LEVELING IN THE FIRST AMENDMENT CONTEXT: IS ALL UNEQUAL TREATMENT CREATED EQUAL?

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Since at least 1971, the Supreme Court consistently has recognized leveling either up or down as an acceptable remedy for Equal Protection violations. Three seemingly conflicting cases decided in 2020, however, have brought into question whether the same leveling remedies that are available in the Equal Protection context are available in the First Amendment context. This Note first analyzes the Court's leveling jurisprudence in the Equal Protection context. It then analyzes the Court's opinions in the three above-mentioned First Amendment cases. It also discusses the arguments for and against leveling in the academic literature and asks whether the First Amendment context should be treated any differently from the Equal Protection context. It finally recommends that leveling in either direction should be an acceptable remedy in all unequal treatment First Amendment cases.

TABLE OF CONTENTS

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I. INTRODUCTION

Up until very recently, it was thought to be a well-established principle that when faced with a constitutional violation in which one group of people is treated either better or worse than another group, both leveling up and leveling down are available remedies.[1] When faced with such a situation, leveling up is accomplished by extending the more favorable treatment to everyone, eliminating the unequal treatment.[2] By contrast, in the same situation, leveling down would be accomplished by denying the more favorable treatment to everyone.[3] This latter result would obviously be unfortunate for both the disadvantaged group seeking the more favorable treatment and for the group that had been receiving it; this, however, would still eliminate the problem of unequal treatment.[4]

Since at least 1971, the Supreme Court has consistently recognized leveling down as an acceptable remedy for Equal Protection violations.[5] Three seemingly conflicting cases decided in 2020, however, raised the question whether the same leveling remedies that are available in the Equal Protection context are available in the First Amendment context.[6] In *Barr v. American Association of Political Consultants*, which involved a content-based restriction on the Freedom of Speech, the Court leveled down to resolve the issue.[7] Yet, in *Espinoza v. Montana Department of Revenue*, which involved Free Exercise of Religion, the

1. *See* Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 515 (2004); Louis Michael Seidman, *The Ratchet Wreck: Equality's Leveling Down Problem*, GEO. U. L. CTR., 2020, at 1; Jean Marie Doherty, *Law in an Elevator: When Leveling Down Remedies Let Equality off in the Basement*, 81 S. CAL. L. REV. 1017, 1019 (2008).

2. *See* Brake, *supra* note 1 (describing leveling up as "improving the treatment of the disadvantaged class"); Doherty, *supra* note 1 (describing leveling up as "extending the benefit to all").

3. *See* Brake, *supra* note 1 (describing leveling down as "bringing the group that is better off down to the level of those worse off"); Doherty, *supra* note 1 (describing leveling down as "removing the benefit from all").

4. *See* Brake, *supra* note 1; Doherty, *supra* note 1; Seidman, *supra* note 1 ("If a court [levels down], it diminishes the welfare of some people while arguably not improving welfare for anyone else.").

5. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 227 (1971) (holding the city of Jackson, Mississippi did not violate the Equal Protection Clause by shutting down its swimming pools rather than desegregating them); Heckler v. Mathews, 465 U.S. 728, 748–49 (1984) (holding Congress had the right to build a severability clause into the Social Security Act that would deny everyone the benefit if the Act's sex-based preference provision was struck down); Sessions v. Morales-Santana, 137 S. Ct. 1678, 1700–01 (2017) (striking down a federal statutory provision that conferred citizenship on children born outside the U.S. to unwed U.S.-citizen mothers but not unwed U.S.-citizen fathers because it violated the Equal Protection Clause).

6. *See* Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2262–63 (2020) (reversing the Montana Supreme Court's decision to strike down a tuition assistance program that violated the state constitution's "no-aid" provision); Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2356 (2020) (striking down a provision that exempted robocalls for the purpose of collecting debts owed to the federal government from the Telephone Consumer Protection Act's general prohibition on robocalls); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65, 68 (2020) (enjoining the former Governor of New York from enforcing occupancy limits on churches which were stricter than those imposed on comparable secular activities, even though the former Governor had already lifted the occupancy limits by the time the Court heard the case).

7. The Supreme Court was faced with the choice of either extending the Telephone Consumer Protection Act's government-debt exception to others or severing the exception, denying the benefit to everyone. The Court chose the latter. *Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2356.

Court invalidated the Montana Supreme Court's attempt to level down.[8] Finally, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court issued an injunction despite the fact that the former Governor seemingly leveled up before the case even made it to the Court.[9]

Most of the academic literature regarding leveling has addressed concerns about leveling down as opposed to leveling up.[10] Many scholars contend that leveling down may not be an appropriate remedy in some contexts.[11] The Justices themselves disagree as to whether it is appropriate in the First Amendment context.[12] Therefore, the bulk of this Note will address leveling down. Although most academics agree that leveling up is preferable,[13] the result in *Roman Catholic Diocese of Brooklyn* necessitates a brief discussion of leveling up as applied to the First Amendment as well.[14]

This Note argues that both leveling up and leveling down should be acceptable remedies for First Amendment violations in which different groups are being treated unequally, just as they historically have been for Equal Protection violations.[15] Both groups of cases present the exact same issue: The harm resulting from certain First Amendment violations is unequal treatment[16]—

8. Although the Montana Supreme Court invalidated the tuition program, denying a benefit to everyone, the Supreme Court reversed that decision. *Espinoza*, 140 S. Ct at 2262–63.

9. Although the former Governor had already reclassified the areas in question, bringing everyone up to the same level, the Supreme Court still issued an injunction preventing him from enforcing the previous occupancy limits. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 65, 68.

10. *See, e.g.*, Brake, *supra* note 1, at 516 ("[L]eveling down is not always consistent with the meaning of equality as reflected in U.S. discrimination law."); Doherty, *supra* note 1, at 1019–21 ("[A] commitment to equality's intrinsic goodness entails a position so universally unsavory that it renders such a commitment untenable and incoherent."); Helen M. Cake, *Palmer v. Thompson: Everybody out of the Pool*, 23 HASTINGS L.J. 889, 912 (1972) ("[Leveling down] may be of practical utility for financially troubled municipalities and heavily burdened judicial systems, but it does not serve to 'maintain a quality historically expected from the Supreme Court.'").

11. *See, e.g.*, Brake, *supra* note 1, at 516; Doherty, *supra* note 1, at 1019–21; Seidman, *supra* note , at 1–2; Cake, *supra* note 10, at 912.

12. *See, e.g.*, *Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2354 ("When the constitutional violation is unequal treatment, as it is here, a court theoretically can cure that unequal treatment either by extending the benefits or burdens to the exempted class, or by nullifying the benefits or burdens for all."). *But see id.* at 2365–66 (Gorsuch, J., concurring in part and dissenting in part) ("[W]e are asked to consider cases involving equal protection violations, where courts have sometimes solved the problem of unequal treatment by leveling others 'down' to the plaintiff 's status rather than by leveling the plaintiff 'up' to the status others enjoy. I am doubtful of our authority to rewrite the law in this way.").

13. *See, e.g.*, Brake, *supra* note 1, at 560 ("[L]eveling down may exacerbate the injuries of discrimination and is not consistent with equality law."); Doherty, *supra* note 1, at 1044 ("[L]eveling up . . . ensure[s] that discrimination is removed in the best way and that those who are entitled to bring claims can do so without fear."); Seidman, *supra* note 1, at 13 ("By granting a benefit to the disadvantaged class, the court remedies the equality problem without reducing the welfare of the advantaged class.").

14. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 69.

15. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 227 (1971); Heckler v. Mathews, 465 U.S. 728, 748–49 (1984); Sessions v. Morales-Santana, 137 S. Ct. 1678, 1700–01 (2017).

16. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 340–41 (2010) ("By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration."); *Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2354 ("Congress violated that First

the same harm resulting from Equal Protection violations.[17] Therefore, the historical acceptability of both leveling up and leveling down for Equal Protection violations obviates that they should likewise be acceptable remedies for these types of First Amendment violations.

Part II begins with an explanation of leveling. This is followed by an illustration of how leveling up works through a leading Equal Protection case. Next, it explores the history of key Equal Protection cases in which the Supreme Court held that leveling down, the more contentious option, was an appropriate remedy. Then, this Note reviews three recent cases addressing leveling: *American Association of Political Consultants* (accompanied by a recent lower court case that addressed a similar issue), *Espinoza*, and *Roman Catholic Diocese of Brooklyn*. Finally, Part II culminates with an explanation of some of the concerns about leveling down raised in the academic literature. Part III analyzes these recent First Amendment cases and the Court's reasoning for its determinations, comparing them to the Equal Protection cases, and exploring whether they are really any different. The Note addresses the Justices' arguments, as well as the arguments raised in the academic literature concerning leveling. Part IV recommends that leveling in either direction should be an acceptable remedy in unequal treatment First Amendment cases for three primary reasons: (1) leveling up and leveling down are considered acceptable remedies in Equal Protection cases, and unequal treatment First Amendment cases involve the same concerns; (2) the Court never truly deviated from its leveling jurisprudence in these recent cases; and (3) none of the concerns about leveling addressed in the academic literature indicate that the First Amendment context should be treated any differently from the Equal Protection context.

II. BACKGROUND

In the Equal Protection context, it seems to be firmly established that "inequality may be remedied either by leveling up or by leveling down."[18] In a situation in which one group enjoys a benefit but another does not, leveling up is the practice of extending the benefit to the disadvantaged party, bringing everyone up to the same level.[19] This remedies the unequal treatment "without reducing the welfare of the advantaged class."[20] For example, if a state passed a law making it illegal for women to wear hats, a court could invalidate the law,

Amendment equal-treatment principle in this case by favoring debt-collection robocalls and discriminating against political and other robocalls."); Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2254 (2020) (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017)) ("The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, 'protects religious observers against unequal treatment' and against 'laws that impose special disabilities on the basis of religious status.'").

17. *See* Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2410 (2003) (coining the term "First Amendment Equal Protection" to describe cases "where the government threatens to undermine equality in the realm of expression").

18. Brake, *supra* note 1.

19. *See* Doherty, *supra* note 1.

20. Seidman, *supra* note 1, at 13.

allowing people of all genders to wear hats (extending the benefit that everyone else enjoyed to the women as well).

By contrast, leveling down is the practice of removing the benefit from the advantaged class, bringing the group that is better off down to the level of those worse off.[21] In the above example, the court could order the state legislature to change the law, making it illegal for anyone to wear hats. Now the people who previously could wear hats could no longer wear their hats, and the women who challenged the law because they wanted to be able to wear hats still do not have that right. While this is an unfortunate outcome for everyone involved, it eliminates the unequal treatment itself. As Cornell Law Professor Michael Dorf puts it, "[l]eveling down as a remedy for an Equal Protection violation has an element of schadenfreude about it. But it nonetheless comports with our notions of what equality is about."[22] It is important to note that leveling in either direction can be done by either a court who is hearing a case challenging an Equal Protection violation[23] or by a legislative or executive entity.[24]

A. Leveling Up in the Equal Protection Context

Although the Supreme Court has repeatedly affirmed that leveling down is an option in Equal Protection cases,[25] the Court has a strong preference for leveling up when possible.[26] It made this clear in *Califano v. Westcott*, explaining that in "cases involving equal protection challenges[,] . . . extension, rather than nullification, is the proper course."[27] In *Westcott*, two couples challenged § 407 of the Social Security Act.[28] That provision "provide[d] benefits to families whose dependent children ha[d] been deprived of parental support because of the unemployment of the father, but d[id] not provide such benefits when the mother [became] unemployed."[29] The district court held that the gender-based distinction was unconstitutional unequal treatment and "ordered that benefits be paid to families deprived of support because of the unemployment of the mother to the same extent they are paid to families deprived of support because of the unemployment of the father."[30] The Supreme Court affirmed.[31]

21. *See* Doherty, *supra* note 1.

22. Michael Dorf, *Equal Protection and Leveling Down as Schadenfreude*, DORF ON LAW (June 14, 2017), http://www.dorfonlaw.org/2017/06/equal-protection-and-leveling-down-as.html [https://perma.cc/FU98-LH44].

23. *See, e.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1700–01 (2017).

24. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 219 (1971).

25. *See, e.g.*, *id.* at 227; *Morales-Santana*, 137 S. Ct. at 1700–01; Heckler v. Mathews, 465 U.S. 728, 748–49 (1984).

26. *See* Sabina Mariella, *Leveling Up over Plenary Power: Remedying an Impermissible Gender Classification in the Immigration and Nationality Act*, 96 B.U. L. REV. 219, 236 (2016) ("When lower courts have upheld federal legislation, and the Supreme Court has subsequently reversed on equal protection grounds, the Court, pressed to select a remedy itself, has demonstrated a preference for leveling up unless Congress has expressly demonstrated a different preference.").

27. Califano v. Westcott, 443 U.S. 76, 89 (1979).

28. *Id.* at 78, 80.

29. *Id.* at 78.

30. *Id.*

31. *Id.* at 93.

The Court noted that the district court "saw two remedial alternatives: a simple injunction against further operation of the . . . program, or extension of the program to all families with needy children where *either* parent is unemployed."[32] In addressing this choice of remedy, the Court explained that "[w]here a statute is defective because of underinclusion . . . there exist two remedial alternatives: a court may either declare [the statute] a nullity . . . or it may extend the coverage of the statute to include those who are aggrieved by the exclusion."[33] So, although the Court affirmed the lower court's choice to level up by extending the benefit to everyone, which cured the unequal treatment, the Court acknowledged that leveling down would also have been acceptable in this situation.[34]

B. Leveling Down in the Equal Protection Context

Although leveling up is the preferred choice,[35] the Supreme Court has repeatedly affirmed that leveling down is an acceptable remedy in Equal Protection cases.[36] Perhaps the most well-known of these cases is *Palmer v. Thompson*.[37] In *Palmer*, the city of Jackson, Mississippi maintained five public parks, which included swimming pools.[38] It operated all of these facilities on a segregated basis.[39] A number of Black citizens brought suit in federal court, "seeking a declaratory judgment that this state-enforced segregation of the races was a violation of the Thirteenth and Fourteenth Amendments, and asking for an injunction to forbid such practices."[40] The district court entered the declaratory judgment but not the injunction.[41] The city proceeded to desegregate all of the public facilities but, rather than desegregate the swimming pools, it closed four of them and transferred its lease on the fifth to a third party.[42]

In response, several Black citizens brought suit to force the city to "reopen the pools and operate them on a desegregated basis."[43] The district court held that the city's closing of the pools "did not deny black citizens equal protection of the laws."[44] The Fifth Circuit affirmed in an en banc decision.[45] That court "rejected the contention that since the pools had been closed either in whole or in part to avoid desegregation the city council's action was a denial of equal

32. *Id.* at 82 (emphasis added).
33. *Id.* at 89 (quoting Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring)).
34. *Id.* at 93.
35. *Id.* at 89.
36. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 227 (1971); Heckler v. Mathews, 465 U.S. 728, 748–49 (1984); Sessions v. Morales-Santana, 137 S. Ct. 1678, 1700–01 (2017).
37. *See generally* Cake, *supra* note 10 (discussing the decision at length as well as the policy concerns that stem from it).
38. *Palmer*, 403 U.S. at 218.
39. *Id.*
40. *Id.* at 218–19.
41. *Id.* at 219.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*

protection of the laws."[46] The Supreme Court granted certiorari, and addressed the question of whether leveling down cures unequal treatment.[47]

The Supreme Court held that the city did not deny Black citizens equal protection under the law.[48] In so holding, the Court explained that "neither the Fourteenth Amendment nor any Act of Congress purports to impose an affirmative duty on a State to begin to operate or to continue to operate swimming pools."[49] Addressing the question of equal treatment, the Court explained that "this is not a case where whites are permitted to use public facilities while blacks are denied access. It is not a case where a city is maintaining different sets of facilities for blacks and whites and forcing the races to remain separate in recreational or educational activities."[50] Importantly, the Court noted that "no case in this Court has held that a legislative act may violate Equal Protection solely because of the motivations of the men who voted for it."[51] Thus, the Court approved the city's choice to level down to avoid a potential Equal Protection violation, setting the precedent for future Equal Protection cases.[52]

Thirteen years later, the Supreme Court reached a similar conclusion in *Heckler v. Mathews*.[53] Many scholars consider *Heckler* to be the leading case in leveling down as applied to Equal Protection.[54] The Social Security Act contained a provision that "conferred certain benefits on women but not men."[55] The statute also contained a severability clause.[56] In effect, the severability clause ensured that "in the event that the courts struck down the sex-based preference, no one would get the benefit, i.e., the fallback was leveling down."[57] When a male plaintiff challenged the law under the Fourteenth Amendment, "the government argued that he lacked standing . . . . Even if the male challenger prevailed on his equal protection claim, the government said, he wouldn't get any benefit; thus his injury was not redressable by a favorable ruling."[58]

The Supreme Court held that Congress had the right to build in a leveling down mechanism in the form of a severability clause.[59] The Court explained that when choosing between leveling up and leveling down, congressional intent should be given consideration.[60] The Court, however, noted that the plaintiff did

46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 220.
50. *Id.*
51. *Id.* at 224.
52. *Id.* at 227. For a more thorough analysis of *Palmer* and its implications, see Cake, *supra* note 10.
53. Heckler v. Mathews, 465 U.S. 728, 748–49 (1984).
54. *See* Dorf, *supra* note 22.
55. *Id.*
56. *Heckler*, 465 U.S. at 734.
57. Dorf, *supra* note 22.
58. *Id.*
59. *Heckler*, 465 U.S. at 748–49.
60. *See id.* at 742–44.

have standing.[61] His injury was not the denial of the benefit but the denial of equal treatment.[62] Although it affirmed its position in *Westcott* that "ordinarily, 'extension, rather than nullification, is the proper course,'"[63] the Court noted that it has "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."[64] In other words, the Court's jurisprudence has never suggested that leveling up is the only available remedy. The Court used some familiar language from *Westcott*: A court facing an Equal Protection violation has "two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion."[65] Thus, the Court reaffirmed that when facing an Equal Protection violation, the violation can be remedied by *either* leveling up *or* leveling down.[66]

Even as recently as 2017, the Supreme Court has affirmed the validity of leveling down as applied to Equal Protection violations.[67] In *Sessions v. Morales-Santana*, the Court invalidated a federal statutory provision conferring citizenship on children born outside the United States to unwed United States-citizen mothers in some circumstances where such citizenship was denied to children born outside the United States to unwed United States-citizen fathers.[68] Again looking to Congress's intent,[69] the Court held that the provision violated the Equal Protection Clause as incorporated into the Fifth Amendment.[70] By invalidating the provision entirely, the Court denied the children of unwed United States-citizen mothers the benefit they would have received under the provision, bringing them down to the level of the disadvantaged class.[71] Justice Ginsburg reemphasized yet again what the Court explained in *Westcott*:

> There are "two remedial alternatives," [the Supreme Court's] decisions instruct . . . when a statute benefits one class . . . and excludes another from the benefit. "[A] court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion."[72]

61. *Id.* at 737–38.
62. *Id.* at 738.
63. *Id.* at 739 n.5 (quoting Califano v. Westcott, 443 U.S. 76, 89, 91 (1979)).
64. *Id.* at 738.
65. *Id.* (quoting Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring)).
66. *Id.* at 738–39.
67. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1700–01 (2017).
68. *Id.*
69. *See id.* at 1685.
70. *Id.* at 1700–01.
71. *Id.* at 1701.
72. *Id.* at 1698 (quoting Califano v. Westcott, 433 U.S. 76, 89 (1979)).

Once again, leveling down—despite having an unfortunate outcome for the previously benefitting parties—solved the unequal treatment problem and cured the constitutional violation.[73] Based on this line of cases, there can be no doubt that, at least in the Equal Protection context, both leveling up and leveling down are available remedies for curing unconstitutional unequal treatment.[74]

C. Leveling in the First Amendment Context

Leveling has seemingly had less consistent application in the First Amendment context.[75] Interestingly, the Supreme Court does not appear to have addressed this specific choice of remedy in First Amendment unequal treatment cases prior to 2020.[76] In the following cases, no member of the Court cites to a single First Amendment case in their discussion of leveling in a majority, plurality, or dissenting opinion.[77] Instead, members of the Court cite to Equal Protection cases, lending credence to the idea that Equal Protection jurisprudence is an appropriate place to look in deciding First Amendment cases.[78] Despite this fact, the Court reached opposite conclusions about whether leveling down was permissible in the contexts of Freedom of Speech and Free Exercise of Religion, and did not allow what seemed to be leveling up as a remedy in another Free Exercise case.[79]

1. Leveling Down Freedom of Speech

Barr v. American Association of Political Consultants addressed unequal treatment in the context of Freedom of Speech.[80] The Telephone Consumer Protection Act ("TCPA") was enacted in 1991 and prohibits robocalls to cell phones and home phones.[81] In 2015, Congress added a provision exempting robocalls attempting to collect debts owed to the United States government.[82] The plaintiffs, political and non-profit organizations, brought suit, claiming that

73. *Id.* at 1701.

74. *Id.*

75. *See, e.g.*, Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2262 (2020) (reversing the Montana Supreme Court's decision to strike down a tuition assistance program that violated the state constitution's "no-aid" provision); Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2356 (2020) (striking down a provision that exempted robocalls for the purpose of collecting debts owed to the federal government from the Telephone Consumer Protection Act's general prohibition on robocalls); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65 (2020) (enjoining the former Governor of New York from enforcing occupancy limits on churches that were stricter than those imposed on comparable secular activities even though the former Governor had already lifted the occupancy limits by the time the Court heard the case).

76. *See infra* note 78 and accompanying text.

77. *See* cases cited *supra* note 75.

78. *See, e.g.*, *Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2354 (citing Heckler v. Mathews, 465 U.S. 728, 740 (1984)).

79. *See Espinoza*, 140 S. Ct. at 2262; *Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2356; *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 69.

80. *Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2343.

81. *Id.*

82. *Id.*

the provision favored debt-collection speech over other types of speech.[83] The plaintiffs sought the same exception the government enjoyed when collecting debts.[84] The Supreme Court agreed that the exception was unconstitutional but, instead of extending the benefit to the plaintiffs, it struck down the provision, denying the benefit of the exception to everyone. The Court leveled down to cure unequal treatment in the Freedom of Speech context.[85]

Justice Kavanaugh discussed the similarities between the Equal Protection Clause and the Freedom of Speech Clause.[86] Most notably, despite being a First Amendment case as opposed to an Equal Protection case, Justice Kavanaugh explicitly characterized the case as "an equal-treatment case."[87] He went on to explain that "Congress violated that First Amendment equal-treatment principle in this case by favoring debt-collection robocalls and discriminating against political and other robocalls."[88] Finally, citing *Heckler*, he explained that "[w]hen the constitutional violation is unequal treatment, as it is here, a court theoretically can cure that unequal treatment either by extending the benefits or burdens to the exempted class, or by nullifying the benefits or burdens for all."[89]

Justice Kavanaugh squarely rejected the notion that "a First Amendment equal-treatment case is different" from an Equal Protection case.[90] He further noted that "the First Amendment does not tell us which way to cure the unequal treatment."[91] He determined that "severing the 2015 government-debt exception cures the unequal treatment."[92]

Justice Gorsuch disagreed.[93] In dismissing leveling down as an appropriate remedy, he dismissed the entire premise of analogizing the case to an Equal Protection case.[94] He argued that "the analogy to equal protection doctrine [does not] solve the problem. That doctrine promises equality of treatment, whatever that treatment may be. The First Amendment isn't so neutral. It pushes, always, in one direction: against governmental restrictions on speech."[95] As such, he would have issued an injunction preventing the TCPA from being enforced against the plaintiffs—he would have leveled up (at least partially).[96]

83. *Id.*
84. *Id.*
85. *Id.* at 2356.
86. *Id.* at 2354.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 2355.
91. *Id.*
92. *Id.*
93. *Id.* at 2365 (Gorsuch, J., concurring in part and dissenting in part).
94. *Id.*
95. *Id.* at 2366
96. *Id.* at 2365.

Lower courts have also allowed government entities to level down in the Freedom of Speech context.[97] Without even needing to rely on the precedent set in *American Association of Political Consultants*, the United States District Court for the District of Minnesota allowed the city of Belle Plaine to level down in *Satanic Temple v. City of Belle Plaine*.[98] In that case, the city council passed a resolution creating a limited public forum, allowing "private parties access to Veterans Memorial Park for the purpose of erecting displays in keeping with the purpose of honoring and memorializing veterans."[99] The Belle Plaine Veterans Club was granted a permit under the resolution to erect a display.[100] The Satanic Temple also submitted an application to erect a display in the park.[101] Soon thereafter, the city passed another resolution which rescinded the first resolution and eliminated the limited public forum.[102] The city leveled down, opting to refuse to let anyone exercise their Freedom of Speech over allowing the Satanic Temple to do so.[103]

When the Satanic Temple sued, the district court characterized the city's actions not as a content restriction, but as a time, place, and manner restriction.[104] The court explained that "[a]ny restriction on speech that does not fall within the type of expression permitted in a limited public forum must be reasonable and viewpoint neutral. But the government need not keep a limited forum open indefinitely."[105] The court determined that as the city's actions were viewpoint neutral because it denied everyone the benefit, the Satanic Temple failed to state a claim on which relief could be granted.[106] Notably, the court said that the Satanic Temple alleged "no facts demonstrating that [the resolution] did not apply equally to all entities."[107] Because the city leveled down, denying everyone the benefit, there was no unequal treatment.[108]

97. *See, e.g.*, Satanic Temple v. City of Belle Plaine, 475 F. Supp. 3d 950, 961 (D. Minn. 2020) (characterizing the city's speech restriction as viewpoint neutral because it denied a benefit to everyone, thus permitting the city to level down).

98. *Id.*

99. *Id.* at 956.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 957.

104. *See id.* at 961.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

2. Leveling Down Free Exercise of Religion

Espinoza v. Montana Department of Revenue addresses unequal treatment in the context of Free Exercise of Religion.[109] The Montana Legislature created a program which provided tuition assistance to parents who sent their children to private schools.[110] It granted a tax credit to anyone who donated to organizations which award scholarships to certain students attending the private schools.[111] When the Montana legislature created the program, however, it also enacted a regulation directing that the program be administered in accordance with Article X, Section 6, of the Montana Constitution, which contains a "no-aid" provision, barring government aid to religious schools.[112] When the petitioners "sought to use the scholarships at a religious school, the Montana Supreme Court struck down the program."[113] The respondent specifically argued that there was no violation here because the Montana Supreme Court leveled down by eliminating the program altogether.[114] The Supreme Court, however, reversed the Montana Supreme Court's decision, reinstating the program, remanding the case, and ordering the Montana Supreme Court to "'disregard[]' the no-aid provision and decide[] this case 'conformably to the [C]onstitution' of the United States."[115]

Justice Ginsburg, in dissent, argued that because the Montana Supreme Court leveled down by eliminating the scholarship program altogether, there was no longer any unequal treatment.[116] She reasoned that "the Montana court remedied the state constitutional violation by striking the scholarship program in its entirety. Under that decree, secular and sectarian schools alike are ineligible for benefits, so the decision cannot be said to entail differential treatment based on petitioners' religion."[117] Further underscoring the way in which leveling down remedies the unequal treatment problem, she explained that "petitioners argue that the Free Exercise Clause requires a State to treat institutions and people neutrally when doling out a benefit—and neutrally is how Montana treats them in the wake of the state court's decision."[118]

Chief Justice Roberts, who wrote the Court's majority opinion, drew an interesting procedural distinction, refusing to directly address the question of whether leveling down is acceptable in unequal treatment Free Exercise of

109. Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2262–63 (2020) (holding that the Montana Supreme Court's invalidation of a tuition program that violated the state constitution's "no-aid" provision violated the Free Exercise Clause of the First Amendment).

110. *Id.* at 2251.

111. *Id.*

112. *See* MONT. CODE ANN. §15-30-3101 (2021); *see also* MONT. CONST. art. X, § 6 ("The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.").

113. *Espinoza*, 140 S. Ct. at 2251.

114. *Id.* at 2261–62.

115. *Id.* at 2262 (quoting Marbury v. Madison, 5 U.S. 137, 178 (1803)).

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

117. *Id.*

118. *Id.*

Religion cases.[119] Chief Justice Roberts argued that the Montana Supreme Court's decision to strike down the program completely was not a "neutral policy decision."[120] He explained:

> When the Court was called upon to apply a state law no-aid provision to exclude religious schools from the program, it was obligated by the Federal Constitution to reject the invitation. Had the Court recognized that this was, indeed, "one of those cases" in which application of the no-aid provision "would violate the Free Exercise Clause," the Court would not have proceeded to find a violation of that provision. And, in the absence of such a state law violation, the Court would have had no basis for terminating the program.[121]

Therefore, he reasoned that "[b]ecause the elimination of the program flowed directly from the Montana Supreme Court's failure to follow the dictates of federal law, it cannot be defended as a neutral policy decision."[122]

It would seem, then, that even Chief Justice Roberts, although reaching a different outcome, accepts the idea that leveling down is an acceptable remedy *in theory*, just not in this particular case.[123] Otherwise, he could have just addressed that issue head on instead of relying on this procedural issue. So, we have one unequal treatment First Amendment case where the Court did employ leveling down as a remedy,[124] and one in which it did not, but because of a procedural technicality, not the doctrine itself.[125]

3. Leveling Up Free Exercise of Religion

Most recently, the Supreme Court addressed leveling up in the Free Exercise context.[126] In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court was asked to issue an injunction preventing the former governor of New York from enforcing an executive order which placed occupancy limits on churches because the applicants claimed it was stricter than limits imposed on comparable secular activities.[127] The former governor divided New York into different zones.[128] In red zones, a maximum of ten persons could attend religious services.[129] In orange zones, the maximum occupancy was twenty-five people.[130] In these same zones, however, secular businesses categorized as "essential" were

119. *Id.* at 2261–62.
120. *Id.* at 2262.
121. *Id.* (quoting Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 614 (Mont. 2018)).
122. *Id.*
123. *Id.*
124. Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2356 (2020).
125. *Espinoza*, 140 S. Ct. at 2262.
126. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65–66 (2020) (enjoining the former governor of New York from enforcing occupancy limits on churches that were stricter than those imposed on comparable secular activities even though the former governor had already lifted the occupancy limits by the time the Court heard the case).
127. *Id.* at 65–67.
128. *Id.* at 65–66.
129. *Id.* at 66.
130. *Id.*

allowed to have "as many people as they wish[ed]."[131] The list of essential businesses included "acupuncture facilities, camp grounds, [and] garages."[132] Two religious groups from two different religions applied for the injunction.[133]

After the applicants asked the Court for relief, "the Governor reclassified the areas in question from orange to yellow, [meaning] that the applicants may hold services at 50% of their maximum occupancy."[134] Despite this fact, the Court said that the applicants "made a strong showing that the challenged restrictions violate[d] 'the minimum requirement of neutrality' to religion."[135]

Setting aside whether Cuomo's restrictions on churches were harsher than those imposed on comparable secular activities, at the time the Court entertained the application for injunctive relief, there was no unequal treatment.[136] The dissenters believed that the former governor had leveled up, curing the unequal treatment.[137] As the majority opinion characterized the dissenters' position: "The dissenting opinions argue that we should withhold relief because the relevant circumstances have now changed. After the applicants asked this Court for relief, the Governor reclassified the areas in question [so] that the applicants may hold services at 50% of their maximum occupancy."[138] The majority continued: "[t]he dissents would deny relief at this time but allow the Diocese [of Brooklyn] and Agudath Israel to renew their requests if this recent reclassification is reversed."[139]

The majority disagreed, arguing that "[i]t is clear that this matter is not moot."[140] Citing to a 2014 case, it explained that "injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified."[141] In that case, the Court explained that when deciding whether a party has standing, "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'"[142]

131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 68.
135. *Id.* at 66 (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993)).
136. *See id.* at 68.
137. *See id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* (citing Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014)).
142. *Driehaus*, 573 U.S. at 158 (holding that the threat of a future injury may suffice to satisfy Article III standing).

D. Academic Discussions of Leveling

As explained above, there is very little controversy when it comes to leveling up. Recall that the Supreme Court reaffirmed in *Heckler* that "ordinarily, 'extension, rather than nullification, is the proper course.'"[143] The academic literature generally agrees.[144] The discussion of leveling is typically a criticism of leveling down.[145] Any argument against leveling up is usually based on budgetary concerns.[146] Whether leveling down in the Equal Protection context is right or wrong based on the policy concerns raised in this literature is not within the scope of this Note.[147] Those arguments, however, warrant a brief explanation here for the purpose of assessing whether they apply differently in the First Amendment context.

The primary criticism of leveling down is that instead of improving anyone's material situation, this remedy both denies the disadvantaged party the benefit they seek and worsens the situation of the advantaged party.[148] As Professor Deborah Brake puts it, "[t]he permissibility of leveling down confronts persons disadvantaged by inequality with a double bind: challenge the inequality and risk worsening the situation for others instead of improving one's own situation, or continue to endure unlawful discrimination."[149] The solution she proposes is "to recognize that leveling down is not always consistent with the meaning of equality as reflected in U.S. discrimination law."[150]

One of her primary concerns is that leveling down "relies on a principle of equal treatment as the exclusive meaning of equality without taking into account alternative understandings that would render leveling down problematic in certain settings."[151] Leveling down "proceeds from an abstracted and objectified analysis of equality that ignores the lived experience of inequality and implicitly privileges the perspective of those doing the abstracting."[152] In her view, the analysis of leveling down, as it stands today, "treats equality as if it were about balancing faceless pieces of clay on a scale with the single goal of arriving at equal weights in either direction."[153] These concerns are quite apparent in *Palmer*, for example, where Black citizens were granted "equal treatment" as it

143. Heckler v. Mathews, 465 U.S. 728, 739 n.5 (1984) (quoting Califano v. Westcott, 443 U.S. 76, 89, 91 (1979)).

144. *See, e.g.*, Doherty, *supra* note 1, at 1044 ("[L]eveling up . . . ensure[s] that discrimination is removed in the best way and that those who are entitled to bring claims can do so without fear."); Seidman, *supra* note 1, at 13 ("By granting a benefit to the disadvantaged class, the court remedies the equality problem without reducing the welfare of the advantaged class.").

145. *See, e.g.*, Brake, *supra* note 1, at 560 ("[L]eveling down may exacerbate the injuries of discrimination and is not consistent with equality law.").

146. *See, e.g.*, Cumming v. Richmond Cty. Bd. of Educ., 175 U.S. 528, 544 (1889).

147. For an extremely thorough and detailed analysis of several of the policy concerns that call the validity of leveling down in the Equal Protection context into question, see *id.*

148. *See* Brake, *supra* note 1, at 516.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

pertained to the public pools.[154] This "equal treatment" not only did not give the plaintiffs the remedy they sought but still very likely left them worse off than their white counterparts, even though they were technically being treated equally.[155] For example, it is very likely that the white residents of Jackson, Mississippi, as a group, had more access to private pools, perhaps though club memberships, possibly due to more economic means to purchase their own pools, or maybe having friends who could afford pools.[156] So, while all of the citizens were being treated "equally," in that none of them had access to the public pools, there is a strong argument to be made that the result of this "equal treatment" was more inequality on the whole.[157]

Professor Louis Michael Seidman outlines the fragmented landscape that is leveling jurisprudence—what he calls the "ratchet wreck."[158] One cause of this fragmentation is the variety of approaches which different courts employ when deciding what remedy to implement.[159] It is useful to discuss some of these theories to determine whether they apply differently to the First Amendment than they do to Equal Protection.

Professor Seidman explains that a "welfarist approach" calls for "legal rules [to be] evaluated solely in terms of their effect on welfare and [not to] be influenced by whether they meet the criteria for fairness."[160] This approach is based on the underlying philosophy that "a change that makes at least one person better off but no one worse off uncontroversially enhances human welfare and therefore ought to be made. Conversely, a change that makes at least one person worse off but no one better off is inefficient and should be avoided."[161] He explains that one problem with this approach is that it runs the risk of "reading the equality requirement out of the Constitution."[162] Under this framework, leveling down would never be allowable, but "so long as an equality mandate is part of the Constitution, the law must require downward ratchets when upward ratchets are impossible."[163]

Another approach Professor Seidman explores is the "noninstrumental equality" approach.[164] Under this approach, "equality is a good in itself that

154. Palmer v. Thompson, 403 U.S. 217, 219 (1971) (holding that the city of Jackson, Mississippi did not violate the Equal Protection Clause by shutting down its swimming pools rather than desegregating them).

155. *See id.*

156. *Cf. id.* ("However, the city council decided not to try to operate the public swimming pools on a desegregated basis. Acting in its legislative capacity, the council surrendered its lease on one pool and closed four which the city owned. A number of [black] citizens of Jackson then filed this suit to force the city to reopen the pools and operate them on a desegregated basis.").

157. *Id.* at 268 (White, J., dissenting).

158. *See* Seidman, *supra* note 1, at 8, 9 (characterizing the Supreme Court's leveling jurisprudence as a "chaotic landscape" and providing a roadmap to "clean up the mess").

159. Professor Seidman explains that "no equality theory explains all of the Court's [leveling] decisions." *Id.* at 63.

160. *Id.* at 40–41.

161. *Id.* at 41.

162. *Id.* at 42. Professor Seidman goes on to explain that "[w]elfarist theories conflict with cases mandating [leveling down] and, perhaps, with the equality requirement itself." *Id.* at 63.

163. *Id.* at 42.

164. *Id.* at 44.

people value regardless of its material consequences."[165] He asserts that many of the Court's decisions use this approach.[166] Professor Brake highlighted one of the biggest problems with this theory—that legal equality is not always practical equality.[167] Professor Seidman also explains that this approach "proceed[s] on the undemonstrated empirical assumption that people in fact value equality as a noninstrumental good even when equal treatment leaves everyone otherwise worse off. At best, then, the argument clears the way for downward leveling without proving that it is justified."[168]

This is by no means an exhaustive list of the concerns discussed in the academic literature, but these are the most relevant to the discussion of leveling in the First Amendment context. This Note now turns to a discussion of the recent First Amendment cases and an evaluation of the Justices' arguments for and against leveling. As part of this analysis, this Note considers whether the concerns raised in the academic literature apply differently in the First Amendment context than they do in the Equal Protection context.

III. ANALYSIS

In this Part, this Note explores whether the unequal treatment in the First Amendment context is really any different from the Equal Protection context for the purposes of leveling. Legal scholars disagree on the answer to that question,[169] as do the Justices themselves.[170] This Part analyzes the Justices' arguments for and against leveling in *American Association of Political Consultants*, *Espinoza*, and *Roman Catholic Diocese of Brooklyn*, and compares them to the Court's reasoning in the key Equal Protection cases. It also assesses whether the concerns raised in the academic literature warrant approaching unequal treatment First Amendment cases differently from Equal Protection cases.

165. *Id.*

166. *Id.* at 45. Professor Seidman explains, however, that "[n]oninstrumental theories . . . might explain some [leveling down decisions], but not all of them and, in any event, do not cohere with the Court's overall approach to equality." *Id.* at 63.

167. Brake, *supra* note 1, at 516.

168. Seidman, *supra* note 1, at 46.

169. *See* Tokaji, *supra* note 17, at 2421 ("There are substantial differences of opinion over the character of the equality that the First Amendment and the Equal Protection Clause demand, differences that correspond to conflicting theories of what values these constitutional mandates should serve.").

170. *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2354 (2020) ("When the constitutional violation is unequal treatment, as it is here, a court theoretically can cure that unequal treatment either by extending the benefits or burdens to the exempted class, or by nullifying the benefits or burdens for all."). *But see id.* at 2365 (Gorsuch, J., concurring in part and dissenting in part) ("[W]e are asked to consider cases involving equal protection violations, where courts have sometimes solved the problem of unequal treatment by leveling others 'down' to the plaintiff 's status rather than by leveling the plaintiff 'up' to the status others enjoy. I am doubtful of our authority to rewrite the law in this way.").

A. Unequal Treatment in Freedom of Speech

Justice Scalia once opined that "the First Amendment is a kind of Equal Protection Clause for ideas."[171] Justice Kavanaugh agreed with this reasoning in the Freedom of Speech context in *American Association of Political Consultants*.[172] Recall that his argument relied on the premise that "Congress violated that First Amendment equal-treatment principle . . . by favoring debt-collection robocalls and discriminating against political and other robocalls."[173] So, if the harm in that case was unequal treatment, and the harm in Equal Protection cases is unequal treatment, Justice Kavanaugh is correct in asserting that the same remedies should be available.[174] And, as explained above, leveling down is a remedy that has long been available in the Equal Protection context.[175] Indeed, Justice Kavanaugh made this argument, and cited to only one case for support—*Heckler*—an Equal Protection case.[176]

But Justice Kavanaugh did address some of the more complex issues raised by leveling down.[177] Primarily, he addressed the plaintiffs' contention that "a court should not cure a 'First Amendment violation by outlawing more speech.'"[178] He discarded this argument, noting that the "implicit premise of that argument is that extending the robocall restriction to debt-collection robocalls would be unconstitutional. But that is wrong. A generally applicable robocall restriction would be permissible under the First Amendment."[179]

Justice Gorsuch agreed with the plaintiffs' argument.[180] He agreed that there was a First Amendment unequal treatment issue but contended that the appropriate remedy was "an injunction preventing [the provision's] enforcement against [the plaintiffs]."[181] He made two primary arguments. His first argument was that leveling down in this case was not "a remedy at all."[182] He went on to say:

> [The plaintiffs] came to court asserting a right to speak, not a right to be free from other speakers. Severing and voiding the government-debt exception does nothing to address the injury they claim; after today's ruling, federal law bars the plaintiffs from using robocalls to promote political causes just as stoutly as it did before. What is the point of fighting

171. Williams-Yulee v. Fla. Bar, 575 U.S. 433, 470 (2015) (Scalia, J., dissenting).

172. *Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2354.

173. *Id.*

174. *Id.*

175. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 227 (1971) (holding that the city of Jackson, Mississippi did not violate the Equal Protection Clause by shutting down its swimming pools rather than desegregating them).

176. *Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2354.

177. *Id.*

178. *Id.* at 2355.

179. *Id.*

180. *Id.* at 2365 (Gorsuch, J., concurring in part and dissenting in part).

181. In other words, he would have leveled up. *Id.*

182. *Id.*

> this long battle, through many years and all the way to the Supreme Court, if the prize for winning is no relief at all?[183]

But this assessment ignores what the Court has established in Equal Protection jurisprudence.[184] As the Court explained in *Heckler*, the injury is not the denial of the benefit but the denial of equal treatment.[185] The *Heckler* Court explicitly stated that it has "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."[186] So leveling down in this case *was* in fact a remedy.[187] It just wasn't the specific remedy the plaintiffs were seeking.[188] They were being treated unequally, and Justice Kavanaugh's solution cured that unequal treatment.[189]

Justice Gorsuch's second argument in *American Association of Political Consultants* was that the First Amendment is different from the Equal Protection Clause.[190] He argued that while the Equal Protection Clause "promises equality of treatment, whatever that treatment may be[,] The First Amendment isn't so neutral. It pushes, always, in one direction: against governmental restrictions on speech."[191]

Justice Gorsuch's statement overlooks the very subset of First Amendment cases of which *American Association of Political Consultants* is a member: cases in which Freedom of Speech is being granted to one group of people but not another.[192] This is, by definition, unequal treatment.[193] There are of course many Freedom of Speech cases in which the violation is the government's abridgment of some type of speech for everyone across the board, and in those cases, Justice Gorsuch's contention is correct.[194] But that is not the only type of Freedom of Speech case. In cases in which the violation is unequal treatment, the Court has explained that "[t]here are 'two remedial alternatives,'" leveling up *or* leveling down.[195]

While the discussions of leveling down in the academic literature certainly raise valid concerns in general, nothing about them suggests that the Freedom of Speech should be treated differently.[196] Professor Brake's concern that leveling down "treats equality as if it were about balancing faceless pieces of clay on a

183. *Id.* at 2366 (Gorsuch, J., concurring in part and dissenting in part).
184. *See* Heckler v. Mathews, 465 U.S. 728, 739 (1984).
185. *Id.*
186. *Id.* at 738.
187. *Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2354.
188. *Id.*
189. *Id.* at 2355.
190. *Id.* at 2366 (Gorsuch, J., concurring in part and dissenting in part).
191. *Id.*
192. *See, e.g.*, Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 96 (1972).
193. *Id.*
194. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 415 (1989).
195. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698 (2017) (quoting Califano v. Westcott, 433 U.S. 76, 89 (1979)).
196. *See* Brake, *supra* note 1, at 516.

scale with the single goal of arriving at equal weights in either direction"[197] is a legitimate concern that calls into question the validity of leveling down as a remedy on the whole, but this concern holds true in both the First Amendment and the Equal Protection context.[198] Literal equal protection under the law can have the same disparate impact on some protected classes that literal equal treatment in the Freedom of Speech context can.[199] For example, if the government were to deny unemployment benefits to anyone who was fired from their job for using peyote, this would have a disparate impact on members of some Native American religions even though the law treats everyone equally. Yet the Supreme Court would allow such a law.[200]

The above concerns are valid. Perhaps leveling down should never be allowed as a remedy, especially when it causes an already marginalized group to be even worse off. That is a reasonable position. But that debate is outside the scope of this Note. If the Court allows leveling down as a remedy in the Equal Protection context, there is no reason why it should not also be a remedy in the Freedom of Speech context.

The possible approaches Professor Seidman outlines also present no reasons why Freedom of Speech should be treated differently.[201] Under his explanation of the welfarist approach, "a change that makes at least one person worse off but no one better off is inefficient and should be avoided."[202] But he explains that "so long as an equality mandate is part of the Constitution, the law must require downward ratchets when upward ratchets are impossible."[203] Because the Constitution requires equal treatment in both the Fourteenth Amendment context and in the Freedom of Speech context, under this approach, leveling down should be allowed in both contexts.[204]

Professor Seidman's explanation of the noninstrumental equality approach yields the same result.[205] Under this approach, "equality is a good in itself that people value regardless of its material consequences."[206] This is exactly the approach that led to Justice Kavanaugh's solution in *American Association of Political Consultants*.[207] If equality is a good in itself, we should want equality in both the Equal Protection and the Freedom of Speech context. Leveling down cures unequal treatment, so under this approach, it should be a remedy in both contexts.[208]

197. *Id.*
198. *See* discussion *infra* Section III.B.
199. *Id.*
200. *Id.*
201. Seidman, *supra* note 1, at 58–59.
202. *Id.* at 41.
203. *Id.* at 42.
204. *See id.*
205. *Id.* at 44.
206. *Id.*
207. Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2354 (2020).
208. *See id.* at 2354–55.

B. Unequal Treatment in Free Exercise of Religion

The Justices' positions on leveling in the Free Exercise of Religion context are much less clear than their positions in the Freedom of Speech context. In the following cases, the Justices present what seem like puzzling arguments. Moreover, the cases have what at first glance appear to be confusing results. Further analysis, however, reveals that the Court's leveling jurisprudence is maintained despite the outcomes of these cases.[209]

1. Leveling Down in Free Exercise of Religion

In *Espinoza*, while the Justices disagreed on the appropriate outcome, the majority did very little to address leveling down as a possible remedy.[210] In fact, Chief Justice Roberts side-stepped the question entirely by finding a procedural violation that led to the Montana Supreme Court leveling down.[211] A deeper look into some of his comments, however, reveals two implied arguments.

First, although the majority did not explicitly say as much, the fact that the Court heard the case at all necessitates that leveling down, at least by the Montana Supreme Court, was not an acceptable remedy in the majority's view.[212] Justice Ginsburg's dissent suggested that the petitioners did not even have standing.[213] Recall that in *Heckler*, the Court explained that the plaintiff's injury was not the denial of the benefit, but the denial of equal treatment.[214] Drawing a distinction from *Trinity Lutheran*,[215] Justice Ginsburg explained that in *Espinoza*, there was no "*differential treatment* occasioning a burden on a plaintiff's religious exercise."[216] Indeed, she explained that *Espinoza* "is missing that essential component."[217] And that is because "the Montana court remedied the state constitutional violation by striking the scholarship program in its entirety."[218] In fact, her very first question out of the gate at oral argument was, "[u]der the Montana judgement, [the petitioners] are treated no differently than parents of children who are going to secular private schools, so where is the harm?"[219] If the petitioners were being treated the same way as everyone else, and leveling down is an acceptable remedy, then there would be no live case or controversy for the Court to hear.[220] Therefore, something about the Montana

209. *See* discussion *infra* Subsection III.B.1.

210. *See* Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2262 (2020).

211. *See id.* at 2262–63.

212. *See id.*

213. *See id.* at 2279 (Ginsburg, J., dissenting).

214. Heckler v. Mathews, 465 U.S. 728, 739–40 (1984).

215. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017) (holding that the Missouri Department of Natural Resources discriminated against a church by disqualifying it from a public program that benefitted secular institutions).

216. *Espinoza*, 140 S. Ct. at 2279 (Ginsburg, J., dissenting).

217. *Id.*

218. *Id.*

219. Oral Argument at 02:18, Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246 (2020), https://www.oyez.org/cases/2019/18-1195 [https://perma.cc/JA33-WDWZ].

220. *See* U.S. CONST. art. III, § 2, cl. 1.

Supreme Court's leveling down must not have been an acceptable remedy for the majority.

Chief Justice Roberts seems to imply that the Montana legislature could have leveled down, just not the state's Supreme Court.[221] He explains that "[t]he Montana Legislature created the scholarship program; the Legislature never chose to end it, for policy or other reasons. The program was eliminated by a court, and not based on some innocuous principle of state law."[222]

But his real issue here seemed to be one of motive more than one of procedure. While he did not explicitly speak to the Montana legislature's or the Montana Supreme Court's motive as being dispositive in this case, he did offer a glimpse into his thinking, characterizing those bodies' actions as follows: "[T]he Montana Supreme Court invalidated the program pursuant to a state law provision that expressly discriminates on the basis of religious status."[223] He went on to again couch the motive issue in procedural language, explaining that "[b]ecause the elimination of the program flowed directly from the Montana Supreme Court's failure to follow the dictates of federal law, it cannot be defended as a neutral policy decision, or as resting on adequate and independent state law grounds."[224]

But why not just reverse the Montana Supreme Court's decision on the motive grounds alone? Once again, the answer is in the Court's Equal Protection jurisprudence.[225] Going all the way back to *Palmer*, the Court has said that despite the fact that "petitioners have argued that the Jackson pools were closed because of ideological opposition to racial integration in swimming pools," and that "evidence in the record appears to support this argument . . . . [t]here is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters."[226] The Court explained that "[i]f the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons."[227] Chief Justice Roberts's refusal to reinstate the program based on motive, instead finding another excuse, was a tacit endorsement of Equal Protection jurisprudence in the Free Exercise of Religion context.[228] He recognized that under the Court's Equal Protection precedents, motive was an insufficient reason to reverse the Montana Supreme Court's decision.[229] He, therefore, had to find another way. If the Free Exercise of Religion context were different from the Equal Protection context, the Court could have just said so.[230]

221. *See Espinoza*, 140 S. Ct. at 2262.
222. *Id.*
223. *See id.*
224. *See id.*
225. *See e.g.*, Palmer v. Thompson, 403 U.S. 217, 224 (1971).
226. *Id.* at 224–25.
227. *Id.* at 225.
228. *See id.* at 224–26.
229. *See id.*
230. *See id.*

And the Supreme Court has endorsed the value of equal treatment—the foundational principal of the Equal Protection Clause—in the Free Exercise of Religion context before.[231] In *Employment Division v. Smith*, the Court, when faced with a question of unequal treatment in the Free Exercise of Religion context, chose to treat everyone equally instead of giving a special exception to those of a particular religion.[232] In *Smith*, the respondents were fired from their jobs because they used peyote at a ceremony at their Native American church.[233] When they applied for unemployment benefits, they were denied because they had been discharged for work-related misconduct under Oregon's criminal code.[234] The Court upheld the denial of benefits because the criminal law because of which they were denied benefits was a "valid and neutral law of general applicability."[235]

The Court was faced with a choice. It could mandate a religious exemption for all people seeking unemployment benefits whose religious practices precluded them from obtaining the benefits, or it could let the law stand, endorsing equal treatment in the Free Exercise of Religion context. It chose the latter.[236] In fact, Justice Scalia, addressing the idea of granting every religious exemption that anyone asked for, declared that "[a]ny society adopting such a system would be courting anarchy."[237] He explained that allowing such exemptions "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[238] Although *Smith* has been criticized increasingly in recent years,[239] it remains good law today, and is part of the Court's Free Exercise of Religion jurisprudence.[240] It shows that just like in the Equal Protection context, in the Free Exercise of Religion context, the Court values equal treatment.

Again, the discussions in the academic literature do nothing to demonstrate that Free Exercise of Religion should be treated differently from Equal Protection when it comes to leveling down. Professor Brake's concerns that leveling down "proceeds from an abstracted and objectified analysis of equality that ignores the lived experience of inequality and implicitly privileges the perspective of those doing the abstracting" is absolutely valid, but it is equally valid in both contexts.[241] Certainly, there are persons belonging to underrepresented and

231. *See* Emp. Div. v. Smith, 494 U.S. 872, 890 (1990) (holding that an Oregon state law that denied unemployment benefits to individuals who use peyote for religious purposes did not violate the Free Exercise Clause because the law prohibited drug use for everyone equally).

232. *Id.*

233. *Id.* at 874.

234. *Id.*

235. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring)), 890.

236. *Id.* at 890.

237. *Id.* at 888.

238. *Id.*

239. *See, e.g.*, Petition for Writ of Certiorari at 2, Fulton v. Philadelphia, 141 S. Ct. 1868 (2021) (No. 18-2574), https://www.supremecourt.gov/DocketPDF/19/19-123/108931/20190722174037071_Cert%20Petition%20FINAL.pdf [https://perma.cc/VV4R-CABA] (specifically calling for the Supreme Court to revisit *Smith*).

240. *See id.* at 31.

241. Brake, *supra* note 1, at 516.

persecuted religions whose lived experience of inequality is ignored by leveling down, and those of religious majorities who are privileged to be implementing such a remedy.[242] That is a strong argument for doing away with leveling down as a remedy altogether, but it does not present a unique argument against leveling down in the Free Exercise of Religion context alone.

Nor do the approaches Professor Seidman outlines do anything to set apart Free Exercise of Religion as a unique context in which leveling down should be disallowed. Under the welfarist approach, again, "a change that makes at least one person worse off but no one better off is inefficient and should be avoided."[243] This is a condemnation of leveling down, but just like in the Freedom of Speech context, nothing about this approach makes the Free Exercise of Religion context unique.[244] Therefore, perhaps leveling down should not be an acceptable remedy at all, but if it is in the Equal Protection context, it should be in the Free Exercise of Religion context as well.

Likewise, the noninstrumental equality approach, which endorses equality as "a good in itself that people value regardless of its material consequences," would allow for leveling down in any context.[245] Equality is just as much of a good in the Free Exercise of Religion context as it is in the Equal Protection context under this approach. Therefore, leveling down should be an allowable remedy in both contexts.

2. Leveling Up in Free Exercise of Religion

Given that the Supreme Court has made clear that it has a strong preference for leveling up,[246] one would think that the Justices would have little to disagree about in a leveling up situation. But *Roman Catholic Diocese of Brooklyn* tells a different story.[247] Recall that prior to the Court even hearing the case, former Governor Cuomo seemingly leveled up by lifting the COVID-19 restrictions he had placed on the houses of worship via executive order.[248] But despite this, the Court said that the applicants "made a strong showing that the challenged restrictions violate[d] 'the minimum requirement of neutrality' to religion."[249]

It is indisputable that at the time the Court heard the case, there was no unequal treatment in any literal sense.[250] Indeed, the dissenters argued that Cuomo leveled up and cured the unequal treatment.[251] The majority, on the other

242. *Id.*
243. Seidman, *supra* note 1, at 41.
244. *See id.*
245. *Id.* at 44–45.
246. *See* Mariella, *supra* note 26, at 236 ("When lower courts have upheld federal legislation, and the Supreme Court has subsequently reversed on equal protection grounds, the Court, pressed to select a remedy itself, has demonstrated a preference for leveling up unless Congress has expressly demonstrated a different preference.").
247. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68 (2020).
248. *Id.*
249. *Id.* at 66 (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993)).
250. *See id.* at 68.
251. *Id.*

hand, argued that "[i]t is clear that this matter is not moot."[252] It explained that "injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange."[253]

So here, the Court seemingly did not allow leveling up as a remedy because the threat of unequal treatment was "certainly impending."[254] This case did not involve actual permanent leveling, only a temporary leveling, and even that was incidental. As the majority explained, "[t]he Governor regularly changes the classification of particular areas without prior notice. If that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained."[255] Had Cuomo permanently lifted all COVID-19 restrictions, then he would have truly leveled up. Alternatively, had he limited all businesses to the same restrictions as the houses of worship, he truly would have leveled down. Both courses of action would have cured the unequal treatment.

But here, the State reserved the right to reinstate the restrictions at any time.[256] Indeed, the former Governor could have theoretically leveled up the day before any legal challenge to its restrictions, and "nothing would prevent the Governor from reinstating the challenged restrictions [the next day]."[257] Even Cuomo himself acknowledged this, musing that "'it's only a matter of time before [all] five boroughs' of New York City are flipped from yellow to orange."[258] Thus, Justice Gorsuch concluded, "it seems inevitable this dispute will require the Court's attention."[259]

Further, Cuomo did not level *in order to* cure the unequal treatment, as in, for example, *Palmer* or *Espinoza*.[260] In fact, he very well may have leveled up merely to avoid suit.[261] Recall that in *Palmer*, the city closed all the public pools so that everyone was equally denied the benefit in an attempt to preclude an Equal Protection violation.[262] Likewise, in *Espinoza*, the Montana Supreme Court ended the scholarship program so that neither religious nor secular schools would receive the benefit, curing the unequal treatment.[263] But *Roman Catholic Diocese of Brooklyn* was different. Here, the former Governor claimed he

252. *Id.*

253. *Id.* (citing Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014)).

254. *Driehaus*, 573 U.S. at 158 (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401 (2013)).

255. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 68.

256. *Id.*

257. *Id.* at 72 (Gorsuch, J., concurring).

258. *Id.* (quoting Jon Skolnik, David Goldiner & Denis Slattery, *Staten Island Goes 'Orange' As Cuomo Urges Coronavirus 'Reality Check' Ahead of Thanksgiving*, N.Y. DAILY NEWS (Nov. 23, 2020), https://www.nydailynews.com/coronavirus/ny-coronavirus-cuomo-thanksgiving-20201123-yyhxfo3kzbdinbfbsqos3tvrku-story.html [https://perma.cc/4SEB-Z94S]).

259. *Id.*

260. *Compare id.*, *with* Palmer v. Thompson, 403 U.S. 217, 219 (1917), *and* Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2279 (2020) (Ginsburg, J., dissenting).

261. Justice Gorsuch seems skeptical of the former Governor's timing for loosening the restrictions, describing it as "just as this Court was preparing to act on their applications." *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 72 (Gorsuch, J., concurring).

262. *Palmer*, 403 U.S. at 219.

263. *Espinoza*, 140 S. Ct. at 2279 (Ginsburg, J., dissenting).

reclassified the areas not to cure any unequal treatment, but simply because COVID-19-related circumstances had changed.[264]

An area is classified as a red zone when "hospital capacity is within 21 days of reaching 90 percent, even after the cancellation of elective procedures and a 50 percent increase in bed capacity in hospitals in the region."[265] Likewise, an orange zone is created when an area

> has a 4 percent positivity rate (7-day average) over the last 10 days and it is located in a region that has reached 85 percent hospital capacity. . . . [or] if the State Department of Health determines the region's rate of hospital admissions is unacceptably high and a zone designation is appropriate to control the rate of growth.[266]

Finally, a yellow zone is an area that "has a 3 percent positivity rate (7-day average) over the past 10 days and is in the top 10 percent in the state for hospital admissions per capita over the past week and is experiencing week-over-week growth in daily admissions."[267]

The former Governor claimed to have merely followed this framework in reclassifying the zones in which the houses of worship were located and, as explained above, could just as easily have reclassified them back into red or orange zones if circumstances changed again.[268]

But regardless of whether this was an actual leveling scenario, in his dissent, Chief Justice Roberts explicitly reinforced the Court's historical position on leveling.[269] He argued that "there [was] simply no need" to issue an injunction.[270] He explained that "an order telling the Governor not to do what he's not doing fails to meet [the] stringent standard" required to issue "the extraordinary remedy of injunction."[271] Justice Breyer, joined by Justices Sotomayor and Kagan, agreed.[272] He said that "there [was] no need . . . to issue any such injunction."[273] His reasoning was that "none of the applicants are now subject to the fixed-capacity restrictions that they challenge in their applications."[274]

So, the Court did not actually abandon its leveling jurisprudence, but instead was faced with a unique scenario that fell outside that framework. Leveling up would have been fine had the risk of former Governor Cuomo

264. *See Governor Cuomo Announces Updated Zone Metrics, Hospital Directives and Business Guidelines*, N.Y. State, https://www.governor.ny.gov/news/governor-cuomo-announces-updated-zone-metrics-hospital-directives-and-business-guidelines (last visited Mar. 7, 2022) [https://perma.cc/LFF4-9SDP] (outlining the metrics by which zones are classified under former Governor Cuomo's Executive Order).

265. *Id.*

266. *Id.*

267. *Id.*

268. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 71–72 (Gorsuch, J., concurring).

269. *Id.* at 75 (Roberts, C.J., dissenting).

270. *Id.*

271. *Id.*

272. *Id.* at 76 (Breyer, J., dissenting).

273. *Id.* at 77.

274. *Id.*

reinstating the restrictions not loomed.[275] It was not the leveling up that was the problem, but the temporary nature of that leveling up.[276] Indeed, had the leveling up been guaranteed to be permanent, the Court very well may have unanimously agreed that there was no live case or controversy.[277]

As mentioned above, the discussions in the academic literature largely revolve around leveling down, not up.[278] Although it is possible that granting everyone a benefit could work an inequity upon a certain group—a sort of mirror image of Professor Brake's concern regarding leveling down[279]—it is difficult to see how that would affect the Free Exercise of Religion context any differently than it would the Equal Protection context. Thus, if leveling up is an allowable remedy in the latter context, it surely should be in the former.

The approaches Professor Seidman has outlined would both align with leveling up in the Equal Protection and the Free Exercise of Religion context.[280] Under the welfarist approach, "a change that makes at least one person better off but no one worse off uncontroversially enhances human welfare and therefore ought to be made."[281] If this is true, then allowing leveling up in both the Equal Protection context and the Free Exercise of Religion context would work the same good upon society and should thus be allowed. The noninstrumental equality approach operates under the "assumption that people in fact value equality as a noninstrumental good even when equal treatment leaves everyone otherwise worse off."[282] Leveling up would certainly create equality.[283] If equality is inherently good, then giving everyone a benefit is at least as inherently good as denying everyone that benefit. There is no reason why this should be different in the Free Exercise of Religion context as it is in the Equal Protection context.

275. *Id.* at 72 (Gorsuch, J., concurring).

276. *See id.* at 69.

277. *See* U.S. CONST. art. III, § 2, cl. 1.

278. *See, e.g.*, Brake, *supra* note 1, at 516; Doherty, *supra* note 1, at 1019–21; Seidman, *supra* note 1, at 1–2; Cake, *supra* note 10.

279. Recall that one of Professor Brake's concerns is that leveling down could, while creating literal equality, work an inequity on certain groups. *See* discussion *supra* Section II.D.

280. *See* discussion *supra* Section II.D.

281. Seidman, *supra* note 1, at 41.

282. *Id.* at 46.

283. *See id.* at 3.

IV. RECOMMENDATION

Both leveling up and leveling down should be accepted as valid remedies for all unequal treatment First Amendment violations, just as they historically have been for Equal Protection violations, for three primary reasons.[284] First, there is effectively no difference between the harm in Equal Protection violations and unequal treatment First Amendment violations.[285] Second, despite the confusing and seemingly contradictory results, the Supreme Court has not actually deviated from its Equal Protection leveling jurisprudence in deciding the recent First Amendment cases.[286] Third, the academic discussions on the issue raise valid concerns about leveling down as a general matter but do not indicate that the First Amendment context should be treated any differently from the Equal Protection context.[287]

First, as a practical matter, there is no difference between the harms suffered from an equal treatment First Amendment violation and an Equal Protection violation.[288] In both situations, one group is unconstitutionally being treated differently than another.[289] As the Supreme Court has repeatedly instructed, when faced with unequal treatment, "there exist two remedial alternatives: a court may either declare [the statute] a nullity . . . or it may extend the coverage of the statute to include those who are aggrieved by the exclusion."[290] According to the Court, denying the benefit, while not ideal for any of the parties involved, does cure the constitutional violation—the unequal treatment.[291] Even lower courts have reached this conclusion.[292]

Free Exercise of Religion cases are even more akin to Equal Protection cases than Freedom of Speech cases are. Religious groups have long been considered to be vulnerable in much the same way as national and racial minorities are.[293] If religious groups are vulnerable in a similar way to other minority groups, then unequal treatment of religious groups on the basis of religion should be seen as equally as unconstitutional as unequal treatment of other minority groups. The Court has long held that both leveling up and leveling down are acceptable remedies when members of a minority group face unequal

284. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 227 (1971); Heckler v. Mathews, 465 U.S. 728, 748–49 (1984); Sessions v. Morales-Santana, 137 S. Ct. 1678, 1701 (2017).

285. Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2354 (2020).

286. *See* discussion *supra* Part III.

287. *See* discussion *supra* Part III.

288. *See Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2354.

289. *Id.*

290. *Id.*; Califano v. Westcott, 443 U.S. 76, 89 (1979) (quoting Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring)); Heckler v. Mathews, 465 U.S. 728, 738 (1984) (quoting *Welsh*, 398 U.S. at 361 (Harlan, J., concurring)); Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698 (2017) (quoting *Westcott*, 433 U.S. at 89).

291. *See* Palmer v. Thompson, 403 U.S. 217, 227 (1971); *Heckler*, 465 U.S. at 748–49; *Morales-Santana*, 137 S. Ct. at 1701; *see also* Dorf, *supra* note 22.

292. *See* Satanic Temple v. City of Belle Plaine, 475 F. Supp. 3d 950, 962 (D. Minn. 2020).

293. *Suspect Classification*, CORNELL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/suspect_classification (last visited Mar. 6, 2022) [https://perma.cc/A9PH-YLG8] ("There are four generally agreed-upon suspect classifications: race, religion, national origin, and alienage.").

treatment.[294] Therefore, leveling in either direction should also be acceptable when members of a religious group face unequal treatment.

Second, despite the inconsistent results in these recent First Amendment cases, the Court either explicitly or implicitly endorsed leveling in either direction as acceptable remedies in its opinions.[295] In *American Association of Political Consultants*, Justice Kavanaugh said that "Congress violated that First Amendment equal-treatment principle . . . by favoring debt-collection robocalls and discriminating against political and other robocalls."[296] Then, citing *Heckler*, explained that "[w]hen the constitutional violation is unequal treatment, as it is here, a court theoretically can cure that unequal treatment either by extending the benefits or burdens to the exempted class, or by nullifying the benefits or burdens for all."[297]

Although Justice Gorsuch argued that "The First Amendment . . . . pushes, always, in one direction: against governmental restrictions on speech,"[298] this argument ignores the subset of First Amendment cases in which restrictions on speech are being applied differently to different groups—where the injury is unequal treatment.[299] In unequal treatment Freedom of Speech cases, like *American Association of Political Consultants*, the government should be able to choose from either of the "two remedial alternatives" to cure the unequal treatment.[300]

In *Espinoza*, while Chief Justice Roberts, writing for the majority, reversed the Montana Supreme Court's attempt to level down, he did so because of improper procedure.[301] In fact, even though he clearly objected to that court's motive, he still used this procedural workaround, leaving the Court's leveling jurisprudence undisturbed.[302] He even implied that the Montana legislature could have leveled down if it so chose, which seems to be an endorsement of leveling down in the Free Exercise of Religion context.[303] As for the dissenters, Justice Ginsburg told us point blank that there was no "*differential treatment* occasioning a burden on a plaintiff's religious exercise" because the Montana Supreme Court had successfully leveled down.[304]

In *Roman Catholic Diocese of Brooklyn*, all of the Justices seemed to be in agreement that had former Governor Cuomo permanently leveled up, the unequal treatment would have been cured.[305] The dissenters argued that Cuomo

294. *See, e.g.*, *Palmer*, 403 U.S. at 227.
295. *See* discussion *supra* Part III.
296. Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2354 (2020).
297. *Id.*
298. *Id.* at 2366 (Gorsuch, J., concurring in part and dissenting in part).
299. *See* discussion *supra* Section III.A.
300. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698 (2017) (quoting Califano v. Westcott, 433 U.S. 76, 89 (1979)).
301. Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2262 (2020).
302. *Id.*
303. *Id.*
304. *Id.* at 2279 (Ginsburg, J., dissenting).
305. *See* discussion *supra* Subsection III.B.2.

had leveled up and that was enough to cure the violation.[306] Justice Breyer said that "there [was] no need to issue any such injunction,"[307] and Chief Justice Roberts explained that "an order telling the Governor not to do what he's not doing fails to meet [the] stringent standard" required to issue "the extraordinary remedy of injunction."[308] The majority's primary issue with Cuomo's attempt to level up was that "[t]he Governor regularly changes the classification of particular areas without prior notice. If that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained."[309] Had the threat of the reinstated restrictions not been "certainly impending,"[310] it is likely the majority would have been satisfied. Therefore, it would seem, at least in this context, that no one on the Court has a problem with leveling up—as long as it is permanent. Because the Supreme Court has either explicitly or implicitly endorsed leveling up and leveling down in these First Amendment cases consistent with its Equal Protection jurisprudence,[311] it should be considered an acceptable remedy in the First Amendment context.

Finally, it is true that the discussions of leveling in the academic literature raise serious concerns as to whether leveling down is an acceptable remedy in general.[312] But if anything, they support the position that if leveling in either direction is an acceptable remedy in the Equal Protection context, it should be an acceptable remedy in the First Amendment context.[313] Professor Brake's concern that leveling down "proceeds from an abstracted and objectified analysis of equality that ignores the lived experience of inequality and implicitly privileges the perspective of those doing the abstracting" is absolutely correct,[314] but that fact is in no way weightier in the unequal treatment First Amendment context than it is in the Equal Protection context. As explained above, the harm in both contexts is the same, and thus, the remedies should be the same.[315]

As for the approaches Professor Seidman outlines, they do not support different treatment in these contexts either. The welfarist approach, which proposes that "a change that makes at least one person worse off but no one better off is inefficient and should be avoided," is certainly an indictment of leveling down,[316] but if leveling down is wrong in one context, it is wrong in all contexts. This approach also proposes that "a change that makes at least one person better off but no one worse off uncontroversially enhances human welfare and therefore ought to be made."[317] This supports leveling up, and again, if that is good in one

306. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 77 (2020) (Breyer, J., dissenting).
307. *Id.*
308. *Id.* at 75 (Roberts, C.J., dissenting).
309. *Id.* at 68.
310. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014).
311. Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2342 (2020).
312. *See, e.g.*, Brake, *supra* note 1, at 516.
313. *See id.*
314. *Id.*
315. *See* discussion *supra* Section II.C.
316. Seidman, *supra* note 1, at 41.
317. *Id.*

context, it is good in all contexts. Under the noninstrumental equality approach, which proposes that "equality is a good in itself that people value regardless of its material consequences,"[318] leveling up and leveling down would both be a universal good and would be good in any unequal treatment context. Therefore, while some of the discussions in the academic literature certainly call into question the validity of leveling down, none question the wisdom of leveling up. More importantly, none indicate that the First Amendment context should be treated any differently from the Equal Protection context.

V. CONCLUSION

Leveling down should be an acceptable remedy for all First Amendment violations that result in unequal treatment. Since *Palmer*, the Supreme Court has repeatedly affirmed this solution for Equal Protection violations. The harm resulting from Equal Protection violations and the harm resulting from unequal treatment First Amendment violations is identical. The Supreme Court, though producing curious recent results, has never indicated that its Equal Protection jurisprudence should not be applied in the First Amendment context.[319] And the discussions in the academic literature, while raising valid concerns about leveling down in general, do not indicate that those concerns and approaches apply any differently in the First Amendment context as they do in the Equal Protection context.[320] Thus, leveling up or leveling down should be treated as an acceptable remedy for unequal treatment First Amendment violations just as it historically has been for Equal Protection violations.

318. *Id.* at 44.
319. *See* discussion *supra* Section II.C.
320. *See* discussion *supra* Section II.D.