people are worse off than others."[21] "It is bad, for example, that some people are sighted and others are blind."[22] On its face, this intuition seems rather uncontroversial, and with the added notion that inequalities animated by invidious discrimination are somehow worse, it is this intuition that motivated the development of antidiscrimination laws. The general purpose of these laws is to prevent discrimination by eliminating at least those inequalities that exist among equally deserving

19. Egalitarianism takes many forms. For our purposes, it is sufficient to say that egalitarians believe in equality (political, before the law, in terms of rights) and that an egalitarian may be teleological—believing that inequality is bad, and thus, that we should aim for equality in order to make the outcome better—or deontic, believing that we should aim for equality not to make the outcome better, but for some other moral reason (such as that people have rights to equal shares). *See* Parfit, *supra* note 12, at 84.

20. *Id.*

21. *Id.*

22. *Id.* at 97.

individuals occupying specific classes.[23]

The Leveling Down Objection draws out the potential negative consequences of a commitment to egalitarianism. First, to accept that it is in itself bad if some people are worse off than others—a proposition one scholar calls the Principle of Equality[24]—is not to have committed oneself to any particular method of inequality removal. For example, "[s]uppose . . . that the people in some community could all be either (1) equally well off, or (2) equally badly off. The Principle of Equality does not tell us that (2) would be worse."[25] This is because the Principle is about the badness of inequality; it says nothing about the badness of certain equalities in relation to certain other equalities. As it is intuitively loathsome to think all equalities (equal distributions of nothing that result in everyone starving or equal distributions of overabundance that result in everyone being well-fed) are equally appealing, there must be something other than equality that we value. Thus, our reasons for thinking that everyone being warmed is better than everyone freezing cannot be egalitarian.

The Leveling Down Objection intensifies the warning about what a commitment to the intrinsic goodness of equality entails by pointing out that not only does such a commitment say nothing about what types of equality we should prefer, but also it compels us to *prefer* the kinds of outcomes none of us would actually accept. In "cases where, if some inequality were removed, that would be worse for some people and better for no one,"[26] even egalitarianism's most dogmatic apostle may eye the proverbial fence upon understanding more fully the consequences of a commitment to equality:

> Suppose [in Figure 1 below] we could transform A into B. Many find it hard to believe there could be *any* reason not to do this. In B, *everybody* is better off than they were in A. In fact, B's worse-off have even better lives than A's better-off. True, there is greater inequality in B than A. But so what? Doesn't that just show we shouldn't attach weight to equality *per se*? After all, one might wonder, how *could* B's inequality be bad, *when there is no one for whom it is worse*?
>
> Or consider C and D, and imagine that D is a world where half are

23. *See supra* note 18 (referring to Chemerinsky's overview of the Fourteenth Amendment). As mentioned, this Note will not delve into the particularities of what exactly equality law or antidiscrimination law is intended to protect; it adopts general language simplifying the reasoning behind and complex circumstances surrounding the enactment of such laws.

24. *See* Parfit, *supra* note 12, at 84.

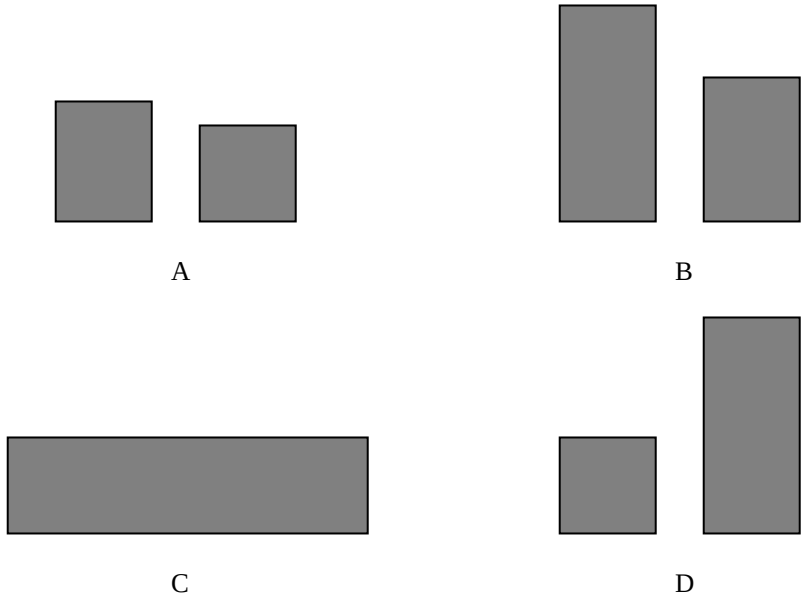
25. *Id.*

26. *Id.* at 110.

> blind, C a world where all are. One *could* always transform D into C by putting out the eyes of the sighted. However, many find the view that this would improve the situation in even one respect *more* than incomprehensible; they find it abominable.[27]

Thus, the Objection proposes that egalitarians who attach value to equality *itself* may have adopted an implausible view, a view that would support transforming B into A and D into C by leveling down the relevant groups, even though to do so would be better for no one.[28] Just as a rule that requires removing inequality does not specify how inequalities should be removed or whether any inequalities are more deserving of removal than others, there may be even worse consequences of a commitment to removing inequality: the entailed commitment that it *should* be removed, even when to remove it will make everyone worse off than if it remained.

FIGURE 1.[29]



A, B, C, and D represent worlds/states, with the height of the box representing the general distribution of X, where X represents the good to be distributed. X can be eyes, food, money, well-being, quality of life, or widgets: the important thing to understand is that in A, distribution is inegalitarian (there is unequal distribution) and in C, distribution is egalitarian. B is inegalitarian, but the person who has the least in B has more than the person who has the most in A.

27. *Id.* at 131.

28. *See* Temkin, *supra* note 13, at 131.

29. *Id.* The remainder of this Note contains original figures modeled after Temkin's figures for the purpose of consistency.

Thus, although intuitively, "[g]reater equality is only desirable when it *benefits* the worse-off, not when it results from levelling [sic] down the better-off,"[30] the Objection suggests that the egalitarian is committed to removing inequality even when it harms both the better- and the worse-off. Since only the most "hardened misanthrope"[31] would accept such a state of affairs as superior with regard to anything, much less equality, the Objection concludes that "equality is only extrinsically valuable, not intrinsically valuable . . . [and thus] egalitarianism should be rejected."[32]

Another version of the Objection describes how, just as there seems to be no respect in which a situation is normatively improved merely by leveling down a better-off person to the level of someone worse-off, there seems to be no way a situation can be worsened by improving it for someone:[33]

> [T]he Raising Up Objection claims that there is *no* respect in which a situation is normatively worsened *merely* by improving some people's lives, even if those people are already better off than everyone else. But, it is claimed, since levelling [sic] down may undeniably decrease inequality, and raising up may undeniably increase inequality, this shows that there is *nothing* valuable about equality *itself*, and hence that substantive non-instrumental egalitarianism must be rejected.[34]

The above examples reveal three general problems that accompany the belief that inequality is always bad: First, there is no way to tell whether inequality should be removed by leveling up or leveling down because it only matters that the inequality is removed. Second, such a commitment might compel the removal of inequality to the detriment of everyone. And third, such a commitment might not allow for the extension of further benefit to some groups even when such extension would benefit those groups.

Even worse,

> [i]f inequality is bad, its disappearance must be in one way a change for the better, *however this change occurs*. Suppose that those who are better off suffer some misfortune, so that they become as badly off as everyone else. Since these events would remove the inequality, they must be in one way welcome . . . even though they would be worse for some people,

30. *Id.* at 132.
31. *Id.* at 131.
32. *Id.* at 132.
33. *See* Parfit, *supra* note 12, at 112–13.
34. Larry Temkin, *Illuminating Egalitarianism*, *in* CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY (Thomas Christiano & John Christman eds., forthcoming 2009) (manuscript at 27), *available at* http://weblaw.usc.edu/academics/assets/docs/temkin.pdf.

and better for no one.[35]

Thus, from the perspective of strict equality, not only is it *better* to remove inequality at all costs, but it also is in at least one way *good* when leveling down happens.

B. THE FORCE OF THE LEVELING DOWN OBJECTION CONSISTS IN A COMMITMENT TO "THE SLOGAN"

It is easy to see in light of the foregoing considerations how their "tremendous force"[36] underlies the thinking of many of those who decline to accept egalitarianism and has facilitated much discourse between egalitarians and their rivals about how to reconcile a commitment to equality with the Leveling Down Objection. In the course of one such attempt, Temkin proposes that a presupposition, which he calls The Slogan, underlies our aversion to leveling down.[37]

"*The Slogan:* One situation *cannot* be worse (or better) than another if there is *no one* for whom it *is* worse (or better)."[38]

The Slogan "expresses the view that outcomes should be assessed solely in terms of the way sentient beings in those outcomes are *affected* for better or worse."[39] Thus, the reason the Objection is so compelling is that it points out that, in order to accept egalitarianism, we must commit to the removal of inequalities when their removal results in the outcomes of sentient beings being affected for the worse. Because we all accept that outcomes should be assessed in the terms of the effect such outcomes have on us, we cannot accept a principle that would require us to prefer an outcome without those characteristics. To do so is absurd; thus, egalitarianism must be false.[40]

35. Parfit, *supra* note 12, at 98.

36. Temkin, *supra* note 13, at 132.

37. *Id.*

38. *Id.* An alternative version of The Slogan is presented by Parfit, who refers to it as the "Person-Affecting Claim," and describes it as stating "if an outcome is worse for no one, it cannot be in any way worse." Parfit, *supra* note 12, at 114.

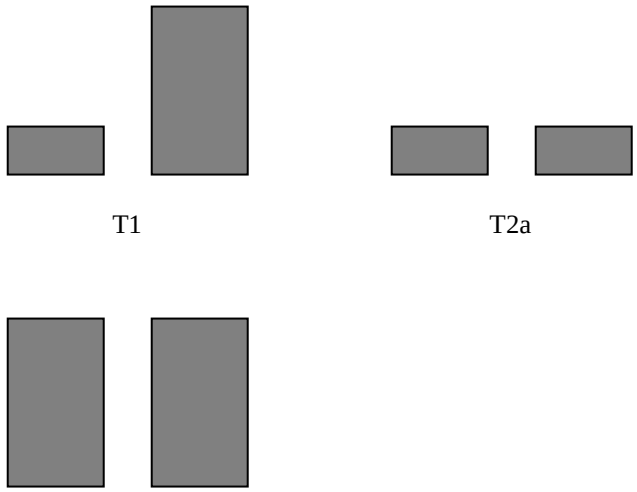
39. Temkin, *supra* note 13, at 132.

40. Temkin's thesis is actually that The Slogan is false, and most of his work consists of attempting to defeat The Slogan in order to defend egalitarianism. *See id.* at 137–46. For our purposes, it is not important to understand his arguments against The Slogan but to understand how the Objection is illuminated by The Slogan and to see how some commitment to The Slogan entails that one must answer to the Leveling Down Objection.

C. *CAZARES* REEXAMINED

Applying principles that derive from the Leveling Down Objection and The Slogan to a case like *Cazares* is helpful in understanding the challenges the court faced in attempting to determine what was required to eliminate the discrimination in that case. Consider Figure 2:

FIGURE 2.[41]



T1, T2a, and T2b each represent potential circumstances regarding Cazares's nomination to the Society. The first block in each pair represents Cazares, and the second block represents the other students.

At T1, presuit, Cazares was denied nomination, whereas all the students who had been nominated enjoyed the benefit of the nomination. Postsuit, at T2, victorious Cazares could have ended up at T2b, in which case none of the other students would have suffered any loss and she would have experienced gain. This outcome is, understandably, uncontroversial from any perspective in the sense of happiness of the parties involved. It is ostensibly better because her nomination would be better for Cazares, and worse for nobody. T2a, however, the actual outcome, illustrates what animates the very crux of the Objection. Analogous in form to the mass blinding of the sighted,[42] this outcome presents a circumstance which is

41. These original figures are modeled after Temkin's. They also represent distribution, but this time, it is the distribution of benefits received through nomination to the National Honor Society (whether it be lack of stigma, material benefit, etc., is of little importance at this point) that is at issue.

42. The dramatic nature of this example should not alarm. Of course, the National Honor Society as a benefit is not of the same sort or scope of the benefit of having eyesight. The substance of the example is only important insofar as it illustrates the form of the example. Thus, even though removing

better for nobody and, in fact, is worse for some (those students who had been nominated and then subsequently denied access to a benefit they already had). That is, it is a perverse notion of victory that encompasses a circumstance under which the victor receives no benefit whatsoever and under which, in fact, benefits to parties unrelated to the suit are denied.

Thus, it appears that in the realm of remedies for violations of antidiscrimination laws, courts acknowledge that something akin to the Objection helps to explain why formal equality is an incoherent principle to use when fashioning an appropriate remedy; at the same time, that acknowledgement does not reduce the vigor with which the courts defend the commitment to formal equality as one appropriate way in which discriminations can be eliminated. The result of this paradoxical posture is that outcomes like *Cazares*, unsatisfactory even to the courts, are viewed as lamentable yet unpreventable consequences of an antidiscrimination framework. Since the decision whether to level up or level down accompanies most violations of antidiscrimination law, and it is the courts that must determine whether a remedy proposed by a violator passes constitutional muster, it is of particular importance how courts come to such decisions and what principles they invoke in so doing. Brake's analysis of leveling down's treatment, parts of which are presented in the section to follow, further illuminates the way in which courts seek to reconcile the removal of discrimination with the removal of inequality and places the resulting paradox in the context of cases in which leveling down has received inconsistent treatment.

III. LEVELING IN THE COURTS

A. THE GENERAL ACCEPTABILITY AND PARADOXICAL DISFAVOR OF LEVELING DOWN

The most cursory glance at the jurisprudence reveals that cases like *Cazares*, where the violation was cured by leveling down, are the rule, not the exception, in instances of discrimination that result in liability judgments.[43] *Cazares* exemplifies the time-honored tradition of leveling down as a constitutional remedy for equal protection violations that was

the National Honor Society from a deserving student obviously will not infringe upon the rights of that student in the same way a removal of that sighted student's eyes will, the point is that the reasoning behind the removal of the National Honor Society—commitment to formal equality and the "badness" of inequality—seems to be the same reasoning that could, in dire circumstances, lead to mass blinding.

43. *See* Brake, *supra* note 3, at 525 (explaining how early discrimination cases "set the tone for future cases by viewing differential treatment as the touchstone of discrimination").

articulated in *Heckler v. Mathews*, which provided explicit authorization of leveling down in response to an injury caused by a constitutionally underinclusive scheme.[44] Brake analyzes *Mathews* as an example of a case in which leveling up is allowed, yet paradoxically scorned. In *Mathews*, the appellant husband retired from the Postal Service shortly after his wife, who was fully insured for Social Security retirement, retired and applied for husband's benefits on his wife's account.[45] When informed that his benefit would be offset by the amount of his Postal Service pension because he had not been dependent on his wife for support in accordance with a federal statute, the family sought to prove that the pension offset violated Equal Protection on the grounds that it offset pensions of husbands but not wives.[46]

Brake notes that in overturning the district court's finding that the law was unconstitutional, the Court held that the gender-based classification was justified, and stated 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."[47] The Court continued—its reasoning reminiscent of that found in the concurring opinion of *Welsh v. United States*[48]—that courts sustaining claims of constitutional underinclusiveness face "two remedial alternatives."[49] Justice Harlan's *Welsh* concurrence explained that courts can either declare the statute a nullity, ordering that its benefits not extend to the class that the legislature intended to benefit, or extend the coverage of the statute to the excluded class.[50] Extending its analysis to all types of equality-law violations, the concurrence noted explicitly that "when 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*

44. Heckler v. Mathews, 465 U.S. 728, 740 (1984) (Harlan, J., concurring).

45. *Id.* at 734–35.

46. *Id.* at 735.

47. *Id.* at 738.

48. Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring).

49. *Mathews*, 465 U.S. at 738 (citing *Welsh*, 398 U.S. at 361).

50. *Welsh*, 398 U.S. at 361. *Welsh* also compared an earlier case, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), in which Justice Douglas,

> in an opinion holding infirm under the Equal Protection Clause a state statute that required sterilization of habitual thieves who perpetrated larcenies but not those who engaged in embezzlement, noted the alternative courses of extending the statute to cover the excluded class or not applying it to the wrongfully included group. The Court declined to speculate which alternative the State would prefer to adopt and simply reversed the judgment.

Welsh, 398 U.S. at 361 n.14 (construing *Skinner*, 316 U.S. at 541).

class."[51]

Brake points to earlier cases that foreshadowed the intuition articulated in *Mathews*—that is, that equal treatment is coextensive with formal equality. *Iowa Des-Moines National Bank v. Bennett*,[52] a 1931 case regarding the entitlement of banks to refunds, set forth a less explicit version of the leveling down authorization. "The right invoked is that to equal treatment," explained Justice Brandeis, and "such treatment will be attained if either [the bank's] competitors' taxes are increased or their own reduced."[53] Thus, the Supreme Court has authorized leveling down on numerous occasions as one way to remedy most inequalities resulting from instances of discrimination that result in liability judgments.

Notwithstanding that leveling down is a generally accepted remedy when an antidiscrimination principle like that embodied in the Equal Protection Clause has been violated, scholars like Brake remind us that courts have nonetheless expressed some acknowledgment of the intuition drawn out by the Leveling Down Objection. Brake points out that even in *Mathews*, the Court noted that "[a]lthough the choice between 'extension' and 'nullification' is within the 'constitutional competence of a federal district court,'"[54] in the absence of legislative guidance, ordinarily "extension, rather than nullification, is the proper course."[55] The acknowledgement that leveling up, when feasible, is the best way to remove the discrimination may have been what animated the district court's decision in *Cazares* to penalize the school district for choosing to remove the National Honor Society.[56] The district court, which had

51. *Mathews*, 465 U.S. at 740 (emphases added).

52. Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 247 (1931).

53. *Id.* The Court noted that, in this case, the petitioners were entitled to a refund of excess taxes even though compelling certain domestic corporations, who had been taxed significantly less than petitioners, to pay what petitioners were charged would have technically equalized the treatment. The Court noted that the "fact that the [S]tate may still have power to equalize the treatment of the petitioners and the competing domestic corporations by compelling the latter to pay hereafter the unpaid balance . . . is not material" even though it "may be assumed that all ground for a claim for refund would have fallen if the [S]tate, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors." *Id.* However, to achieve this form of equality, the court would essentially have had to place the burden of seeking an increase of the taxes which the others should have paid, and the Court noted that "it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot" be so required. *Id.*

54. *Mathews*, 465 U.S. at 739 n.5 (quoting Califano v. Westcott, 443 U.S. 76, 91 (1979)).

55. *Califano*, 443 U.S. at 89.

56. Other scholars have addressed the issue of leveling down in more specific contexts and concluded that the current framework is infirm. *See, e.g.*, Caminker, *supra* note 17, at 1185 (arguing that so-called "'inchoate' substantive norms" should be consulted in guiding courts who are dealing with underinclusive statutes, and that these norms "often do assert a preference between the two

expected the school district to interpret its words as requiring leveling up, may have based its finding of bad faith and the corresponding slap on the wrist that the finding allowed it to administer, on the school's "misinterpretation" of its words.[57] Brake points out that this interpretation of the reasoning behind the majority's decision to award fees is supported by the dissent's reference to a finding of bad faith: "it doesn't matter, of course, why a party chooses one of two permissible ways of complying with a district court's order."[58]

B. LEVELING DOWN AND FORMAL EQUALITY'S GENERAL TRICKINESS

Support for the notion that leveling down to formal equality is an acceptable method for discrimination removal does not lie solely in the authorization of this practice by the courts. For example, the practical consideration that the remedy process is simplified by eliminating the debate over what constitutes equal access in cases that involve leveling issues more complex than nomination to the National Honor Society often leans in favor of allowing leveling down. *United States v. Virginia* ("*VMI II*")[59] is illustrative. Whereas in *Cazares*, in which the benefit was simply a nomination to the National Honor Society, no question was raised about the feasibility or acceptability of Tohono O'Odham's creation of another, equally prestigious, National Honor Society just for students like Cazares. However, this notion of a comparable alternative was important in *VMI II*, in which the United States sued Virginia on equal protection grounds based on Virginia's refusal to admit women to its publicly funded military institute.[60]

remedies").

57. Under 28 U.S.C. § 2412(b) (2000), a court, in the absence of a prohibiting statute, may grant attorney's fees under many different circumstances, including against a party acting in bad faith. Here, the court below followed a test for interpreting this statute provided by *Rawlings v. Heckler*, which instructed the court to consider the "totality of the circumstances prelitigation and during trial," and including the underlying agency actions. *See* Rawlings v. Heckler, 725 F.2d 1192, 1195 (9th Cir. 1984). In *Cazares*, the Ninth Circuit's opinion noted the district court's remarks regarding the school district officials' "arrogant and calloused attitude . . . from the beginning" and, in particular, the court's perception of the school district officials' conduct "*after the district court issued its judgment on the merits* as a 'clear indication of their attitude' throughout." Cazares v. Barber, 959 F.2d 753, 755 (9th Cir. 1992) (emphasis added). Thus, the district court clearly viewed the postjudgment conduct—which consisted in canceling the National Honor Society program—as a perversion of its mandate. At the same time, the attorney's fees point to the district court's perceived helplessness in remedying the problem after the fact, given the accepted constitutionality of leveling down.

58. Brake, *supra* note 3, at 532 (citing *Cazares*, 959 F.2d at 756–57 (Kozinski, J., dissenting)).

59. United States v. Virginia (*VMI II*), 518 U.S. 515 (1996).

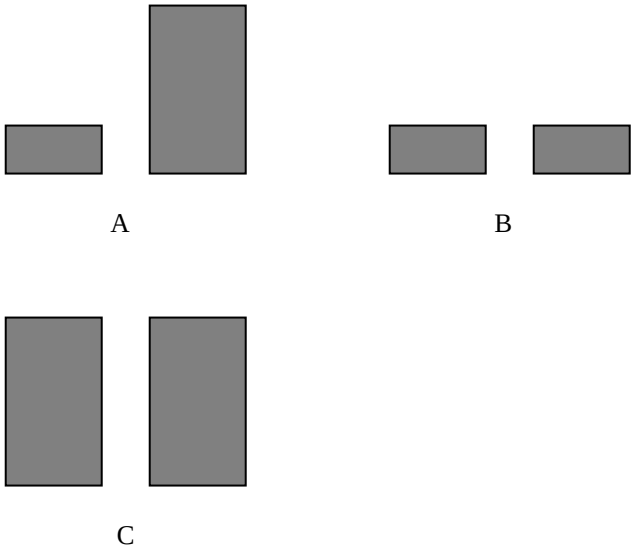
60. *Id.* at 515.

Prevailing in the court below,[61] Virginia's triumph was short-lived because the Supreme Court found that it failed to carry its burden to eliminate the discrimination either by admitting women or creating a program that reflected equal educational opportunities.[62] Although Virginia's proposal to provide a women's institution comparable to the Virginia Military Institute ("VMI") was ultimately rejected because it was "distinctly inferior to [VMI]"[63] given that it failed to show "substantial equality in the separate educational opportunities [Virginia] supports at [VMI] and [the proposed school],"[64] the Court's analysis of the proposal focused on the level of education available to the students of each gender as compared to the level of education available to students of the other gender.[65] In order for the creation of an all-female VMI to cure the violation, that institution would have to offer exactly the same level of education as the men's institution.[66] Moreover, Virginia emphasized that allowing women to enroll would change certain policies that were essential to VMI's educational value. Thus, Virginia argued, leveling up in one sense would actually result in the benefit of VMI being denied to all its enrollees.[67] From Virginia's perspective, therefore, the only true leveling-up option was to create an all-female VMI, a task Virginia perceived as daunting and that it, in fact, failed to complete.

The traditional leveling-down option was also open to Virginia in the form of privatizing VMI and thereby denying all potential applicants the benefits of a publicly funded education at a military academy. Virginia took this possibility seriously to the extent that it "conducted a study of the feasibility of discontinuing its status as a public institution"[68] that would result in an elimination of the benefit of VMI to the men who attended and no change in the status of female prospective enrollees. If the discontinuation of VMI's status as a public institution had been feasible, and the level of education thus zero for both groups, the constitutional infirmity would have been cured and the comparable alternative analysis avoided completely. *VMI II* and the options Virginia examined in considering how best to remedy the violation create the interesting leveling circumstance illustrated below:

61. United States v. Virginia (*VMI I*), 976 F.2d 890, 900 (1992).
62. *VMI II*, 518 U.S. at 556.
63. *Id.* at 566 (Rehnquist, C.J., concurring).
64. *Id.* at 554.
65. *See id.*
66. *Id.*
67. *See id.* at 516.
68. Brake, *supra* note 3, at 520.

FIGURE 3.



A, B, and C represent potential ways to view VMI's status with regard to leveling. The first block in each represents the female applicants, and the second block represents the men who had already been admitted.

A in Figure 3 represents VMI as it was prechallenge, with the women currently lacking the benefit of a publicly funded military education (or the opportunity to apply for such an education) represented at left, and the men currently enrolled (or having the opportunity to so enroll) represented at right.

Classifying B and C is less straightforward, and illustrates the challenges Virginia faced when attempting to remedy the violation. If Virginia privatized, the benefit as currently available would be denied to everyone.[69] But if VMI opened its doors to women, would it become B or C? In contrast with *Cazares*, in which case the district did not want to include Cazares because of its conceptions of honor but did not claim that her inclusion would effectively erode the benefit currently available via admission in the National Honor Society, Virginia argued that allowing women to enroll would actually destroy the benefit of the unique education available at the school. That is, Virginia's position was that allowing women to apply to VMI would result in B: the leveling down of the benefit

69. Of course, those who were eligible would still enjoy the benefit of an all-male military education if VMI privatized. Similarly, in *Cazares*, the students at Tohono O'Odham who had their nominations revoked may have had the option of going to a different school where the National Honor Society was still available. These considerations do not change the force of the present analysis, where the focus is on access to the benefit *as then existing*.

to both male and female enrollees. This is because the very *essence* of VMI, and its goal and ability to produce "'citizen-soldiers' through 'an adversative, or doubting, model of education' which features '[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, [and] minute regulation of behavior,'" would be destroyed if women were admitted.[70]

Although the Supreme Court did not accept Virginia's position that certain necessary allowances that would have to be made if it admitted women would result in a fundamental alteration of the curriculum so ruinous as to constitute sufficient justification for continuing to exclude women, the district court's agreement with the argument reveals that Virginia's position was not frivolous.[71]

Determining what *is* leveling down, *VMI II* illustrates, can be more complex than *Cazares* would have it appear.[72] Thus, when a court requires formal equality, however accomplished, as a remedy, leveling down sometimes is the simple choice, especially when one type of leveling up might actually be leveling down insofar as it would result in the "essence" of the benefit being denied to all.

The authorization of leveling down combined with practical considerations that come to light in cases like *VMI II* intimate that outcomes like in *Cazares*, although counterintuitive, may nonetheless fall within a well-established remedial scheme that should not be upset simply because of a few hurt feelings. However, the Supreme Court's occasional rejection of formal equality as sufficient to satisfy equal protection, as well as the justification one lower court set forth for requiring a school district to induct a student after she met the burden for a preliminary injunction, point to the reality that courts use equality in different ways to cure discrimination. Therefore, leveling down may not always satisfy the antidiscrimination principle being enforced.

First, Brake points to cases like *Shelley v. Kramer*,[73] *Palmore v. Sidoti*,[74] *Loving v. Virginia*,[75] and more recently, *Romer v. Evans*[76] as those

70. *VMI II*, 518 U.S. at 522.

71. *Id.* at 524.

72. Note, however, that the defendant school district in *Cazares* could have argued along similar lines as did VMI. That is, they might have claimed that including an unwed, pregnant plaintiff in their definition of honor would pervert the definition of honor as understood by the National Honor Society to the extent that no students could benefit from participating in the Society.

73. Shelley v. Kramer, 334 U.S. 1 (1948).

74. Palmore v. Sidoti, 466 U.S. 429 (1984).

75. Loving v. Virginia, 388 U.S. 1 (1967).

in which states urged the Court to buy the argument that, since there was formally equal treatment, equal protection was satisfied:

> In *Shelley*, the state claimed to treat all persons the same in enforcing private racially restrictive covenants. 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. In *Loving*, the state claimed that it treated African American and white citizens alike in forbidding their intermarriage. . . . In *Romer*, Colorado prohibited any person, straight or gay, from obtaining protection from sexual orientation discrimination through the normal political process.[77]

In discussing the cases, Brake's point is to defend her use of a norm of equal concern, but the larger point is that whatever principle upon which the Court relied, it was "more than mere formal equality: it required the state to avoid otherwise neutral actions that gave added effect to private prejudice."[78] Here, the challenged status quo *was* formal equality in that, for example, the statute in question burdened both whites and minorities, [79] yet the elimination of discrimination required abandonment of the currently existing practice in favor of a remedial scheme. The Court rejected appeals to formal equality as justifications for the statutes, noting that equality as it is embodied by the antidiscrimination principle of the Equal Protection Clause does not just involve the formal distribution of benefits and burdens, but something deeper.[80] The heightened standard of review associated with invidious race discrimination reflects the notion that there is something special about this type of discrimination by making the first step to an equal protection victory—finding a violation—much smaller for plaintiffs claiming classifications made on the basis of race.[81]

76. Romer v. Evans, 517 U.S. 620 (1996).

77. Brake, *supra* note 3, at 568–69 (internal footnotes omitted).

78. *Id.* at 569.

79. *See, e.g.*, *Loving*, 388 U.S. at 1 (declaring unconstitutional a statute making it a crime for Caucasians to marry outside their race).

80. *See id*. at 8, 12. The Court rejected "the notion that the mere 'equal application' of a statute concerning racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discrimination." *Id.* at 8. "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 12.

81. Erwin Chemerinsky explains that, "[d]iscrimination based on race or national origin is subjected to strict scrutiny," meaning that the government,

> must have a truly significant reason for discriminating, and it must show that it cannot achieve its objective through any less discriminatory alternative. The government has the burden of proof under strict scrutiny, and the law will be upheld only if the government persuades the court that it is necessary to achieve a compelling purpose. *Strict scrutiny is virtually always fatal to the challenged law*.

Chipman v. Grant County School District[82] provides an example of a case with facts very similar to those in *Cazares* and further illuminates the loss plaintiffs like Cazares suffered. In *Chipman*, two teen mothers were ordered into the National Honor Society after a Kentucky federal district court found that the students had a high "probability of successfully proving [sex] discrimination" based on the record.[83] Judge Bertelsman, in granting a preliminary injunction, determined that the denial of the motion would cause irreparable injury to the girls, acknowledging that "this is the only time in these girls' lives that they will be seniors in high school with the opportunity to participate in NHS activities. . . . [T]he plaintiffs will be unable to list NHS membership on their college admission . . . and . . . financial aid applications."[84] The school district likely could have taken the *Cazares* strategy and cancelled the whole program, making the cases virtually indistinguishable,[85] except for Bertelsman's emphasis on the harm suffered by the plaintiffs, not by the inequality but by what they would lose. *Chipman* and *Cazares* stand in dramatic contrast to one another in that all plaintiffs, on virtually identical facts, technically triumphed. Yet, what that triumph meant for Cazares, contrasted with what it meant for the plaintiffs in *Chipman*, serves as an ultimate reminder of the complications that arise when a remedial principle insufficiently captures, or fails to specify, what it intends to protect. Combined with the difficulty revealed in attempts like that made by Virginia to articulate what leveling up really entails even if it is identified as a superior remedy, it is easy to see how courts might grapple with the decision whether to require leveling up or allow leveling down because of their uncertainty or disagreement about

Chemerinsky, *supra* note 5, at 645 (internal footnotes omitted) (emphasis added). In contrast,

> [r]ational basis review is the minimum level of scrutiny that all laws challenged under equal protection must meet. All laws not subjected to strict or intermediate scrutiny are evaluated under the rational basis test. Under rational basis review a law will be upheld if it is rationally related to a legitimate government purpose. The government's objective need not be compelling or important, but just something that the government legitimately may do. The means chosen only need be a rational way to accomplish the end.
>
> The challenger has the burden of proof under rational basis review. The rational basis test is enormously deferential to the government, and only rarely have laws been declared unconstitutional for failing to meet this level of review.

Id. at 645–46 (internal footnote omitted). Strict scrutiny, which is virtually insurmountable, enables a quick finding of a violation upon a showing of the existence of a classification on the basis of race, whereas the intermediate scrutiny test and the rational basis test are much more easily passed. *Id.* at 645.

82. Chipman v. Grant County Sch. Dist., 30 F. Supp. 2d 975 (E.D. Ky. 1998). The *Chipman* court analyzed only the Title IX issue for the purposes of the preliminary injunction. *Id.* at 976 n.1.

83. *Id.* at 978.

84. *Id.* at 980.

85. E-mail from Deborah L. Brake, Professor of Law, University of Pittsburgh Law School, to the author (Apr. 29, 2008) (on file with author).

what specifically constitutes the discrimination and, in turn, about what remedy will best serve to eliminate that discrimination.

Brake's discussion of the action of an Oregon county commission provides further insight into the difficulty in determining what role exactly equality should play in the removal of discrimination in a given case.[86] The ACLU brought a suit arguing that the state marriage statute, which limited marriage to a man and a woman, violated the equal protection clause of the state constitution.[87] In response to the uncertainty generated by the legal challenge, the county preemptively leveled down by refusing to grant marriage licenses to all couples, gay and straight alike.[88]

A first impression may be that the county's actions were "childish" attempts to strike against opposition to its gay marriage laws.[89] The commission's decision, however, elicited responses from those intimately involved that revealed more than a clever attempt at circumvention of the system by a vigilante social avenger. As Linda Modrell, the chairwoman of the county commission that made the decision, explained, "For me, this doesn't have to do with gay marriage at all. . . . It has to do with equal treatment. It would be the same if we had a law that says we couldn't sell property to Japanese or redheaded Danish people. What would we do?"[90] Modrell's answer reflects her intuition that the antidiscrimination principle contained in the Equal Protection Clause protects formal equality, and although the social consequences of her actions clearly align politically, her decision to decline to issue licenses was justified on pure equality grounds. Similarly, rejoiced a gay couple, "We are still equal if no one else can get a license,"[91] reflecting that couple's own willingness to accept the commissioner's interpretation of the equality principle. Would they have felt the same way had they been in Cazares's position? Probably not. As Brake points out, the action was perceived as a method of subverting social hierarchies, not perpetuating them. An indignant heterosexual bride-to-be voiced her own interpretation of the decision: "[i]t's not a

86. Of course, Benton County is not a true instance in which a remedy needed to be fashioned, because there was no violation found. Rather, the county was guessing at what it would need to do in order to remedy any discrimination that might be found, and attempting to comply preemptively, drawing on pertinent concerns.

87. *See* Brake, *supra* note 3, at 521.

88. *Id.*

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

90. *Id.*

91. *Id.*

nondiscrimination policy, it's a full-discrimination policy."[92]

Ironically, it is the traditionally privileged group in this case that faced the potentially negative consequences formal equality can bring, and the traditionally deprivileged that triumphantly celebrated a requirement of formal equality, a paradox that illuminates the difficulty in identifying the crux of an antidiscrimination-principle violation. Courts who take the line of the commissioner and the gay couple may recognize leveling down as a way to achieve equality and *thereby* remove the discrimination, whereas courts that align with the bride-to-be might see leveling down as a way of deprivileging everyone to the detriment of all and, *therefore*, the discrimination will not only not be removed, but it will also be exacerbated. In light of the apparent slipperiness of the very concept of equality and leveling down, it is easy to see how guidance with regard to its treatment may be welcome in the courts.

C. LEVELING DOWN CONSIDERATIONS SPECIFIC TO LAW

Perhaps however, leveling down, and the Leveling Down Objection, are simply conceptual infusions inapposite to an appropriately nuanced discussion of antidiscrimination law. For example, leveling down may reflect our interest in honoring the separation of powers, considerations that philosophers need not entertain in their discussions of equality's moral status or lack thereof.[93] The role that respect for the separation of powers might play in the decision whether to require leveling up is illustrated by the tendency of courts, when determining the remedy for violations that involve statutes, to require leveling up only after conducting an inquiry into the legislative intent behind the statute.[94] Brake points to remarks by the Supreme Court that courts should not use their "remedial powers to circumvent the intent of the legislature"[95] and the Supreme Court's occasional reliance on its "*sub silentio* reading of legislative intent, as opposed to a clearly articulated remedial preference for leveling up," in a certain subset of cases.[96] Last, Brake points to *Califano v. Westcott*,[97] in which the court "left open the door to a possible limit on leveling down

92. *Id.*

93. The debate about equality's normative status allows scholars to retain the luxury of leaving practical considerations to policymakers. *See, e.g.*, Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (raising some of the first objections to equality as a normative principle).

94. *See* Brake, *supra* note 3, at 548–50.

95. *Id.* at 548 (quoting Califano v. Westcott, 443 U.S. 76, 94 (1979)).

96. *Id.* at 550.

97. *Califano*, 443 U.S. at 76.

remedies where 'a legislative attempt to thwart a court's ability to remedy a constitutional violation would itself violate the Constitution.'"[98]

Thus, although separation of powers concerns do arise in the realm of antidiscrimination law in a way they do not in abstract discussions of equality, the concession by courts that extension of the benefit is better than abrogation, all things considered,[99] reflects an awareness of the courts that there *is* something "better" about a circumstance under which equality is achieved at a higher level than a circumstance under which equality is achieved at a lower level. In fact, in the same sentence in which the Court emphasized the need to defer to the wishes of the legislature, *Welsh* proposed a balancing test whereby a court could "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."[100] If formal equality were the end-all of equality law in the eyes of the courts, no such cost-benefit analysis would be necessary. Moreover, the deeper concern regarding how discrimination is best to be removed does not lose its force; if Congress can choose the remedy, it, instead of the courts, will face the same difficulties in determining whether to incorporate a remedial principle in favor of leveling up into the statute. Thus, considerations of separation of powers may explain why leveling down or leveling up happens in certain cases; the underlying question of how to decide when this should happen is one that should be answered before either Congress or the courts make a move.

Considerations of federalism will, however, come into play in cases that involve challenges to statutes as well as cases that do not. Particularly given the controversy surrounding recent forays by the federal government into the public education system,[101] and given the generally accepted proposition that "states bear principal responsibility for education

98. Brake, *supra* note 3, at 548 n.127. Brake notes that the Court "declined to address this argument" because its powers were not thwarted, but "[i]ts treatment of the issue . . . left open the possibility that a legislative effort that does thwart a Court's remedial power might violate the separation of powers." *Id.*

99. *Id.* at 548.

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

101. "[K]ey federal actors and institutions have long understood that education—particularly elementary and secondary education—resides at the core of state and local, not national, responsibility." Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 131 (2006) (examining No Child Left Behind in the context of education federalism). *See also* Douglas S. Reed, *The Politics of Information: Endorsing Change: Editorial Views of No Child Left Behind*, 10 GEO. PUB. POL'Y REV. 31, 31–32 (2004) (explaining how federal plans like No Child Left Behind have particularly controversial implications for federalism given the "traditional public preference for local autonomy").

policy,"[102] the implications for federalism of a recommendation that federal courts demand that violator public schools level up are by no means trivial. Moreover, unlike public school teachers and administrators, who have been specially trained in educational policy and procedure and who have firsthand experience of the educative methods that best serve the interests of the students, the federal judiciary's expertise lies in interpreting and applying the law. Although requiring a school district to include the characteristics of a particular student in its definition of honor can be seen as ensuring compliance with an antidiscrimination principle, it can also be seen as one step away from writing a lesson plan. Especially in cases like *Cazares* and *Mayberry v. Waverly Public Schools*,[103] discussed further in Part IV, in which emotions run high and considerations of preserving the peace of the learning environment arise, perhaps it should be those best acquainted with the students and correspondingly best able to predict their reactions to a structural change in their learning environment who should decide which change will be least contributory to the inclemency of the educative climate and how that change should be made. In an abstract discussion of equality in the context of egalitarianism, this worry that leveling down may dishonor federalism is conspicuously absent.

However, although concerns of federalism are by no means inapposite to the present discussion, ensuring that the zeal with which they are honored remains uncompromised is not mutually exclusive with the establishment of a test that would enable courts to mandate leveling up in more cases. The right kind of test will recognize when leveling down is consistent with the equality principle, just as it will alert the courts to circumstances under which only leveling up is sufficient. A principle that reflected the judiciary's access to a consistently applicable test would result in the state violators being able to predict and preempt inadequate remedies. In turn, states will be less vulnerable to unexpected upsets of, for example, their educational conditions, because the rules will be much clearer. States, and educators, can thus take steps to comply with equality that will be in line with the steps the courts will take, resulting in significantly diminished incidence of the unexpected exercise of intrusive judicial power.

Not only will guidelines help unite state and federal forces in terms of their conceptions of equality and prevent unexpected intrusiveness, they may also have a chilling effect on actual incidents of intrusion. For

102. *See* Heise, *supra* note 101, at 130.

103. Mayberry v. Waverly Pub. Sch., No. L89-50091-CA, 1990 U.S. Dist. LEXIS 10249, at *9–10 (W.D. Mich. Aug. 3, 1990).

example, the court's willingness to let Virginia take its pick of remedies may have ostensibly seemed like—and, in fact, may have been intended to be—an exercise of judicial restraint. However deferential the court's intentions were, Virginia's attempts to achieve even *formal* equality in the form of an all-female VMI were ultimately thwarted by judicial intervention. Thus, confusion about what exactly would honor the equality principle resulted in fruitless and futile attempts by the state to comply with the judiciary's commands. It is difficult to see how a simple mandate for Virginia to level up by accepting women in its military institute could have been more intrusive than what actually occurred.

Last, the concerns of federalism may be less compelling in equality-law cases generally, even in cases like *Cazares* that involve spheres of law, the authority over which has been most vigilantly guarded by the states. First, state equal protection laws mirror the federal Constitution in a way that suggests that, notwithstanding how difficult it is for state and federal governments to achieve consistent application of whatever principle of antidiscrimination it is they wish to protect, they have parallel conceptions of its identity and characteristics and correspondingly parallel ambitions about how ardently it should be protected.[104] Secondly, violations of state antidiscrimination laws would not violate principles of federalism. Thus, not only do not all circumstances under which a court must fashion an equal protection violation remedy raise federalism concerns, but also those that ostensibly do perhaps should be viewed as something other than a potential battlefield ripe for a standoff between the state and federal government. Instead, such circumstances could be viewed as an opportunity to unify these branches and, in so doing, to clarify the principle of equality for both courts and potential violators of both the state and the federal realms.

A related concern that goes unaddressed by the egalitarians is whether the court's current apparent preference for leveling down to formal equality does not reflect that preference at all, but rather, a realization that requiring leveling of any kind is simply unnecessary. It could be that in the realm of equality law, the fuss over leveling down is simply unwarranted—not because leveling down is sufficient to remedy an equal protection violation, but because the political system can be trusted to achieve correct outcomes and, thus, "provide[s] sufficient protection against the harms of leveling down."[105] If this is the case, then leveling down may more often than not

104. The equal protection language in the state constitutions and the Federal Constitution is very similar. *See, e.g.*, U.S. CONST. amend. XIV, § 1; CAL. CONST. art. I, § 7.

105. *See* Brake, *supra* note 3, at 610.

cure the discrimination, and subsequent political processes will keep the negative consequences at bay. Brake frames this concern, pointing out that "[c]onventional wisdom suggests that the majority will not often choose to fix inequality by subjecting itself to more negative treatment,"[106] a view the articulation of which she attributes to Kenneth Simons:

> Equality rights are often invoked by minorities. If government responds 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, or by leveling up instead of down.[107]

As Brake explains, the notion to which Simons appeals is accredited to Justice Jackson's famous concurrence in *Railway Express Agency v. New York*.[108] The idea is that where the removal of privilege (from a minority) is remedied by a removal of the privilege *from everyone*, the privileged class (the majority) from whom the privilege is subsequently removed will invoke the political process to prevent that removal or reclaim the removed benefit. Justice Jackson's faith in this principle was unreserved:

> [T]here is *no more effective practical guaranty* against arbitrary and unreasonable government than to require that the principles 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 affected.[109]

While she finds this approach conceptually appealing, Brake contends that it is unreasonably idealistic because, although it may be applicable to material benefits,[110] it will not extend to the protection of other, nonmaterial benefits, such as status in a social hierarchy. Moreover, as Brake points out, and as is clear in cases like *Cazares*, it is not always true

106. *Id.* at 536.

107. *Id.* at 610 (quoting Simons, *supra* note 1, at 766).

108. Ry. Express Agency v. New York, 336 U.S. 106, 111–17 (1949) (Jackson, J., concurring).

109. *Id.* at 112–13 (emphasis added).

110. The idea that the privileged, via the political process, will help protect against leveling down is supported by the cases involving litigation challenging inequalities in school funding:

> In response to a New Jersey Supreme Court ruling that the state constitution requires equal funding for public schools, then-Governor Christine Whitman proposed a remedial plan to lower spending in richer districts to the level of funding for poorer districts. . . . Governor Whitman ultimately retreated from this proposal in response to pressure from irate parents . . . .

Brake, *supra* note 3, at 606 (internal footnote omitted).

that the privileged class will speak out even to preserve its material privilege when another of its more coveted privileges, such as its social status, is competing with that material privilege.[111]

Brake invokes the Benton County, Oregon case discussed above to illustrate her doubts regarding the efficacy of the political process as a check on leveling down when "leveling down operates to serve the nonmaterial interests of the majority."[112] Even when these interests are not materially served, in cases in which the privilege is deeply entrenched, leveling down that results in deprivileging may be unrealistic to the point of absurdity.[113] The response to the suspension of the marriage licenses in Benton County reflects the social reality that when a firmly entrenched practice is at issue, leveling down will not even be considered as a feasible approach. Of course, the fundamental right to marriage keeps leveling down from being feasible, but that only begs the question—part of the fundamental rights test is an inquiry into the extent that the practice in question is time-honored.[114]

Brake's analysis of the Benton County case underscores the unlikelihood that the privileged will use the political process to protect against leveling down in cases in which the privilege is one to which they are unequivocally entitled: "the leveling down decision was . . . . a *tactic* designed to challenge that status hierarchy . . . . as a temporary measure . . . ."[115] That is, the gay rights activists themselves were counting on an outcome that would not involve permanent leveling down of marriage for heterosexual couples; everyone agreed that there was no long-term chance of that. The only option would be to level up *given* the degree of entrenchment of the right enjoyed by the privileged. Although the activists lost the battle ultimately, the key point is that the political process Justice Jackson praised may be insufficient because it is an ineffective mechanism when there is *no chance* the benefit would ever be taken away from the privileged group, as when it is a fundamental right like marriage. There is no need for the privileged to employ the political process in these cases, because they are essentially immune from leveling down.

The implicit and explicit recognition by courts that leveling up is superior to leveling down, all things considered, reveals their discomfort

111. *Id.*

112. *Id.* at 537.

113. *Id.*

114. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (explaining that whether a right is fundamental depends in part on how deeply embedded it is in tradition and history).

115. Brake, *supra* note 3, at 600 (emphasis added).

with outcomes that are better for no one.[116] However, given the tradition and the authorization of leveling down as a generally appropriate method of discrimination removal, and the special concerns that arise in the equality law context that do not in the armchair philosopher's, whatever medium by which the courts accomplish this goal must be employable on a case-by-case basis and sensitive to the omnipresent considerations of federalism and the separation of powers. Most importantly, it must acknowledge the antidiscrimination principle as broader and more complex and mandate that removals of discrimination must accord with formal equality. The following part, drawing on both egalitarianism and legal scholarship, introduces two principles that may vie for candidacy as guides in the discrimination-removal process.

IV. THE RIGHT ROLE FOR EQUALITY I: EXPLORATION

A. APPLYING AN EGALITARIAN APPROACH

1. "An Argument for Equality Without Leveling Down"[117]

"[T]he leveling down problem," thus, "casts doubt on whether conventional equality jurisprudence serves the interests of those whom it supposedly protects,"[118] confronting "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."[119] The best principle would prevent this circumstance in as many cases as possible, guaranteeing a leveling up result in more cases in order to ensure that discrimination is removed in the best way and that those who are entitled to bring claims can do so without fear.

One candidate principle is found in a version of egalitarianism proposed by Thomas Christiano, who would include leveling up as a built-in part of the notion of equality and would result in claimants, like Cazares, being extended the benefit in more cases.[120] Christiano, contributing to a storied debate among philosophers over the moral status of equality, defends a principle of equality that implies that normally we should choose

116. Brake suggests several other constraints on leveling down in noting that courts have expressed vague disfavor for leveling down even as they continue to allow it. *See id.* at 541–61.

117. CHRISTIANO, *supra* note 13, at 37.

118. Brake, *supra* note 3, at 516.

119. *Id.*

120. *See* CHRISTIANO, *supra* note 13, at 45.

a state in which some are better off and none are worse off than under the best feasible equality.[121] In defending this principle, Christiano sidesteps the Leveling Down Objection.

The argument proceeds by showing that justice is grounded in the dignity of persons and that, in turn, the dignity of persons grounds some main principles at the root of justice—main principles which ground the principle of equality in the distribution of well-being. These three principles, the principle of equal moral status of humans,[122] the principle of well-being,[123] and the generic principle of justice (which contains the no relevant difference thesis),[124] are grounded by the concept of the person.[125]

Essentially, "[t]he generic principle of justice coupled with the equal status of persons and the no relevant difference thesis and the principle of well-being give us all the necessary premises for defending"[126] the principle that "well-being ought to be distributed equally by the institutions of society."[127] In simple terms, Christiano finds that this principle requires that we advance the well-being of persons and that if we have a good reason to advance the well-being of anyone, we have that same reason to

121. *Id.* at 23.

122. *Id.* at 17. This principle establishes that human persons have equal moral status, arguing from the premise that "the status of humanity derives from the fact that humanity is a kind of authority in the realm of values" and concluding that because of that, "human beings all have essentially the same basic capacities to be authorities in the realm of value." *Id.*

123. *Id.* at 18–19. This principle accepts the premise that well-being is "that quality of a person's life that involves an appreciative and active engagement with intrinsic goods," requiring that "a person enjoys or takes pleasure in or is happy with the appreciation and active engagement with intrinsic good." *Id.* at 18. That is, well-being consists in "the happy exercise of the distinctive authority of persons." *Id.* For example, a person's well-being is enhanced when a person is enjoying life's small pleasures, like a sunset. Given this definition, well-being, which is good for the person and which constitutes the flourishing of the person, is important to justice in that,

> [t]o honor the distinctive authority of the person is to ensure that it happily exercises that authority in its life. . . . [t]o the extent that well-being consists in the happy exercise of the distinctive authority of human beings and each person is due the exercise of that distinctive authority, well-being is due each person.

Id. at 19. "The more a person has well being, in general, the better." *Id.*

124. *Id.* at 20. This principle holds that one ought to treat relevantly like cases alike and relevantly unlike cases unlike. The principle "regulates those reasons that accord specifically with the principle of propriety," which holds that justice is concerned with what one is due. *Id.* at 21. The principle requires that one act in accordance with relevant reasons, reasons that are given by the principle of propriety. In other words, "[w]hat the person is due is a fitting response to the worth of the person in question." *Id.* This is the "no relevant differences thesis." *See id.* at 24. At this point, to avoid a debate over what differences are relevant, Christiano suggests a group that most would agree have no relevant differences: people beneath the age range of sixteen to eighteen years. These individuals are "capable of well-being to a significant extent and this is the quality that is relevantly similar among them." *Id.* at 25.

125. *Id.* at 13.

126. *Id.* at 25.

127. *Id.*

advance the well-being of everyone.[128] Christiano contends that the reason the Leveling Down Objection is so compelling is that it ostensibly allows us to prefer a state of equality in which each person has a substantial amount of something over a state of equality in which each person has nothing, when in fact egalitarians *must* prefer a Pareto-superior equality to a Pareto-inferior equality:

> There is an internal connection between the rationale for equality and the value of the relevant fundamental good that is equalized. If it were not true that more well-being is better than less, then there would be no point to equality. There would be no reason to care about equality. Since the importance of well-being or opportunity for well-being seems to be built in to the principle of equality—it is the reason for the principle taking the shape that it does—they cannot be indifferent between these two states.[129]

Christiano concludes that "a necessary condition for equality mattering is that the thing being equalized is such that more is better than less," asserting that,

> since the truth of the proposition that more substantial good is better than less substantial good is a necessary condition for the principle of equality in the substantial good having a point, the right account of the principle of equality must somehow include the idea that equalities in which everyone is better off are better than equalities in which everyone is worse off.[130]

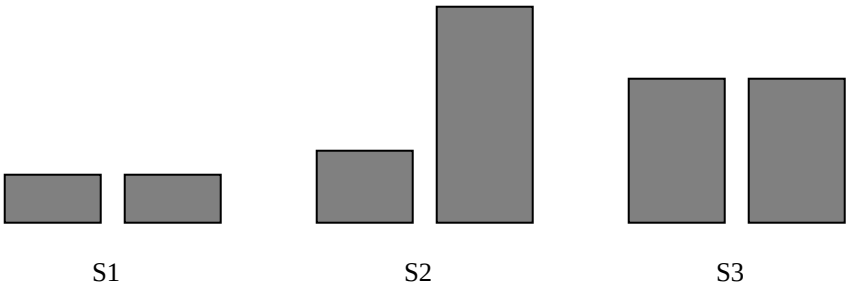
Having set forth his conception of equality and his description of in what circumstances it matters, Christiano moves on to explain how his account meets the Objection. The principle of equality as defended answers the Objection by arguing that it does not follow from "the fact that there is loss from inequality"[131] that "any egalitarian state is better in respect of equality than any nonegalitarian state."[132] That is, Christiano points out that egalitarians, whose central claim is that all inequalities are unjust,[133] infer from that claim that something is lost when there is some inequality, and from *that* conclusion infer that "any egalitarian state is better in respect of equality than any nonegalitarian state."[134] The mistake, he contends, is in the making of this last inference—the egalitarian does not need to say that

128. *See id.* at 25–26.
129. *Id.* at 33.
130. *Id.* at 34.
131. *Id.* at 35.
132. *Id.*
133. *Id.*
134. *Id.*

"every nonegalitarian state is unjust because it is not equal."[135]

The approach accepts that "something is lost when there is some inequality," the claim from which "the leveling down objection derives its apparent strength"[136] and the claim which "follows from the central egalitarian claim that all inequalities are unjust."[137] At the same time, the approach denies the accompanying inference that "any egalitarian state must be better than any nonegalitarian state, at least in one respect."[138] Specifically, Christiano's approach denies that there is one important respect in which an egalitarian state is better than, for example, a strongly Pareto-superior state. Figure 4 is illustrative:

FIGURE 4. [139]



S1, S2, and S3 represent worlds/states in which each block represents one party or group of parties within that world/state.

S1 and S3 are egalitarian; S2 is not. "S3 and S2 are strongly Pareto superior to S1;"[140] that is, at least one party is better off and nobody is worse off. Also, assume that S2 and S3 are Pareto-non-comparable (some individuals prefer S2 and some S3 so that comparison is impossible), but S3 is egalitarian and S2 is not. "The difference is that in S2 at least one person is better off and another is worse off than in S3."[141] All the egalitarian is committed to, argues Christiano, is that something in S2 is lost by virtue of the fact that everyone who lives in S2 is not equally well off, which may imply that S3 is better or more than S2, and is compatible

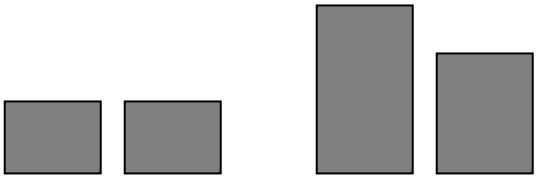
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. Christiano's version of this figure attaches numerical values to A and B in each state. In S1, A and B both have a value of two. In S2, A has three and B has seven. In S3, both A and B have five. *Id.* at 33 tbl.1.1.
140. *Id.* at 35.
141. *Id.*

with saying S2 is better or more just than S1, just as S3 is.[142] This is sufficient to "ground the claim that for every inequality, there is something lost with respect to equality."[143]

But a finding that there is something lost with respect to equality, although it does commit the egalitarian to the view that every inequality is unjust because it is unequal, does not entail that *any* egalitarian state is better in respect of equality than *any* nonegalitarian state. This "gap in the leveling down objection"[144] opens the door for Christiano's next move, which is to show that "if all persons can be made better off than under the best feasible equality, then the principle of equality . . . defended implies that normally we should choose that state in which some are better off and none are worse off than under the best feasible equality." [145]

Christiano applies the example to two persons: A and B, living in two states, S1 and S2. In S1, A and B are equally well off; in S2, "both are better off than in S1 but A is better off than B."[146] Figure 5 is illustrative:

FIGURE 5.



S1 and S2 represent worlds/states in which each block represents one party or group of parties within that world/state.

From S1 to S2 there is a Pareto improvement; that is, nobody is worse off in S2 than in S1, but this Pareto improvement is accompanied by an increase in inequality. The generic principle of justice, which, recall, requires treatment of a person to be in accordance with the reasons that apply to him or her, would say that there is some kind of failure of justice because of the unequal distribution, assuming nothing else has changed (no other relevant differences have emerged).[147] The egalitarian would say

142. *Id.* at 35–36.
143. *Id.* at 36.
144. *Id.*
145. *Id.* at 37.
146. *Id.*
147. *Id.*

there is something wrong with S2, and that something wrong consists in inequality of distribution. Christiano argues that "there is something *even worse* in S1 with regard to justice" and that "we have reason to prefer S2 to S1, from the point of view of justice" *even though* every nonegalitarian state is unjust because it is not equal (that is, something is lost).[148] The fundamental reason Christiano provides for his thesis is rooted in his initial grounding of the principle of equality in a concern for the well-being of each person[149] and the accompanying assumption that "equality seems to lack any point when the thing to be equalized is not such that more is better than less."[150] Essentially, he posits that if ideal equality cannot be reached, a Pareto-optimal inequality may be superior to the best feasible equality, and what we need is a strategy "for constructing a principle that gives us a schematic account of how to assess the size of the departure from ideal equality."[151] Christiano provides only a sketch of how this is to be accomplished, but in so doing he recommends that we assess the ideal equality point, identifying it as the best Pareto-optimal state, or that Pareto-optimal state that has the highest average utility among all feasible states.[152] For example, the "average point of well-being between A and B in S2 is the ideal equality point."[153] To determine which departures from the ideal equality point are greater departures from justice and which are smaller ones, Christiano suggests the construction of approximation rules which must "register the importance of well-being (or any kind of substantial good)."[154] While he does not flesh out a rule completely, he does provide several constraints:

> 1. "[T]he most just state of affairs in the circumstances must be the ideal equality point."[155]
>
> 2. The rule must always favor Pareto-superior states over Pareto-inferior states.[156]
>
> 3. The rule must allow for cases in which "some states are closer approximations to the ideal equality point than others even though the others have a greater amount of average utility."[157]

148. *Id.* (emphasis added).
149. *Id.*
150. *Id.* at 38.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 39.
155. *Id.*
156. *Id.*
157. *Id.* at 40.

Christiano recommends that equality, which he stipulates is important when the benefit is such that more is better than less, be achieved by identifying an ideal equality point and determining what state will result in the least departure therefrom.

Assuming that the Objection can be defeated by adhering to a view that requires a commitment to the claim that inequality is not always worse, from the point of view of the principle of equality, than a Pareto-inferior equality,[158] would indeed encourage leveling up in more cases by working it into the very concept of equality. And as discussed above, an approach that mandates leveling up in more cases is appealing.

However, application of Christiano's approach to antidiscrimination law, with no adaptation, may not provide the right result in all cases. Most importantly, this is because Christiano's conception of equality contains the notion that equality is only important with regard to things of which a greater quantity is better. In the realm of antidiscrimination law, when equality may be important notwithstanding the material benefit, it is not clear that equality only matters when "more is better"—equality might matter where "more" does not matter at all. Christiano's letters-in-names example is illustrative in understanding how a conception of equality that can be adapted to antidiscrimination law must contain guidelines that regard the distribution of "benefits" that are *not* such that more of them is better than less. Letters in last names, everyone will likely concede, do not matter outside of the meaning we give them, an intuition drawn out by Christiano's use of the example as something that does not need to be equalized.[159] But what if Congress enacted the More Letters the Better Act, pursuant to which all white Americans may have from zero to twenty characters in their last names, and African Americans may have only up to five letters? The harm caused by a law like this is symbolic. Christiano is surely right that it is not per se better to have fewer or more letters in our last names, but he would just as surely agree that in the realm of antidiscrimination law, we would care about equality with regard to this instance nonetheless. Thus, the leveling-up mandate and the assumption it rests upon—namely, that equality matters when the thing in question should be maximized—is not completely ready for adaptation to equality law. Put another way, Christiano's view concerns itself with *equality* alone, whereas much of antidiscrimination law is concerned with removing discrimination. Thus, Christiano's piece alerts us to the fact that whatever

158. *Id.* at 41–42.
159. *Id.* at 34.

role equality plays in that removal must first be considered before invoking a remedial principle concerned only with equality.

Because Christiano's very conception of equality includes a leveling-up mandate, based in large part on its assumption that equality matters only when more is better than less, his framework appears on first glance to require leveling up not only in cases like *Cazares*, but also in all other cases. As discussed earlier, this outcome is problematic because, for the purposes of getting the right result in equality law, leveling up is something we may want much of the time to ensure that cases like *Chipman* cannot become cases like *Cazares* just because the school decides to cancel the ceremony. But we may not always require the antidiscrimination principle in question to be honored. That is, the earlier discussion of the authorization for leveling down implies that that authorization may be in place for a reason: leveling down is, in some cases, not only authorized and appealing on a descriptive level, but also acceptable with regard to the removal of discrimination in some cases and, thus, appealing on a normative level as well. A deeper look reveals that Christiano's framework simply does not tell us, and does not claim to tell us, what to do when it is not the case that the thing to be equalized is such that more is better than less. Either way, his framework teaches us both that there is a way to think about equality that does not wed us to leveling down, and that there is more wood to hew and water to haul if such a framework is to be adapted to the antidiscrimination realm.

2. When More May Not Be Better than Less[160]

Brake points out that "where the injury from the inequality is a formal equality injury, adequately redressed by the end to differential treatment," leveling down may adequately remedy the harm.[161] *Heckler v. Mathews*[162] exemplifies this kind of circumstance, under which Christiano's account might require leveling up, but in which leveling up might not be necessary to honor the antidiscrimination principle. Recall in *Mathews*, discussed earlier, "the Court upheld standing for male plaintiffs challenging the SSA's interim provision allowing wives and widows, but not husbands or

160. The following analysis is borrowed from Brake, *supra* note 3, at 592–602, and is in this Note simply to show the breadth of different cases in which leveling down may be satisfactory and how looking at cases differently changes them significantly.

161. Brake, *supra* note 3, at 592. Note that Brake employs the use of these examples to illustrate her expressive harms test, a test I do not embrace in total, as shown in Part V. However, it is included here to draw out the idea that we should not embrace leveling up as the end-all of antidiscrimination remedies.

162. Heckler v. Mathews, 465 U.S. 728 (1984).

widowers, to receive full spousal benefits without first having to show financial dependence on a spouse or offset other government pension funds."[163] While speculating as to what would be an appropriate remedy for the differential treatment, the Court emphasized that the nature of the injury was actually the stigma from the treatment, not the deprivation of the material benefit itself.[164] By denying benefits to women, instead of extending them to men, the injury could easily be remedied.[165]

Even though in *Cazares*, just as in *Mathews*, the nature of the injury consisted largely in the stigma from the treatment, the outcome in *Mathews* is intuitively appealing in the way the outcome in *Cazares* is not. First, one main problem with the *Cazares* outcome is the tendency of similar cases to discourage litigation of equal protection rights because of the threat to the plaintiff of being scapegoated by other people who will be harmed by the denial of the privilege.[166] Where the forum is small, personal, and intimate like a high school, being the one responsible for the denial by school officials of a benefit which was previously enjoyed by those with whom the plaintiff is intimately acquainted is very different from the denial of benefits to a huge class of people, where the plaintiff—although affecting those people indirectly—is more a mechanism for large social change than a named, identifiable person responsible for disadvantages to that named person's acquaintances.[167]

Brake points out further considerations that weigh in favor of leveling down in antidiscrimination cases and that demand a more nuanced approach like the one ultimately proposed. For example, she points out that the injury of the type in *Mathews* actually perpetuates the expectation of "men's and women's breadwinning roles"[168] and marginalizes nonconforming men by denying them benefits. Removing the statute removes that preservation, whereas removing the benefit in *Cazares* served as a personal message to the plaintiff that the school would *rather* give up its privilege than extend it to her, reinforcing her social status.[169] That is, although leveling up by giving the benefit to everyone would obviously be superior with regard to the *Mathews* plaintiff's satisfaction,[170] Brake finds

163. Brake, *supra* note 3, at 593.
164. *See id.*
165. *Id.*
166. *Id.* at 518.
167. *See id.*
168. *Id.* at 594.
169. *See id.* at 518.
170. That is, questions of economic feasibility aside, all parties involved might agree that as a general rule, the more benefits, the better.

that the addition of insult to injury which is so conspicuous in a case like *Cazares* is absent in a case like *Mathews*, even though to extend the benefit to all would be an unquestionably Pareto-optimal move. Thus, it seems that in at least some cases in which the injury consists in the stigma, leveling down is adequate to cure the violation even in cases in which more is better than less.

Another class of cases, those that involve situations "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," implies that "some leveling down may be necessary to extend the benefit on an equal basis."[171] For example, particularly in Title IX cases, "leveling down of male athletic privilege may be necessary to extend athletic opportunities to women on an equal basis"[172] because the unequal treatment is based on notions of male privilege and of "a cultural ideal of masculinity that emphasizes brute force, explosive speed and a male body type that is highly differentiated from the feminine."[173] Brake points out that extending funding that is equivalent to the "extraordinary levels of spending"[174] that are spent on men's sports to women's sports would be prohibitively expensive, but more importantly, it is not required because equality law should focus on reassessing its baseline to find one that is based on some notion other than presuppositions of male privilege.[175]

The notion of inflated privilege, however, may be less compelling with regard to the male athletes because it is hard to imagine, in the realm of equality law, an instance of judicial intervention so intrusive given America's infatuation with professional sports. If one is not on board for Brake's conclusion that such excessive amounts of money should not be spent at all, her argument loses much of its force. A third category of cases, those "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,"[176] may be more compelling to skeptics, however. One example of this third kind of circumstance is Brake's description of the way Division I male athletes are housed in hotel rooms the night before a big game because of their propensities for violence and other testosterone-

171. Brake, *supra* note 3, at 592.
172. *Id.* at 594.
173. *Id.* at 595.
174. *Id.*
175. *Id.*
176. *Id.* at 592.

fueled activities that are inevitable given their status as alpha males, yet must be constrained because of the athletic endeavors to which they must devote themselves the next day.[177] Extending such a practice to female athletes on the rationale that there is no other way to control or discipline the players because of their out-of-control testosterone levels would make little sense.[178] "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."[179]

Perhaps, though, the female athletes should have the privilege of their own private rooms, and the rationale should be changed to something that could be accommodated by leveled-up equal treatment (athletes need their beauty sleep, or something similar). A last example, probably most compelling and certainly more controversial, dramatically highlights Brake's point that taking the benefit away—leveling down— in certain circumstances is ideal:

> [A]s 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. 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.[180]

Although the above cases reflect conceptual leveling circumstances rather than actual cases, that fact does not make the examples irrelevant to the second point: they point to situations in which we would not want leveling up in the sense that we would never wish to see all athletes receive equal treatment if that meant all get exemptions from the disciplinary structure. Just because we would not indulge this claim, the point is that there are times when leveling up is *not* appropriate, conceptually, which tells us that while formal equality is not exactly what we want, an idea of equality that automatically builds in leveling up is not ideal either when it comes to antidiscrimination law. Thus, courts who wish to honor the intuitions the foregoing elicits—that is, that equality is not coextensive with equal treatment—will need to examine carefully the principle before

177. *Id.* at 597–98.
178. *Id.* at 598.
179. *Id.*
180. *Id.* (internal footnote omitted).

employing its use in the antidiscrimination realm.

A slightly different challenge is raised by circumstances like that surrounding the Benton County commission's decision, discussed earlier, to stop issuing marriages licenses.[181] An alternative interpretation of what the county claimed was a good faith effort to honor a principle of equality is that the county's decision to suspend all licenses was a strategic effort to break down the status differentials between gay and straight couples.[182] Under this interpretation, leveling down can serve a purpose other than just removing a privilege—it can confer power on the deprivileged in certain extreme cases. As Brake points out,

> 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 . . . hasten the extension of marriage to gay and lesbian couples by equalizing the status of their relationships. . . . [I]t is significant that the leveling down of marriage was designed as a temporary measure. . . .[183]

From this perspective, leveling down was one medium through which an important social point could be conveyed.[184] Certainly, a conception of equality that assumes that more is better than less might require everyone to obtain marriage licenses; although some of us may think this is the best result, the point is that if our antidiscrimination guidelines do not provide insight with regard to other types of benefits, they will have nothing to say about tactical leveling down, and they will be insufficient.

Another interesting consequence of infusing a concept of equality like Christiano's into the realm of equality law is that, were we able to create an Honor Society Plus in addition to an Honor Society—the first for properly "honorable" members of the school and the second for plaintiffs like Cazares—an emphasis on Pareto-superior inequality as less infirm with

181. *Id.* at 521.

182. *Id.*

183. *Id.* at 600.

184. Importantly, note that in the Benton County case, there was neither a violator nor a remedy-regulator as there is in cases like *Cazares* and *VMI II* because the leveling down did not happen in the context of a case. Rather, the decision to level down was preemptively made by a county in the position to posit its own interpretation on the constitutionality of the statute pending resolution of a suit. Thus, it is clearly not the county's *role* to use its authority as a forum for partisan political expression. However, in cases in which the violator is allowed to choose a method of remedy after having been found guilty of a violation by a court, leveling down's appeal becomes more clear. The important point is that Christiano's view as adapted would limit the ability of courts to perform a case-by-case analysis of whether leveling down served equality: it would, in essence, summarily reject any such leveling down on the grounds that leveling up is simply an integral part of equality. The Benton County case suggests that such view may not be comprehensive enough for application to equality law.

regard to equality than Pareto-inferior formal equality may mandate a finding that the school's decision to have two Societies does not violate the equality principle. That is, if the school remedied the violation by admitting Cazares into the already-existing Society and then started a new Society for everyone else, a Society with more perks, bigger pins, and so on, on a strict conception nobody would be worse off and those nominated to the already-existing society would be better off, as would the plaintiff.[185] Of course, however, this outcome is unacceptable from an antidiscrimination law standpoint. Creating an Honor Society Plus would send a message of inferiority and discrimination to Cazares that was just as clear, if not clearer, than the message sent by the action the school actually took: removal of the Society. Thus, whatever role formal equality plays in antidiscrimination law, the courts must ensure not only that it allow for leveling down under the right circumstances, but also that it not allow leveling up when it will result only in Pareto-superior inequality rather than formal equality.

B. APPLYING THE PRINCIPLE OF EQUAL CONCERN

Brake's approach, in light of her discussion of the confusion surrounding leveling down, suggests that one principle that would help ensure that "[t]he permissibility of leveling down . . . depend[s] on its responsiveness to the injuries of discrimination"[186] is the principle of equal concern.[187] The critical characteristic of a principle of equal concern, the essence of which is that persons deserve to be regarded as and respected as equals, is that it recognizes that the "normative content of equality law is not fully exhausted by an equal treatment mandate."[188] Thus, unequal treatment will violate equality law only when it violates the more fundamental principles of equal citizenship, equal respect, and other norms that constitute the principle of equal concern.[189] In turn, when unequal treatment does violate equality law, it does so not because equality *always*

185. Of course, this is assuming that Christiano would not work the discrimination that Cazares would obviously experience into his conception of equality, but the point is that there is no mechanism in the view that mandates looking at discrimination separate from the distribution of benefits, whatever those benefits may be, because his view is one concerned with equality alone.

186. *See* Brake, *supra* note 3, at 560.

187. Although she notes that Dworkin's principle of equal concern has been criticized, in particular by feminist scholars, for "positing a neutral observer whose 'concern' is dispassionate and at arms length," Brake explains that there is room for the principle to be interpreted as less aloof. *Id.* at 562. She accepts it as a mediating principle that is "broad enough to[] encompass a more active and connected kind of concern that is empathetic and relational." *Id.*

188. *Id.* at 561.

189. *Id.*

requires treating similarly situated people the same; the right to be treated as an equal may not always require or be satisfied by equal treatment.[190] Brake emphasizes the more subjective nature of the principle of equal concern, noting that "[i]n 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."[191]

Brake fleshes out the principle of equal concern by suggesting that an appropriate test is whether the expressive meaning of actions, as existing wholly apart from their material consequences, indicates a selective disdain or disregard for some persons.[192] In such contexts, "leveling down may reproduce inequality through its expressive meaning, in violation of equal concern."[193] According to the expressive meaning test,

> [t]he legitimacy of leveling down as a response to inequality depends on its expressive meaning, which turns on social context. 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.[194]

A principle that holds that it is the right to be treated "as an equal" that is fundamental, not the right to equal treatment, and that whether one is treated as an equal depends on the expressive harm of action X, sidesteps several of the troubling implications of exalting a formal equality principle as guiding deity in antidiscrimination law.[195] By not specifying that

190. *Id.*

191. *Id.* at 563.

192. *Id.* at 570–71.

193. *Id.* at 571.

194. *Id.* at 585. In applying the expressive meaning approach, Brake considers factors such as social history, including legal history, whether leveling down will preserve a status hierarchy in a particular case, and the message conveyed. *Id.* at 585–90.

195. Most obviously, Brake's approach is concerned with antidiscrimination law itself, whereas Christiano's view is not intended to provide courts with guidance. Therefore, her view is tailored according to the courts and the current antidiscrimination framework; in contrast, I have imported Christiano's view as an illustration, and thus, his view can hardly be expected to account for the complexities of, for example, our Equal Protection jurisprudence. However, my point is less that Brake's view is tailored to the legal community than that certain facets of her view—focus on case-by-case expression of harm and meaning of action—are particularly helpful in determining in what a given

leveling up, or Pareto-superiority, is an inherent part of equality, an account of equality that relies on a principle of equal concern will allow for case-by-case analysis of violations and independent judgments of whether they can be remedied by leveling up or leveling down depending on what message is sent by the action in question. Probably because Brake is explicitly concerned with the antidiscrimination principle invoked in equal protection cases and other equality-law cases, the approach she espouses leaves room for a finding that some instances of unequal treatment do not violate the antidiscrimination principle, creating a framework of flexibility and context dependence within which the courts can maneuver. Moreover, because it does not rely on a conception of equality that presupposes that equality only matters when the goods in question are such that more is better than less, the equal concern/expressive harms framework will be able to account for symbolic harms and situations in which equality matters even though the thing in question is not such that more is better.

Thus, a principle of equal concern as measured by, for example, an expressive meaning test, would enable courts to require leveling up in more cases and yet would leave room for leveling down when to do so would sufficiently eradicate the inequality. Practically speaking, however, how are courts to determine when an action has inflicted an expressive harm without drawing on their normative presuppositions about social reality? Without more detailed guidance as to when an expressive harm violates equal concern and in what an expressive harm consists, courts may essentially be forced to place the cart before the horse, making a judgment about what the social world should be and tailoring the remedial principle accordingly.

The potential difficulties of applying the expressive harm test without sufficient guidance is harder to see in cases like *Cazares*, in which the infliction of an expressive harm is more evident and is highlighted by contrary outcomes like *Chipman* and the award of attorney's fees. In fact, Brake concedes the difficulty that may arise, suggesting that cases like *Mayberry v. Waverly Public Schools*[196] demonstrate the ineluctable circumstances under which application will present a much stickier wicket. In *Mayberry*, which involved "the cancellation of a school play thought to be limiting in its roles for African American students,"[197] "the school district cancelled the school play once it learned of the drama teacher's

instance of discrimination consists and how it may best be removed.

196. *See* Mayberry v. Waverly Pub. Sch., No. L89-50091-CA, 1990 U.S. Dist. LEXIS 10249, at *9–10 (W.D. Mich. Aug. 3, 1990); Brake, *supra* note 3, at 598.

197. Brake, *supra* note 3, at 598.

decision not to cast an African American student in a theatrical production of 'Arsenic and Old Lace.'"[198] The teacher, who did not believe that the audience would be receptive to "an interracial family set in the 1930s,"[199] "decided to seek out other theatrical opportunities for the student."[200] In holding that the plaintiff's equal protection claim failed because she could not show discriminatory intent, the court noted that even had her claim succeeded, the decision to cancel the play would have suitably removed the inequality.[201] Citing *Mathews*, the court affirmed that "the appropriate remedy in equal treatment cases is either the withdrawal of the benefit from the favored class or extension of the benefit to the excluded class"[202] and explained that since "all students were treated equally with regard to participation in the play,"[203] the defendant had already remedied whatever equality violation it had inflicted.[204]

Brake rightly notes that analyzing *Mayberry* within an expressive harm framework is difficult. On the one hand, the play could be seen as conferring a privilege upon white students that could not be enjoyed by African American students. Thus, the cancellation can be interpreted as an "appropriate elimination of white privilege, consistent with equal concern."[205] The school district's subsequent efforts to "seek out other theatrical opportunities for the student, both in the school district and at other schools and private institutions,"[206] supports this interpretation, as does the *Mayberry* court's observation that "it would appear that the play was cancelled because the defendants realized that the decision made by [the director] was not a wise one and that the fairest way to deal with the situation was to cancel the play."[207] If the director and the district realized that the initial production choice sent a message of inferiority and exclusion to the African American members of the student body, the school's decision to cancel the play could have been an effort to rectify that original decision and to ensure that members of minority groups had unobstructed access to their choice of roles, thus complying—albeit retrospectively—with equality.

198. *Id.*
199. *Id.* at 598 (quoting *Mayberry*, 1990 U.S. Dist. LEXIS 10249, at *1–2).
200. *Id.* at 599.
201. *Mayberry*, 1990 U.S. Dist. LEXIS 10249, at *8–9.
202. *Id.* at *9.
203. *Id.* at *8.
204. Brake, *supra* note 3, at 599.
205. *Id.*
206. *Id.*
207. *Mayberry*, 1990 U.S. Dist. LEXIS 10249, at *8.

On the other hand, the very assumption that there were no roles available for African American students itself is controversial:[208]

> [i]f 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.[209]

Thus, if the decision by the school to cancel the production reflected its knowledge of the director's improper motivations, not its independent ambitions to improve its theater program in a way that would better serve the interests of the diverse members of its student body, the expressive harm inflicted would be palpable. That is, the school's cancellation can be seen as a mute affirmation of the director's decision that no roles in *Arsenic and Old Lace* are appropriate for African American students even while they concede that such a position is untenable. The district's postsuit acceptance of the director's resignation, and assertion of its unwillingness to "tolerate that kind of behavior among school staff,"[210] suggests that the school was of the mind that the director's actions were inappropriately excluding the African American students; if so, its decision to cancel constitutes the infliction of a particularly invidious expressive harm.

Since the expressive meaning is difficult to ascertain in cases like *Mayberry*, making the compliance of leveling down with equality in such cases contingent upon whether the action inflicts an expressive harm may be frustrating at best and malapropos at worst. Although Brake concludes that leveling down did not violate equal concern in *Mayberry*, she did so

208. *See* Brake, *supra* note 3, at 599. *Arsenic and Old Lace* was set in the 1930s or 1940s, and revolves around two maiden aunts and their nephews. The teacher thought that the maiden aunts needed to be of the same race, but it is not clear that race was a central issue, or an issue at all, in the play or that the play could not have accommodated two aunts of difference races. *Mayberry*, 1990 U.S. Dist. LEXIS 10249, at *1. Moreover, although the *Mayberry* opinion characterizes the casting director's explanation of why the minority student would only get to be an understudy as emphasizing the audience's unwillingness to accept an interracial family set in the 1930s or 1940s, the student herself told a local newspaper that the director's words were actually "I don't think the community could handle two black women in the lead roles." *Teacher Quits in Race Dispute*, N.Y. TIMES, Nov. 24, 1987, at A18 [hereinafter *Teacher Quits*]. This latter conception of the interaction indicates that the teacher was less concerned with preserving the "artistic integrity of the play" by ensuring "that the familial group of aunts and nephews be of the same race" than with accommodating the audience's preferences, especially given that it contradicts her statement that "if there had been enough black male students try out, she would have been willing to direct the play as a black family." *Mayberry*, 1990 U.S. Dist. LEXIS 10249, at *7.

209. Brake, *supra* note 3, at 599.

210. *Teacher Quits*, *supra* note 208.

ambivalently.[211]

Moreover, Brake notes that the laws containing a discriminatory-intent standard cannot be relied on to screen out expressive harms because people who make decisions that privilege the already privileged and invoke an expressive harm do not always intend to discriminate against the disenfranchised party.[212] However, in cases like *Mayberry*, the only guidance the expressive harm test really can provide is an instruction to look into the motives of the teacher as they interact with the motives of the school administration and the audience. But in many cases, like Equal Protection Clause cases, the intent prong must be satisfied before a claim can be brought. Thus, the test in *Mayberry* for whether cancellation inflicted an expressive harm would be essentially the identical test for whether a violation had initially occurred when the African American student had been denied a role. In this sense, the expressive harm test will often be a simple extension of the intent prong and will provide only minimal assistance to courts, who will likely decline to analyze the harm and instead employ what they see as the simpler test that enables removal or extension of the benefit with no further inquiry.

V. THE RIGHT ROLE FOR EQUALITY II: A GUIDE FOR COURTS

We have seen that Brake's approach asks us to redefine equality to include the notion of expressive harm, yet she notes the difficulty in the application of such a test. Moreover, although she describes her accounts as one that will result in more "equality," she departs from the notion of formal equality to focus on the best way to remove discrimination using alternative guidelines. Christiano also defends equality as a principle, asking us to redefine equality to include leveling up. Although his equality principle is a bit unconventional as well, he does not stray from the notion of equality as involving distribution. Yet we learn from him that this principle runs into trouble when the benefit is not of the type such that more is better than less—and this type of benefit is one that we may see in the realm of antidiscrimination law.

Examining the accounts of these two scholars against the backdrop of the Leveling Down Objection highlights the problem cases like *Cazares* illustrate: when should courts consider formal equality at all? When they are attempting to remove discrimination? And what notion of equality should they consider assuming they do use it as a guiding principle? The

211. *See* Brake, *supra* note 3, at 599.
212. *Id.* at 582.

foregoing illustrates that sometimes discrimination can be removed without looking at formal equality, and that sometimes it cannot. Based on the insights gleaned from the approaches set forth above, I propose the courts employ the test below, dubbed the Equality If Test.

The threshold question for the courts to answer when employing the Equality If Test is whether the material good to be distributed is such that more is better than less, asking the question that underlies Christiano's main assumption. It should be noted that the good can always be characterized more abstractly: for example, as "fairness" or "access." For my purposes, at this stage in the analysis it is important that the *material* good be that which is examined. For example, induction into the National Honor Society, and all the attendant material benefits, is a good such that more is better than less. Similarly, pension benefits are such that more is better than less. If the court determines that this good is such that more is better than less, the court should factor equality into its analysis of whether to allow leveling up or leveling down, and the notion of equality the court should use is that, or similar to that, provided by Christiano. Simply put, the court will level up when it is feasible. Note the earlier reference to the situation posited by Christiano, in which there is a Pareto-optimal inequality state that is more favorable than the best feasible equality, will not arise in equality-law cases, because the court will either have to level all the way up or level all the way down due to the framework of the current legal system. Moreover, when other constraints specific to equality law get in the way—administrative impossibility, fiscal impracticability, federalism, or separation of powers issues—leveling down may still be the best choice; *Mathews*, for example, may still have gone either way, whereas *Cazares* and *Chipman* would likely require leveling up. The key point is that the court should explicitly consider equality of distribution when the good is such that more is better than less.

If the question whether more is better than less is answered in the negative, Christiano's framework is inapposite; that is, it is helpful, but only helpful insofar as it teaches us that equality as we generally consider it is not important in such cases. Thus, a court employing the Equality If Test should, put dramatically, forget about equality and focus on removing the discrimination. The court should endorse a framework like that provided by Brake and focus on the message sent by the action, the expressive harm, and other of her proposed factors, focusing not on equality per se, but on other aspects of the discrimination.

The best example is not a case at all: recall the More Letters the Better Act discussed above, restricting the number of letters African Americans

could have in their last names. Were this statute to fail an equal protection challenge, as it surely would, it would hardly seem inappropriate, assuming Congress could justify the need for limiting letters in the first place, for Congress to limit all last names to five letters. Although the outcome is absurd given our inability to conjure up a situation under which this exercise of congressional power would be justified, the point is that the reason it is absurd is *not* because the five-letter limit would reinforce the discrimination present in the initial statute. In this case, because an increase in the number of letters in a name does not provide a material benefit, a decrease in the letters of everyone's name—leveling down—will not reinforce the discrimination in the initial statute. The More Letters the Better Act is a good example of an instance in which the thing to be equalized is *not* such that more is better, but instead such that equal is better. The only reason someone might want more letters is because of the message sent by the restriction. Here, equality as we traditionally conceive of it does not play a role. An analysis like Brake's is particularly apt because it will enable a look into the message sent, the history behind the action, and all the other attendant circumstances. Whether to level up or level down will depend on the results of Brake's test. Similarly illustrative is the case of "Handshakes-and-Hellos":

> Consider this example. A university official is greeting alumni at a university function. He might simply voice a friendly greeting to each person, or he might also shake everyone's hand. Suppose we conclude that either practice is consistent with his duty to show respect to his guests. To that extent, his duty is discretionary. However, if he were to shake the hands of whites but not blacks, he would violate a duty not to discriminate on racial grounds. Now suppose the official realizes that he has unjustly discriminated against blacks, and responds by voicing a greeting to all guests and discontinuing the practice of shaking hands. Is he now "multiplying the wrong"? No, because the decision to voice a greeting but not shake hands is not a wrong in the first place.[213]

213. Simons, *supra* note 1, at 752–53. Simons is actually using this example to defend his argument that equality has independent normative status. Specifically, this example is used to defeat the objection that equality requires "the multiplication of wrongs." That is, if someone has been wronged, formal equality may sometimes require that everyone else be wronged in order for equality to be achieved. Simons's objection runs as follows: where there was no previous entitlement to the good the distribution of which is at issue, there can be no multiplication of wrongs because it was up to the discretion of the distributor who deserved the benefit to begin with. As Brake points out, an objection like Simons's may not adequately encompass the kinds of harms faced in equality law that may harm on a more symbolic level. However, the notion that leveling down in these cases does not add "insult to injury" may derive from the intuition that the injury was symbolically injurious. *See* Brake, *supra* note 3, at 612.

In the case of the university official, the entire harm consisted in the decision to shake hands with one group, deeming that group privileged, at the expense of another group. Most of us would agree that *handshakes* in themselves are not such that more is better; the harm is in the stigma and the symbolism and an expressive harm framework is particularly apt to solve this type of problem, whereas examining this problem through the lens of equality may be insufficient. Whether a handshake for all or a hello for all will cure the discrimination will depend not on who gets what, but on what the discrimination lies. Formal equality will always be the result; the question whether leveling up or leveling down eliminates the discrimination, however, will not turn on a notion of equality in this case.

Some of the segregation cases provide other examples of instances in which the good is not such that more is better than less. For example, cases with facts like *Palmer v. Thompson* are illustrative.[214] In *Palmer*, a city closed its segregated swimming pools instead of desegregating them after a district court determined that the segregation denied equal protection of laws.[215] The problem with the different swimming pools was not that anybody wanted more, or even that anyone wanted a new swimming pool—the very *problem* with the swimming pools was that there were more rather than less (five, four of which were used by whites and one of which was used by African Americans, rather than one, five, or twenty that everyone could share.) It is very important here not to characterize the good in question abstractly as that of "access." In this case, the court should not factor in equality—if it does, it will have to engage in a complicated analysis of what would constitute equality in this case—when the discrimination is not tied to inequality. The court should rather focus on a test like Brake's, which focuses on aspects other than formal equality in determining what will effectively remedy the discrimination.

VI. CONCLUSION

How to treat equality and how to identify the principle protected in antidiscrimination law is a project of enormous scope that has elicited debate of sonorous dimensions. Even the first, seemingly most uncontroversial example at the beginning of this Note has elicited from the perhaps more empathetic among us the response that leveling up should have been the remedy,[216] attesting to the contested and complex nature of

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

215. *Id.* at 218–19.

216. Brake explains that a discussion with her colleague led her to realize that even the seemingly trivial example of leveling down presented in the ice cream case is not so uncontroversial. Her

the concept of equality. The goal of the foregoing, thus, is modest. It is simply to point to the apparent inconsistencies in the treatment of equality in the removal of discrimination, to characterize these contradictions as an open door through which courts may pass in their attempts to ensure the removal of discrimination in a less constricted way, and to propose a way in which courts may view equality as playing a role in that removal.

An infusion from moral philosophy like the Leveling Down Objection is illustrative in identifying the crux of the difficulty in pinning down the role of equality in the removal of discrimination, and likewise instructive in fashioning guidelines that will further expand notions of equality presented by scholars like Christiano and Brake in a way that will enable courts to achieve leveling up consistently in more, and under the proper, circumstances. A test like the Equality If Test, which identifies one possible role for equality in the removal of discrimination, will be mindful of this depth and will also pave the way for future courts to apply that test consistently. Moreover, it will allow potential violators to regulate their behavior by giving them a context within which to better predict what remedy will cure a potential violation. It will not completely ignore social context, but it will not depend heavily upon subjective, normative preconceptions about the social world. It will examine without assuming whether a violator has denied a more-is-better-than-less benefit. A test that considers the guidelines like those suggested above will infuse antidiscrimination jurisprudence with a perspective that will, in turn, contribute to the consistent administration of justice.

"The power of equality/Is not yet what it ought to be (ought to be)/It fills me up like a hollow tree (hollow tree)/The power of equality. . . ."[217]

colleague pointed out that:

> [u]nless 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.

Brake, *supra* note 3, at 616 n.365.

217. RED HOT CHILI PEPPERS, *The Power of Equality*, *on* BLOOD SUGAR SEX MAGIK (Warner Records 1991).