

LEVEL-UP REMEDIES FOR RELIGIOUS DISCRIMINATION

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.¹

—Chief Justice John Marshall

Few words lie closer to the American heart than the affirmation that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights, [and] that among these are Life, Liberty and the pursuit of Happiness.”² Less commonly quoted is the corollary that immediately follows: “That *to secure these rights*, Governments are instituted among Men”³ One of the principal purposes of government is to vindicate the fundamental rights of its subjects. As Chief Justice John Marshall remarked in *Marbury v. Madison*,⁴ “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”⁵ *Marbury’s* reasoning emphasized that “[f]or every right, there must be a judicial remedy.”⁶ Rights not given life by remedies become merely theoretical to the individuals asserting them.

1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

2. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

3. *Id.* (emphasis added).

4. 5 U.S. (1 Cranch) 137 (1803).

5. *Id.* at 163; *see also id.* (“One of the first duties of government is to afford that protection.”)

6. Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 10 (2003) (emphasis added) (citing *Marbury*, 5 U.S. (1 Cranch) at 163).

The lack of an effective remedy can nullify even vital rights, such as those guaranteed under the Equal Protection Clause.⁷ In weighing such discrimination cases, the Supreme Court has consistently maintained that courts may choose between two “effectively equivalent” remedies: “to ‘level up’ by extending [a] benefit to the excluded class . . . or to ‘level down’” by removing the benefit even from the included class.⁸ In colloquial terms, these two options have been called “the nice remedy” and the “the mean remedy,” respectively.⁹ Scholars, commentators, and common sense agree that “leveling down is not always consistent with the meaning of equality” and that, in many cases, the choice to level up or down determines whether plaintiffs actually get relief.¹⁰

Yet despite occasional dicta to the contrary, the Supreme Court has not erred on the side of leveling up.¹¹ Consider the recent case of Patrick Henry Murphy, a Buddhist death row inmate in Texas.¹² Unlike the Christian inmates of the prison, Murphy was not allowed to have a religious adviser of his faith with him during his execution. But while the Supreme Court stayed Murphy’s execution in 2019 due to the “denominational discrimination” evinced by

7. See, e.g., *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 298 (1955) (noting that while the Court had held the previous year that “racial discrimination in public education is unconstitutional, . . . [t]here remain[ed] for consideration the manner in which relief is to be accorded” before that decision could be put into effect).

8. Kristin A. Collins, *Equality, Sovereignty, and the Family in Morales-Santana*, 131 HARV. L. REV. 170, 175 (2017).

9. Ian Samuel, *SCOTUS Symposium: Morales-Santana and the “Mean Remedy,”* PRAWFSBLAWG (June 12, 2017, 5:04 PM), <https://prawfsblawg.blogs.com/prawfsblawg/2017/06/scotus-symposium-morales-santana-and-the-mean-remedy.html> [<https://perma.cc/TJB7-TPTN>].

10. Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 516 (2004); see also, e.g., Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2027–29 (1998); Tracy A. Thomas, *Leveling Down Gender Equality*, 42 HARV. J.L. & GENDER 177, 201 (2019).

11. See, e.g., *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017) (quoting *Califano v. Westcott*, 443 U.S. 76, 89 (1979)) (claiming that a level-up approach is generally favored, but approving a level-down remedy).

12. See *Murphy v. Collier*, 139 S. Ct. 1475, 1475 (2019) (mem.).

the Texas policy,¹³ it prescribed no particular remedy.¹⁴ Rather than allow Buddhist inmates access to religious advisers of their faith, Texas chose to revoke the privilege from Christian inmates.¹⁵ This level-down solution demonstrates how ineffective remedies can satisfy the letter of the Constitution while denying its spirit: despite a victory in the Supreme Court, Murphy is no better off.

This Note argues that where substantive, explicit constitutional rights guaranteed by the Free Exercise Clause have been violated alongside the Equal Protection Clause, the Constitution may *require* courts to favor a level-up approach. In other words, courts should presumptively apply level-up remedies in religious discrimination cases involving free exercise violations. Part I examines the development of remedies for discrimination claims and sketches the contours of the Supreme Court's current position, which gives no legal preference to leveling either up or down. Part II proposes a presumptive level-up framework for approaching religious discrimination cases implicating free exercise violations. Part III applies this framework to recent cases (including Murphy's) and shows that leveling up can produce more equitable outcomes—a principle illustrated by the Supreme Court's recent ruling in *Espinoza v. Montana Department of Revenue*.¹⁶

I. A BRIEF HISTORY OF EQUAL PROTECTION REMEDIES

Judicial remedies have become a vital tool for enforcing constitutional rights in equal protection cases. Courts attempting to fashion such remedies, however, receive little direction from the Supreme Court. While the Court has expressed a loose preference for level-up remedies, it has never committed itself to a clear rule or standard requiring them.

13. *Id.* (Kavanaugh, J., concurring in grant of application for stay).

14. *Id.* at 1475–76.

15. See *Murphy v. Collier*, 942 F.3d 704, 706 (5th Cir. 2019).

16. 140 S. Ct. 2246 (2020).

A. *The Role of Courts in Fashioning Remedies*

In the early Republic, the legislative branch assumed the primary responsibility for defining remedial mechanisms. The Constitution itself refers explicitly to only two remedies:¹⁷ habeas corpus;¹⁸ and the “just compensation” required by the Fifth Amendment.¹⁹ The Framers expected that constitutional rights would be vindicated through legal structures that already existed (such as actions at common law or at equity).²⁰ They also believed that Congress had the power to create statutory remedies and causes of action to afford relief to victims deprived of their rights, including constitutional rights.²¹ Nearly a century later, the Reconstruction Congress exercised this power by passing the Enforcement Act of 1871,²² which imposed civil liability on state actors who deprived a person of “any rights, privileges, or immunities secured by the Constitution of the United States.”²³ This cause of action has since been codified at 42 U.S.C. § 1983²⁴ and is now perhaps “the most powerful

17. See RICHARD H. FALLON, JR., ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 755–56 (7th ed. 2015); Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 & n.224 (1991) (observing that “the Constitution generally makes no reference to remedies,” *id.* at 1779, and explaining the two major exceptions).

18. See U.S. CONST. art. I, § 9, cl. 2.

19. U.S. CONST. amend. 5; see also *First English Evangelical Lutheran Church v. L.A. Cty.*, 482 U.S. 304, 316 n.9 (1987) (“[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking.”).

20. See FALLON ET AL., *supra* note 17, at 756; Fallon & Meltzer, *supra* note 17, at 1779 (“To the [F]ramers, special provision for constitutional remedies probably appeared unnecessary, because the Constitution presupposed a going legal system, with ample remedial mechanisms, in which constitutional guarantees would be implemented.”).

21. For instance, the remedy so famously discussed in *Marbury* was established by—and sought under—congressional statute rather than the Constitution itself. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 154 (1803); Fallon & Meltzer, *supra* note 17, at 1779.

22. An Act to Enforce the Provision of the Fourteenth Amendment to the Constitution of the United States, and Other Purposes, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983 (2018)).

23. *Id.*

24. The current statute contains minor changes to the original language; for instance, it now protects the “rights, privileges, or immunities secured by the Constitution *and laws.*” 42 U.S.C. § 1983 (2018) (emphasis added).

offensive remedy” available to plaintiffs seeking redress for constitutional violations.²⁵

While Congress did not hesitate to create new remedies, courts were historically less eager to step forward. The early judicial role in fashioning remedies was comparatively limited, perhaps in part because of *Marbury*’s assertion that some remedies were beyond the power of the Supreme Court to grant.²⁶ The Enforcement Act of 1871 included both a clause creating a cause of action for plaintiffs and a clause explicitly creating federal jurisdiction to *hear* such claims. The inclusion of both clauses suggests that, as late as the mid-nineteenth century, Congress may have been unsure about the role of the courts in remedying constitutional injuries.²⁷ But as suits based on constitutional violations increased, courts began to take a more active role in shaping remedial mechanisms. By the mid-twentieth century, the Supreme Court could confidently instruct federal courts to use “equitable principles . . . characterized by a practical flexibility in shaping . . . remedies” to counteract public school segregation.²⁸ And in *Bivens v. Six Unknown Named Agents*,²⁹ the assertive Warren Court boldly declared that “federal courts may use any available remedy to make good the wrong done” when vital constitutional rights are at stake, even if such a remedy is outside the scope of any current statutory scheme.³⁰ In recent years, a more cautious Court has backed away from the leading role it envisioned for itself in *Bivens*.³¹ Nevertheless, the judiciary continues to play an important role in crafting remedies—a role that

25. Nicholas R. Battey, Note, *A Chink in the Armor? The Prosecutorial Immunity Split in the Seventh Circuit in Light of Whitlock*, 2014 U. ILL. L. REV. 553, 558.

26. See *Marbury*, 5 U.S. (1 Cranch) at 176.

27. See Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1156 (1969).

28. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300 (1955).

29. 403 U.S. 388 (1971).

30. *Bivens*, 403 U.S. at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)); see also Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1540–43 (1972).

31. While the Court has not overtly rejected the *Bivens* remedy itself, it has become far more skeptical of inferring causes of action allowing its application. See, e.g., *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020) (“In both statutory and constitutional cases, our watchword is caution.”).

Congress recognizes and occasionally modifies through legislation.³²

B. *"Two Remedial Alternatives:" Judicial Remedies for Equal Protection Violations*

As the judicial power to create remedies developed, the Supreme Court repeatedly grappled with the difficulties inherent in designing remedies that effectively vindicate equal protection rights. These difficulties have engendered a jurisprudence of inconsistency: while the Court has repeatedly spoken to the importance of ending discrimination, its rulings have not always provided effective relief.

One of the first major cases illustrating the challenge of fashioning antidiscrimination remedies was *Cumming v. Richmond County Board of Education*.³³ Decided in 1899, *Cumming* involved an attempt to appropriate tax money for the establishment of a high school exclusively for white children.³⁴ White children thus received a tax-supported educational opportunity that African-American children did not. But in considering possible remedies, the *Cumming* Court faced a difficult dilemma. If it decided that African-American taxpayers had suffered discrimination, it would have only two options: level *up* (by requiring the Board of Education to establish a similar school for African-American children); or level *down* (by closing the existing school for white children). Neither option appealed to the Court. Leveling down by taking existing educational opportunities away from children seemed morally repugnant and politically disastrous. But a level-up remedy would be similarly unpopular in the Jim Crow South and economically impractical.³⁵

32. Examples of such legislation include the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996), the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996). See Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2537 (1998).

33. 175 U.S. 528 (1899).

34. See *id.* at 542, 544.

35. See *id.* at 544.

Faced with this choice of evils, the Court ducked the question by refusing to find a constitutional violation under the Equal Protection Clause altogether.³⁶ The shadow of *Plessy v. Ferguson*,³⁷ decided three years previously, loomed large over *Cumming*. Perhaps it is unsurprising that the Supreme Court was unwilling to find racial discrimination in public education so soon after its infamous decision enshrining that very discrimination.³⁸ But *Cumming* is notable for its logic, not its outcome. Rather than a principled constitutional basis for its decision, the *Cumming* Court offered only a frank acknowledgment that it did not feel comfortable with any available remedy:

The substantial relief asked is an injunction that would either impair the efficiency of the high school provided for white children or compel the Board to close it. But if that were done, the result would only be to take from white children educational privileges enjoyed by them, without giving to colored children additional opportunities for the education furnished in high schools. The colored school children of the county would not be advanced in the matter of their education by a decree compelling the defendant Board to cease giving support to a high school for white children.³⁹

The Court reasoned that granting relief would necessarily curtail available educational opportunities, whether that meant closing the segregated white high school or reallocating educational funds and thus denying children other existing educational opportunities. In other words, *any* remedy would be a level-down remedy. Even in the early stages of equal protection litigation, when the Court was not yet ready to enforce minority rights, it instinctively understood that level-down remedies often fail to provide relief.

36. *See id.* at 545.

37. 163 U.S. 537 (1896).

38. *See id.* at 548 (holding that “the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws”).

39. *Cumming*, 175 U.S. at 544.

The Court expanded this nascent preference for level-up remedies several decades later in *Iowa-Des Moines National Bank v. Bennett*,⁴⁰ a case in which plaintiffs claimed they had been unfairly taxed at a higher rate than their competitors.⁴¹ After finding that a constitutional violation had indeed occurred,⁴² the Court noted that “[t]he right invoked is that to equal treatment; and such treatment will be attained if either their competitors’ taxes are increased or their own reduced.”⁴³ But while there were two paths to equal treatment, a level-down remedy in this case would be no remedy at all. A victim of tax discrimination could not “be required himself to assume the burden of seeking an increase of the taxes which the others should have paid[,] . . . [n]or [could] he be remitted to the necessity of awaiting such action by the state officials upon their own initiative.”⁴⁴ The only viable option, therefore, was a level-up remedy.

Bennett signified the high-water mark of the Court’s enthusiasm for level-up remedies. The modern Court has usually framed its discussion of equal protection remedies by emphasizing its ambivalence. For instance, in the sex discrimination case of *Heckler v. Mathews*,⁴⁵ the Court emphasized that “the right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against,”⁴⁶ and that the “mandate of equal treatment”⁴⁷ may be expressly fulfilled by a level-down remedy:

[W]e have 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. To the contrary, we have noted that a court sustaining such a claim faces “two remedial alternatives:

40. 284 U.S. 239 (1931).

41. *Id.* at 240.

42. *Id.* at 245–47.

43. *Id.* at 247.

44. *Id.* (citations omitted).

45. 465 U.S. 728 (1984).

46. *Id.* at 739.

47. *Id.* at 740 (emphasis omitted).

[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."⁴⁸

While no remedy was actually granted in *Heckler*, it has since become a touchstone of remedies jurisprudence. Over the past three and a half decades, the Court has repeatedly treated its discussion of remedies in *Heckler* as authoritative.⁴⁹ The Court backed away from level-up remedies in *Heckler* in two significant ways. First, it clearly established the constitutionality of level-down remedies by affirming that courts could grant relief in cases where level-up remedies are off the table. *Heckler* held that a severability clause allowing only level-down remedies granted standing to sue because redressability was possible in the form of the desired benefit being withheld from others.⁵⁰ Second, it instructed courts to look for legislative intent in crafting remedies, at least before granting a level-up remedy where a statute might more easily facilitate leveling down instead. In a footnote, the Court tempered its stated position that "extension, rather than nullification, is the proper course" by

48. *Id.* at 738 (quoting *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in the result)) (second and third alterations in original) (emphasis added).

49. *See, e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 (2017); *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426–27 (2010) (citing *Heckler* and stating that "when unlawful discrimination infects . . . legislative prescriptions, the Constitution simply calls for *equal treatment*," and that "[h]ow equality is accomplished—by extension or invalidation of the unequally distributed benefit or burden, or some other measure—is a matter on which the Constitution is silent"); *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 817–18 (1989) (quoting *Heckler*); *see also* FALLON ET AL., *supra* note 17, at 756 & n.3 (citing only *Bennett* and *Heckler* in a brief summary of equal protection remedies).

50. *See Heckler*, 465 U.S. at 738–40 ("[W]hen the 'right invoked is that to equal treatment,' the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class. Because the severability clause would forbid only the latter and not the former kind of relief in this case, the injury caused by the unequal treatment allegedly suffered by appellee may 'be redressed by a favorable decision,' and he therefore has standing to prosecute this action." (first quoting *Bennett*, 284 U.S. at 247 (1931), and then quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1975))).

emphasizing that no court should “use its remedial powers to circumvent the intent of the legislature.”⁵¹

While relatively uncommon, the Court has occasionally chosen not only to consider a level-down remedy, but to *uphold* one. Perhaps the most infamous example is the Court’s widely disparaged 1971 ruling in *Palmer v. Thompson*.⁵² In *Palmer*, the city of Jackson, Mississippi refused to integrate its public swimming pools when faced with a federal judgment that its segregation policy constituted an equal protection violation. Instead, it chose to enact a level-down remedy by closing or divesting from all its pools rather than allowing African-Americans to use them.⁵³ The Supreme Court denied relief to plaintiffs alleging an equal protection violation, holding that racial integration of public services was not required so long as the ultimate outcome was equal as between races and there was “no state action affecting blacks differently from whites.”⁵⁴ Because the swimming pools were equally closed to all citizens of all races, the Court reasoned, equality had been achieved.

Contemporary and modern critics have disparaged *Palmer* for its outcome and its reasoning,⁵⁵ including its “tendentious handling of precedent”⁵⁶ and use of “leveling down as a dubious equal protection remedy.”⁵⁷ The substantive equal protection arguments that prevailed in *Palmer* have aged poorly; it would be impossible to argue today that “a legislative act may [not] violate equal protection

51. *Id.* at 739 n.5 (first quoting *Califano v. Westcott*, 443 U.S. 76, 89 (1979), and then quoting *id.* at 94 (Powell, J., concurring in part and dissenting in part)).

52. 403 U.S. 217 (1971).

53. *Id.* at 218–19.

54. *Id.* at 225; *see id.* at 225–26.

55. *See, e.g.*, Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 131–33 (1971) (explaining how *Palmer* had been wrongly decided and analyzing its logical flaws); John-Paul Schnapper-Casteras, *The Problem with Palmer*, TAKE CARE (May 7, 2017), <https://takecareblog.com/blog/the-problem-with-palmer> [<https://perma.cc/R2WC-ZP6V>] (labeling *Palmer* “an odious and obsolete decision” and calling its endorsement of level-down remedies “jaw-dropping and wrong”).

56. Randall Kennedy, *Reconsidering Palmer v Thompson*, 2018 SUP. CT. REV. 179, 200; *see id.* at 200–02.

57. *Id.* at 204; *see id.* at 204–06.

solely because of the motivations of the men who voted for it.”⁵⁸ While the Court has never formally overruled *Palmer*, later decisions have so squarely contradicted it that it can no longer be considered good law.⁵⁹

Nevertheless, the remedial stance adopted in *Palmer* has never been directly repudiated by the Court. Instead, it has endured in the Court’s tolerance for leveling down in cases such as *Heckler*. “The current understanding of leveling down’s compatibility with equality norms may be traced to *Palmer*,” in the sense that the Court has quietly accepted the idea that equal treatment may be achieved by making everyone worse off.⁶⁰ At the very least, the Court frequently considers level-down remedies as viable options rather than viewing them, as Justice White did in his powerful *Palmer* dissent, as being “at war with the Equal Protection Clause.”⁶¹

C. The Supreme Court’s Current View: Sessions v. Morales-Santana

The Court decided a landmark case in 2017 involving a choice

58. *Palmer*, 403 U.S. at 224. To the contrary, the Court has since held that discriminatory intent is *necessary* to prevail on an equal protection claim. See *Washington v. Davis*, 426 U.S. 229, 241 (1976) (holding that disproportionate impact without “the necessary discriminatory . . . purpose” is insufficient); see also *Pers. Adm’r v. Feeney*, 442 U.S. 256 (1979) (citing *Davis* for the proposition that “a neutral law does not violate the Equal Protection Clause solely because it results in a . . . disproportionate impact; instead the disproportionate impact must be traced to a purpose to discriminate,” *id.* at 260, and holding that a discriminatory law must have been enacted “at least in part *because of*, not merely in spite of” its adverse effect, *id.* at 279 (emphasis added)).

59. See *Hernandez v. Woodard*, 714 F. Supp. 963, 970 (N.D. Ill. 1989) (observing that “[t]he Supreme Court has never expressly overturned *Palmer*, but it has all but done so” and citing *Davis* and *Hunter v. Underwood*, 471 U.S. 222 (1985), to show that “facially neutral laws may run afoul of the Equal Protection Clause if they are enacted or enforced with a discriminatory intent”). Notably, the Department of Justice cited *Palmer* for the proposition that government intent is irrelevant in its defense of the Trump Administration’s “travel ban” on six countries with predominantly Muslim citizens in 2017. See Brief for Appellants at 46–47, *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (No. 17-1351), *vacated sub nom. Trump v. Int’l Refugee Assistance Project*, 138 S. Ct. 353 (2017) (mem.).

60. *Brake*, *supra* note 10, at 518.

61. *Palmer*, 403 U.S. at 240 (White, J., dissenting).

between equal treatment remedies: *Sessions v. Morales-Santana*.⁶² The eponymous plaintiff in *Morales-Santana* moved to the United States from the Dominican Republic while young; his father was a United States citizen, but he nonetheless faced deportation. Under federal law, a child born outside the United States could gain citizenship if one of his parents was an American citizen and the other was not, provided that the citizen parent met a physical-presence requirement prior to the child's birth.⁶³ At the relevant time, the physical-presence requirement for all married parents and unwed fathers was five years.⁶⁴ Unwed mothers, however, were held to a less exacting standard: only one year of physical presence was necessary to grant citizenship to their children born abroad.⁶⁵

Morales-Santana, whose father was an American citizen, brought an equal protection claim arguing that the government could not treat him differently than a similarly-situated person with a citizen mother.⁶⁶ The Supreme Court readily agreed that Congress's sex-dependent scheme was "incompatible with the requirement that the Government accord to all persons the equal protection of the laws."⁶⁷ It admonished Congress to create a standard "uniformly applicable to all children born abroad with one U.S.-citizen and one alien parent, wed or unwed," and required that, in the meantime, the current laws be enforced "in a manner free from gender-based discrimination."⁶⁸ But in considering a remedy for the plaintiff himself, the Court balked at the proposal of leveling up, explaining that it was "not equipped to grant the relief *Morales-Santana* seeks, *i.e.*, extending . . . the benefit . . . reserve[d] for unwed mothers."⁶⁹ In other words, while Congress was empowered to lower the

62. 137 S. Ct. 1678.

63. See 8 U.S.C. § 1401(g) (2012); *Morales-Santana*, 137 S. Ct. at 1686.

64. See 8 U.S.C. § 1409(a); *Morales-Santana*, 137 S. Ct. at 1687.

65. See 8 U.S.C. § 1409(c); *Morales-Santana*, 137 S. Ct. at 1687.

66. *Morales-Santana*, 137 S. Ct. at 1686. The plaintiff's father was only twenty days short of meeting the statutory physical-presence requirement. Had the plaintiff's mother been a citizen, the requirement would have been met.

67. *Id.*

68. *Id.*

69. *Id.* at 1698.

physical-presence requirement across the board, the Court could only *raise* it.

To explain this outcome, the Court returned to its familiar position in *Heckler* that level-down remedies could provide just as much relief for a constitutional remedy as their level-up counterparts.⁷⁰ While it once again stated that “the preferred rule in the typical case is to *extend* favorable treatment” when fashioning remedies, the Court declined to do so on the rationale that *Morales-Santana* was “hardly the typical case.”⁷¹ “The choice between . . . outcomes [wa]s governed by the legislature’s intent, as revealed by the statute at hand,”⁷² and on this issue Congress had spoken clearly by creating a five-year requirement for everyone except unwed mothers. The Court reasoned that leveling up would “would render the special treatment Congress prescribed . . . the general rule, no longer an exception,”⁷³ and thus only leveling down would faithfully preserve legislative intent and keep the exception from swallowing the rule. Like Murphy, *Morales-Santana* prevailed on his legal claim but was denied any practical relief. His “empty victory” resulted only in the denial to others of the favorable treatment he sought.⁷⁴

Morales-Santana highlights the tensions behind the Court’s indifferent attitude toward antidiscrimination remedies. Commentators and scholars have excoriated *Morales-Santana*’s “resurrect[ion]” of the *Palmer* level-down approach and underscored the limited ability of level-down remedies to provide redress.⁷⁵ It may be that the

70. *Id.* (quoting *Califano v. Westcott*, 443 U.S. 76, 89 (1979), and *Heckler v. Mathews*, 465 U.S. 728, 740 (1984), to emphasize that level-up and level-down remedies are both viable options to achieve equality).

71. *Id.* at 1701 (emphasis added) (footnote omitted).

72. *Id.* at 1699.

73. *Id.* at 1701.

74. Collins, *supra* note 8, at 171.

75. Thomas, *supra* note 10, at 177; see also, e.g., *id.* at 178–80 (criticizing the outcome and level-down remedy of *Morales-Santana*); Sandy De Sousa, Comment, *An Analysis of Sessions v. Morales-Santana’s Implications on the Plenary Power Doctrine and the Supreme Court’s Approach to Equal Protection Challenges*, 49 SETON HALL L. REV. 1123, 1151–55 (2019) (same); Linda Greenhouse, *Justice Ginsburg and the Price of Equality*, N.Y. TIMES (June 22, 2017), <https://www.nytimes.com/2017/06/22/opinion/ruth-bader-ginsburg-supremecourt.html> [<https://perma.cc/A6Y5-RXN7>] (“Formal equality was achieved, to be

Court's recent decision in *Espinoza v. Montana Department of Revenue* is responsive to such concerns (at least in some First Amendment cases), and that the Court's "preference" for level-up remedies may become more than mere words.⁷⁶ But given the consistency of its past approach to remedies, the Court may not yet be ready to abandon wholly the logic of *Morales-Santana*.

II. A REMEDIAL APPROACH TO FREE EXERCISE EQUAL PROTECTION CASES

An analysis of the Supreme Court's remedies jurisprudence through *Morales-Santana* reveals two contradictory themes. First, the Court firmly maintains that "[h]ow equality is accomplished . . . is a matter on which the Constitution is silent," and therefore that no constitutional preference exists between level-up and level-down remedies.⁷⁷ The Court thus tends to give lower court judges relatively little guidance in constructing remedies for constitutional injuries. Second, the Court frequently states, at least in dicta, that level-up remedies are preferred.⁷⁸ But while it sometimes applies this preference in cases involving "federal financial assistance benefits,"⁷⁹ the Court is not firmly bound to this principle and has never fully explained its origin.⁸⁰

sure, but it was equality with a price—a high price for many."); Samuel, *supra* note 9 (calling the remedy portion of *Morales-Santana* "an early contender for the worst thing Justice Ginsburg has ever written for the Court" and lamenting that "[t]here is not a single human being whose life will be made better because of this opinion").

76. See *infra* Part III.C.

77. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 (2017) (quoting *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426–27 (2010) (omission in original)).

78. See, e.g., *Morales-Santana*, 137 S. Ct. at 1699, 1701; *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984).

79. *Morales-Santana*, 137 S. Ct. at 1699 (collecting cases).

80. See Thomas, *supra* note 10, at 180 (commenting on "the Court's general, but unexplained, impression that leveling up is ordinarily the proper remedial course"). A third theme that emerges on viewing these cases is that deference to legislative intent is the favored course in choosing a remedy, though, like the apparent preference for level-up remedies, this rule has not been consistently applied or fully clarified. See, e.g., *Morales-Santana*, 137 S. Ct. at 1699 ("On finding unlawful discrimination, . . . courts may attempt, within the bounds of their institutional competence, to implement what the

The tension between the Court's insistence that the Constitution is silent on remedies and its stated preference for level-up remedies is untenable. Even an observer with no legal training may be struck by the incongruity of "preferring" level-up remedies while simultaneously professing that the Constitution offers no justification for this practice. This Part argues that at least on Free Exercise Clause claims, the Constitution is not silent at all; instead, it provides the missing foundation for the Court's stated preference for level-up remedies.

A. The Constitutional Basis for a Level-Up Presumption

The Court's stated preference for level-up remedies makes sense only if it is grounded in the Constitution itself. Congress has passed no legislation that requires it. Indeed, in *Morales-Santana*, the Court interpreted the relevant statutory scheme to require a level-down remedy.⁸¹ In the absence of statutory guidance, policy may sometimes support a level-up presumption—for instance, Professor Deborah Brake has argued that the "expressive meaning" of a level-down remedy may undercut any literal equality by "express[ing] selective disdain or disregard" for the people to whom it is applied, defeating the purpose of giving those people equal treatment in the first place.⁸² But the problem with policy is that it cuts both ways; in *Morales-Santana*, the Court may have considered policy implications in selecting its level-down remedy.⁸³ The Court often quotes its own previous cases rather than citing policy-based or statutory reasons, hinting that stare decisis may justify its preference.⁸⁴ With the

legislature would have willed had it been apprised of the constitutional infirmity." (quoting *Levin*, 560 U.S. at 427)). The role of deference to legislative intent in fashioning remedies demands further attention, but it is beyond the scope of this Note.

81. See *Morales-Santana*, 137 S. Ct. at 1699–1700.

82. Brake, *supra* note 10, at 571; see *id.* at 570–85.

83. See *Collins*, *supra* note 8, at 220–21 (arguing that the Court may have leveled down to avoid drawing attention to the citizenship issue in a political climate that could result in an outcome "disappointing to progressives").

84. See, e.g., *Morales-Santana*, 137 S. Ct. at 1699 (quoting *Califano v. Westcott*, 443 U.S. 76, 89 (1979)).

possible exception of *Bennett*,⁸⁵ however, the Court's prior cases provide no more support for preferring level-up remedies than its more recent decisions have. If the basis is precedent, then it is precedent all the way down.

This leaves the Constitution as the only candidate for any level-up preference in fashioning remedies—and indeed, this makes intuitive sense. It is disingenuous to say that the Constitution has nothing to say about the enforcement of its own substantive rights; to do so would be tantamount to what Chief Justice Marshall described as “prescribing limits[] and declaring that those limits may be passed at pleasure.”⁸⁶ If equal protection is to have any practical meaning, it must be that the law's protection, once extended, cannot be lightly withdrawn in cases of unconstitutional discrimination. This was the view expressed by the plaintiffs in *Palmer*, who argued not that it was “unconstitutional to close pools once opened . . . [but] that it was unconstitutional to close pools *for the purpose of avoiding desegregation*.”⁸⁷ It is also the view apparently favored by the majority in *Espinoza*.⁸⁸ On this view, the Constitution prefers level-up remedies in cases where leveling down would gut its protections by denying guaranteed substantive rights.⁸⁹

Even if the Constitution is the proper foundation for a level-up preference, however, it is still accurate to call such a preference a *presumption* rather than a rule. While *Palmer*-like cases of clear discrimination highlight the need to preemptively consider level-up remedies, there are circumstances that may still call for a level-down remedy. First, to preserve the power of courts to

85. See *supra* notes 45–44 and accompanying text.

86. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

87. Kennedy, *supra* note 56, at 205.

88. See *infra* Part III.C.

89. This Note does not break new ground in suggesting that the Constitution is the source of the Court's stated level-up presumption. See, e.g., Thomas, *supra* note 10, at 197–208 (providing “a normative foundation for [a level-up] remedial presumption grounded in the meaning of equal protection and in the due process right to a meaningful remedy,” *id.* at 180). Previous work grounding such a presumption in the Constitution, however, has never argued that Free Exercise Clause violations are foremost among the cases in which a constitutional level-up presumption applies. Cf. *infra* Part II.B.

meaningfully perform judicial review, level-down remedies must be on the table in many cases, for “no workable system of judicial review could function without a large role for severability.”⁹⁰ Too many limits on judicial remedial power could “immunize from judicial review statutes that confer benefits unevenly.”⁹¹

Second, some of those benefits may be simply impossible or impractical to extend to larger groups. The lesson of *Cumming*—that selecting among constitutional remedies can be a thorny problem—remains true.⁹² The Court lacks the power to provide every benefit to every citizen. While fighting segregation, the Court held that federal courts had the power to order the opening of closed *public* schools to counteract a *Palmer*-like local policy,⁹³ but it likely could not have issued an order to establish a program offering *private* education to students regardless of race. In some sense, then, there are pragmatic limits to the Court’s ability to choose remedies, and those limits may sometimes justify leveling down.

Third, the Court’s deference to legislative intent affirms that Congress has the power to enact legislation prescribing specific remedial schemes, including level-down schemes. For example, Congress might create a program that gives financial support to people that meet certain requirements, but that also includes a *Heckler*-like severability clause. Such a clause would require a level-down remedy if any portion of the program were found unconstitutional. In this case, the Court would likely be justified in upholding a level-down remedy if it found that the program as applied was impermissibly discriminatory against certain groups. Insofar as such deference preserves the separation of powers and prevents judicial policymaking, it serves as a political safeguard that should not be

90. Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 370 (2007).

91. Ruth Bader Ginsburg, Address, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 303 (1979).

92. See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 & n.28 (2017) (grappling with the difficulty of fashioning a remedy and noting that “[t]he Court of Appeals found the remedial issue ‘the most vexing problem in [the] case.’” (quoting *Morales-Santana v. Lynch*, 804 F.3d 520, 535 (2015), *aff’d in part, rev’d in part sub nom. Morales-Santana*, 137 S. Ct. 1678)).

93. *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 232–34 (1964).

discarded. Congress has wide constitutional latitude over the remedies it chooses to make (or not make) available, and courts generally must defer to legislative choices even where a given remedy may be less effective.⁹⁴

B. Presumptive Level-Up Remedies for Religious Discrimination

A strong, indiscriminate level-up requirement is unlikely to emerge in American remedies jurisprudence in the near future.⁹⁵ Nevertheless, there are some constitutional rights for which a presumption to level up makes sense, even in the current legal culture. In particular, constitutional rights protected by the First Amendment are adjudicated against a legal backdrop that suggests “[t]he Constitution . . . is *not* always indifferent between extension and nullification” — that is, between leveling up and leveling down.⁹⁶

One substantive right for which the Supreme Court has found underlying constitutional norms requiring a level-up remedial approach is freedom of speech.⁹⁷ As the Court famously stated in *New York Times Co. v. Sullivan*,⁹⁸ the constitutional guarantee of free speech exists to protect “uninhibited, robust, and wide-open” debate.⁹⁹ This protection would be inconsistent with a level-down remedy that, for example, prevented all speech in a public forum.

94. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366–70 (1953) (“Congress necessarily has a wide choice in the selection of remedies, and . . . a complaint about action of this kind can rarely be of constitutional dimension.” *Id.* at 1366). In rare cases, some constitutional protections may impose limits on congressional power to specify remedies; for example, “a defendant convicted under a law classifying on an impermissible basis may assail his conviction without regard to the manner in which the legislature might subsequently cure the infirmity.” *Morales-Santana*, 137 S. Ct. at 1699 n.24.

95. The Court of Justice of the European Union, in contrast, follows a strict level-up remedial rule in all equal protection cases except those in which a legislature has enacted a specific remedy. Jerfi Uzman, *Upstairs Downstairs: Morales-Santana and the Right to a Remedy in Comparative Law*, 9 CONLAWNOW 139, 144–45 (2018).

96. Evan H. Caminker, Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1196 (1986).

97. See, e.g., *id.* at 1194–96.

98. 376 U.S. 254 (1964).

99. *Id.* at 270.

Indeed, such a restrictive remedy would be unthinkable given the Court's commitment to protecting disfavored groups who seek to exercise their constitutional right to speak.¹⁰⁰ Free speech remedies thus tend to follow the rule of "more speech, not enforced silence"¹⁰¹—not because such a rule is mandated by statute or precedent, but because the Constitution itself requires it. The preference for level-up remedies is "suggested by an inchoate First Amendment norm underlying the doctrinal mandate of equal treatment."¹⁰²

As in free speech cases, the equal protection claims in religious discrimination cases are "closely intertwined with First Amendment interests"¹⁰³ and therefore subject to the underlying norms that animate the Constitution's guaranteed rights. Such claims are intricately linked with a substantive right: that "Congress shall make no law . . . prohibiting the free exercise" of religion.¹⁰⁴ The First Amendment right to free exercise of religion "safeguards an affirmative right for believers to practice their religions—not just a negative right against governmental discrimination largely secured elsewhere by the Equal Protection and Due Process Clauses."¹⁰⁵

Taken together, this combination of affirmative right and passive protection justifies a presumption that courts should level up when correcting equal protection violations that infringe upon the free exercise of religion. They should also carefully scrutinize *Palmer*-like level-down policies that may give rise to such violations, and invalidate them when necessary to provide relief.¹⁰⁶

100. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (affirming that First Amendment protection extends even to "offensive," "disagreeable," "misguided," and "hurtful" speech (citations omitted)).

101. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

102. Caminker, *supra* note 96, at 1195.

103. *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).

104. U.S. CONST. amend. I.

105. *Petition for a Writ of Certiorari at 15, Ricks v. Id. Bd. of Contractors* (2019) (No. 19-66); see also *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2277 (2020) (Gorsuch, J., concurring) ("The right to *be* religious without the right to *do* religious things would hardly amount to a right at all.").

106. See *infra* Parts III.B and III.C. A constitutional presumption for level-up remedies admittedly raises difficult questions of line-drawing. Which constitutional rights

While the relevant constitutional backdrop suggests that the state “may and should affirm enthusiastically that religious freedom is a good thing and that it should be not only protected, but also nurtured, by law and policy,”¹⁰⁷ the precise contours of that freedom are not fully settled. The fundamental meaning of “free exercise” remains a matter of debate.¹⁰⁸ At minimum, a presumption to level up in free exercise discrimination cases would require that the government remove state-imposed obstacles to the free exercise of religion. Despite such questions, however, the Supreme Court acknowledges the existence of uniquely protected free exercise

demand a level-up presumption, and what factors or contexts justify its rebuttal? A full analysis of such questions is beyond the scope of this Note, which argues only: (1) such a presumption should exist in some cases, and (2) like free speech claims, equal protection claims implicating the affirmative First Amendment right to the free exercise of religion are particularly strong candidates for a level-up presumption. *Cf.* *Steward Mach. Co. v. Davis*, 301 U.S. 548, 591 (1937) (“[W]herever the line may be, this . . . is within it. Definition more precise must abide the wisdom of the future.”).

107. Richard W. Garnett, *Freedom “for” Religion: (Yet) Another View of the Cathedral*, in RELIGIOUS FREEDOM AND THE LAW: EMERGING CONTEXTS FOR FREEDOM FOR AND FROM RELIGION 21 (Brett G. Scharffs, Asher Maoz & Ashley Isaacson Woolley eds., 2019); *see also* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 9 (2000) (“The very text of the Constitution ‘singles out’ governmental acts respecting an establishment of religion or prohibiting the exercise of religion for special protections that are not accorded to any aspect of human life.”).

108. For instance, the petitioner in *Murphy v. Collier* argued that the right guarantees him the opportunity to bring his own spiritual adviser into the execution chamber during his lethal injection. *See* *Murphy v. Collier*, 139 S. Ct. 1475, 1475 (2019) (Kavanaugh, J., statement respecting grant of application for stay) (mem.). But an even stronger conception of free exercise might argue that Murphy had a right to have the government *provide* a spiritual adviser regardless of his religious affiliation. Does the Constitution’s command to avoid “prohibiting” free exercise mean that the government is obligated to provide the means necessary to enjoy it? If so, what limiting principles apply? Alternatively, the right to free exercise could be seen as a guarantee that the state will merely remove all barriers to the free exercise of religion. But here, too, there are questions—is the state then empowered to remove barriers erected by private parties? For contrasting views on the scope of the right, compare Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008) (emphasizing the importance of protecting religious infrastructure through the First Amendment), with David Pollack, *Is there a right to freedom from religion?*, in RELIGIOUS FREEDOM AND THE LAW: EMERGING CONTEXTS FOR FREEDOM FOR AND FROM RELIGION 63–75 (Brett G. Scharffs, Asher Maoz & Ashley Isaacson Woolley eds., 2019) (emphasizing the conflicts between the exercise of religious rights and other rights).

rights in *some* form. Laws treating religious adherents differently based on their “religious status” are subject to the “strictest scrutiny.”¹⁰⁹ And in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,¹¹⁰ the Court held that a “difference in treatment” by a state agency possibly reflecting animus toward particular religious beliefs gave rise to a free exercise claim.¹¹¹ If the First Amendment contains *any* affirmative right to free exercise—even merely an obligation for the government to remove impediments of its own making—then a freedom-of-speech-like approach to fashioning remedies is warranted.

One important limit on the presumption in favor of level-up remedies is that it applies only to *judicial* remedies. Courts become “short-term surrogate[s] for the legislature” when crafting remedies, and should therefore be cautious that they do not abuse their limited power.¹¹² But legislatures should be given more leeway to consider alternative remedial schemes. Unlike courts, legislatures are well positioned to consider the pragmatic implications of a remedy and are firmly granted policymaking power.¹¹³ They are also directly accountable to the people through a political process from which courts are, by design, insulated.¹¹⁴ Perhaps most importantly, they are ultimately bounded by the safeguard of judicial review. Legislatures are beholden to the Constitution, and the constitutionality of laws can be tested in the courts. If legislatures enact

109. *Espinoza*, 140 S. Ct. at 2260 (“[P]recedents have ‘repeatedly confirmed’ the straightforward rule that we apply today: When otherwise eligible recipients are disqualified from a public benefit ‘solely because of their religious character,’ we must apply strict scrutiny.” (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017))).

110. 138 S. Ct. 1719 (2018).

111. *Id.* at 1731.

112. Ginsburg, *supra* note 91, at 317.

113. Cf. Joshua Dunn, *The Perils of Judicial Policymaking: The Practical Case for Separation of Powers*, HERITAGE FOUND. (Sep 23, 2008), <https://www.heritage.org/political-process/report/the-perils-judicial-policymaking-the-practical-case-separation-powers> [https://perma.cc/225Y-9ZLX] (arguing that the separation of powers and the prevention of judicial policymaking is a “check on tyranny” and essential to good government).

114. See, e.g., THE FEDERALIST No. 78 (Alexander Hamilton).

a level-down remedy with the “object or purpose . . . [to] suppress[] religion or religious conduct,” it will be found unconstitutional.¹¹⁵ But for *judicially* created remedies that curtail religious freedom, there is often no second opinion.¹¹⁶ Imposing reasonable limits on the judiciary’s ability to create unique (and legally binding) solutions is therefore justified for reasons that do not extend to the legislature.

III. THE LEVEL-UP PRESUMPTION APPLIED

A constitutional presumption favoring level-up remedies in religious discrimination cases would affect plaintiffs in a wide variety of cases. This Part considers three areas of possible application: death row requests for religious advisers, religiously-affiliated student groups on college campuses, and educational funding.

A. *Religious Discrimination on Death Row:* Murphy v. Collier

Religious discrimination claims for death row inmates have recently become a frontier of equal protection law. Before deciding *Murphy*, the Supreme Court received an application in early 2019 to vacate a stay of execution imposed by the Eleventh Circuit in *Dunn v. Ray*.¹¹⁷ Similarly to *Murphy*, Domineque Ray petitioned for a stay of execution because he would not be allowed to have a spiritual adviser of his faith in the execution chamber; the Alabama prison where Ray would be executed allowed only a Christian chaplain into the chamber, but Ray was a Muslim who wanted his imam to be present.¹¹⁸ The Court allowed Ray’s execution to proceed,

115. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

116. A higher court may sometimes review and reverse an improper level-down remedy imposed by a lower one, of course. The Supreme Court did just that in *Espinoza*. See *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2263 (2020). But there is often no structural guarantee of independent review, particularly given the Supreme Court’s discretionary docket.

117. 139 S. Ct. 661 (2019) (mem.).

118. *Id.* at 661 (Kagan, J., dissenting from grant of application to vacate stay). Ray’s

offering a lone citation indicating that the request had not been submitted in a timely manner as rationale.¹¹⁹ But Justice Kagan, joined by three of her colleagues in dissent, argued that the Court's decision was "profoundly wrong."¹²⁰ Acknowledging that prison security was a compelling state interest, she nonetheless found "no evidence to show that [a] wholesale prohibition on outside spiritual advisers is necessary to achieve that goal."¹²¹ Commentators and news outlets largely sided with Justice Kagan, resulting in "bipartisan, ecumenical condemnation" of the Court's decision.¹²²

Seven weeks later, the Court was faced with a virtually identical situation in *Murphy v. Collier*. But this time, Chief Justice Roberts and Justice Kavanaugh voted with the *Ray* dissenters to allow a stay of execution for Murphy.¹²³ Having upheld Murphy's claim, the Court was presented with an opportunity to address the proper remedy for a violation like those alleged by Ray and Murphy. Justice Kagan's dissent in *Ray* offered some simple alternatives to enable a level-up solution: for instance, the prison could provide

constitutional arguments rested on an Establishment Clause claim. Nevertheless, cases like *Ray*'s also implicate important free exercise concerns. The Fifth Circuit's analysis of the law emphasized the intertwined nature of Establishment Clause and Free Exercise Clause rights, *see Ray v. Comm'r*, 915 F.3d 689, 695 (2019), and the plaintiff in the factually similar case of *Murphy v. Collier* alleged a violation of the Free Exercise Clause, 942 F.3d 704, 706 (5th Cir. 2019). In a statement regarding *Murphy*, Justice Kavanaugh listed the Free Exercise Clause among the legal standards that the state's execution policy must satisfy. *See Murphy v. Collier*, 139 S. Ct. 1475, 1476 (2019) (Kavanaugh, J., statement respecting grant of application for stay) (mem.).

119. *Ray*, 139 S. Ct. at 661 (citing *Gomez v. United States Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.")).

120. *Id.* at 661 (Kagan, J., dissenting from grant of application to vacate stay).

121. *Id.* at 662.

122. Frederick Mark Gedicks, *Dunn v. Ray: We Should Have Seen This Coming*, AM. CONST. SOC'Y (Feb. 15, 2019), <https://www.acslaw.org/expertforum/dunn-v-ray-we-should-have-seen-this-coming/> [https://perma.cc/EJ67-E9G6]. For examples of such bipartisan criticism, compare *id.* with Nicole Kennedy & Collin Slowey, *What Can Dunn v. Ray Teach Us About Religious Freedom and Justice?*, INST. REL. FREEDOM ALL. (Mar. 18, 2019), <http://irfalliance.org/what-can-dunn-v-ray-teach-us-about-religious-freedom-and-justice/> [https://perma.cc/GBC9-X7CJ].

123. *See Murphy*, 139 S. Ct. at 1476 (Kavanaugh, J., statement respecting grant of application for stay).

training for outside religious leaders or have them sign a pledge to abide by the prison rules.¹²⁴ But none of these options were pursued in *Murphy*. Instead, a concurrence by Justice Kavanaugh fell back on the Court's old habit of presenting level-up and level-down remedies as equally valid options:

In an equal-treatment case of this kind, the government ordinarily has its choice of remedy, so long as the remedy ensures equal treatment going forward. For this kind of claim, there would be at least two possible equal-treatment remedies available to the State going forward: (1) allow all inmates to have a religious adviser of their religion in the execution room; or (2) allow inmates to have a religious adviser, including any state-employed chaplain, only in the viewing room, not the execution room. . . .

*[T]he choice of remedy going forward is up to the State. What the State may not do, in my view, is allow Christian or Muslim inmates but not Buddhist inmates to have a religious adviser of their religion in the execution room.*¹²⁵

So long as the end result is that no denomination is treated differently than any other, Justice Kavanaugh suggested, equal treatment is achieved. This analysis was consistent with the Court's previous holdings, including those in *Palmer* and *Morales-Santana*. But like those cases, it ultimately failed to guarantee Murphy's right to free exercise in a meaningful way. Rather than allow Murphy's adviser into the execution chamber, the state of Texas chose to disallow *all* religious advisers from being present.¹²⁶ Consequently, Murphy filed an amended complaint two weeks later alleging further discrimination based on the amount of time he was allowed to spend

124. *Ray*, 139 S. Ct. at 662 (Kagan, J., dissenting from grant of application to vacate stay) ("Why couldn't Ray's imam receive whatever training in execution protocol the Christian chaplain received? . . . Why wouldn't it be sufficient for the imam to pledge, under penalty of contempt, that he will not interfere with the State's ability to perform the execution?").

125. *Murphy*, 139 S. Ct. at 1475–76 (Kavanaugh, J., concurring in grant of application for stay) (emphasis added) (citation omitted).

126. See *Murphy v. Collier*, 942 F.3d 704, 706 (5th Cir. 2019).

with his adviser.¹²⁷ The Fifth Circuit allowed a further stay on Murphy's execution, finding "a strong likelihood of success on the merits of his claim that the [state] policy violates his rights."¹²⁸ The question whether a categorical ban on religious advisers in the execution chamber is constitutionally permissible remains undecided, though some Justices have since found it unlawful in cases governed by the Religious Land Use and Institutionalized Persons Act (RLUIPA).¹²⁹

Had the Supreme Court viewed Murphy's claim as an equal protection claim based on First Amendment rights and presumptively granted a level-up remedy, further litigation would have been unnecessary. Murphy, and other prisoners who would later rely on his precedent, would have enjoyed constitutional protection for the "guidance of the soul at the moment of execution."¹³⁰ Instead, future inmates who have the misfortune of adhering to a faith other than that favored by established prison policy may someday face their executions alone, as Ray did—not because their claims will be rejected, but because even a legal victory may make no difference.

B. Religious Discrimination on University Campuses: Business Leaders in Christ v. University of Iowa

Murphy provides an example of one religious group being

127. *Id.* Christian inmates were allowed "a single hour" more of total time with a Christian chaplain than non-Christian inmates were with their spiritual advisers. *Id.* at 710 (Elrod, J., dissenting).

128. *Id.* at 708.

129. In early 2021 the Court declined to vacate a stay of execution in Alabama, which banned all religious advisers in the execution chamber. *Dunn v. Smith*, 141 S. Ct. 725 (2021) (mem.). Applying strict scrutiny under RLUIPA, four Justices explained that in their view, the state could not "carr[y] its burden of showing that the exclusion of all clergy members from the execution chamber is necessary to ensure prison security." *Id.* at 725 (Kagan, J., concurring in denial of application to vacate injunction). Justice Kavanaugh, joined by the Chief Justice, argued that the state's policy was "non-discriminatory" and served the state's compelling safety interests. *Id.* at 726 (Kavanaugh, J., dissenting from denial of application to vacate injunction). Neither opinion considered the constitutional questions raised by *Murphy*.

130. Brief Amicus Curiae for The Becket Fund for Religious Liberty in Support of Petitioner at 22, *Murphy*, 139 S. Ct. 1475 (No. 18A985).

preferred above another—what Justice Kavanaugh referred to as “denominational discrimination.”¹³¹ Increasingly more common, however, is another type of discrimination: preference of nonreligious people or groups over religious ones.

*Business Leaders in Christ v. University of Iowa (BLinC)*¹³² is one such case. In 2014, a group of students founded the Business Leaders in Christ (BLinC) group at the University of Iowa and gained recognition as an on-campus organization.¹³³ The group’s purpose was “to create a community of followers of Christ” and “to share and gain wisdom on how to practice business that is both Biblical and founded on God’s truth.”¹³⁴ As part of this mission, BLinC required its leaders to adhere to certain religious beliefs, including the group’s “biblically based views on sexual conduct.”¹³⁵ In February 2017, a gay student filed a complaint with the University of Iowa claiming that he had been denied a leadership position in BLinC because of his sexual orientation and asking that the University “[e]ither force BLinC to comply with the non-discrimination policy ([and] allow openly LGTBQ members to be leaders) or take away their status of being a student organization.”¹³⁶

After an investigation and a series of unsuccessful negotiations, the University of Iowa deregistered BLinC.¹³⁷ In response, BLinC immediately filed suit and requested an injunction ordering the University of Iowa to reinstate it as an on-campus organization.¹³⁸ Noting that the loss of First Amendment freedoms, “for even minimal periods of time, unquestionably constitutes irreparable injury,”¹³⁹ the district court granted the injunction based on “the

131. *Murphy*, 139 S. Ct. at 1475 (Kavanaugh, J., concurring in grant of application for stay).

132. 360 F. Supp. 3d 885 (S.D. Iowa 2019).

133. *Bus. Leaders in Christ v. Univ. of Iowa*, No. 17-cv-00080, 2018 WL 4701879, at *2 (S.D. Iowa Jan. 23, 2018).

134. *Business Leaders in Christ*, UNIV. OF IOWA, <https://tippie.uiowa.edu/student-organizations/business-leaders-christ> [<https://perma.cc/5U4K-DQER>].

135. *Bus. Leaders in Christ*, 2018 WL 4701879, at *3.

136. *Id.*

137. *BLinC*, 360 F. Supp. 3d at 892–93.

138. *Bus. Leaders in Christ*, 2018 WL 4701879, at *6.

139. *Id.* at *15 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The district court

University's selective enforcement of an otherwise reasonable and viewpoint neutral nondiscrimination policy,"¹⁴⁰ observing that other groups with differing beliefs had apparently not been subject to the same scrutiny. Six months later, the court granted a renewal of the injunction because developing facts revealed that "a large number of student organizations were operating in violation of the University's stated policies" when it had chosen to deregister BLinC and that "[t]he University [did] not reconcile that fact with how the proceedings against BLinC were carried out."¹⁴¹

In response, the University of Iowa opted for a level-down policy shift. In 2018, it "scrub[bed] the campus" of groups that maintained leadership requirements it deemed violative of its nondiscrimination policy, eliminating thirty-nine groups in an attempt to enforce the policy more consistently.¹⁴² But the University did not apply this harsher standard to many nonreligious groups such as fraternities and sororities, creating a disparity in treatment that disfavored religious organizations as compared to their peer groups.¹⁴³ Seeing that the University had doubled down on its inconsistent enforcement measures, another religious student group—InterVarsity Christian Fellowship (ICF)—filed a separate complaint parallel to BLinC's.¹⁴⁴

Rulings in both cases arrived in 2019. When the court issued its *BLinC* decision in February 2019, it harshly criticized the University of Iowa's selective enforcement measures, holding that the university's deregistration of BLinC was subject to strict scrutiny under the Free Exercise Clause and that the University's policy failed

specifically pointed to the immediate possible losses of "freedoms of speech and expressive association," but the religious issues in the case are difficult to ignore. *Id.*

140. *Id.* at *1.

141. *Bus. Leaders in Christ v. Univ. of Iowa*, No. 17-cv-00080, 2018 U.S. Dist. LEXIS 131934, at *3–4 (S.D. Iowa June 28, 2018).

142. See *InterVarsity Christian Fellowship v. University of Iowa*, BECKET (Apr. 4, 2019), <https://www.becketlaw.org/case/intervarsity-christian-fellowship-v-university-iowa> [<https://perma.cc/4S3D-PVYZ>].

143. See *InterVarsity Christian Fellowship v. Univ. of Iowa*, 408 F. Supp. 3d 960, 969–70, 980 (S.D. Iowa 2019).

144. See *id.* at 974.

under such scrutiny.¹⁴⁵ The court granted BLinC a permanent injunction,¹⁴⁶ emphasizing that the selective enforcement of a nondiscrimination policy against groups holding certain religious views was unlawful: “[t]he Constitution does not tolerate the way [the University] chose to enforce the Human Rights Policy.”¹⁴⁷ Seven months later, the district court also issued a ruling favorable to ICF, condemning the university’s actions in even stronger language:

[Representatives of the University] proceeded to broaden enforcement of the Human Rights Policy in the name of uniformity—applying extra scrutiny to religious groups in the process—while at the same time continuing to allow some groups to operate in violation of the policy and formalizing an exemption for fraternities and sororities. The Court does not know how a reasonable person could have concluded this was acceptable, as it plainly constitutes the same selective application of the Human Rights Policy that the Court found constitutionally infirm in the preliminary injunction order.¹⁴⁸

The court denounced the University of Iowa’s attempt to level down by enforcing its Human Rights Policy more harshly against religious groups while carving out formal exceptions for nonreligious organizations such as fraternities and sororities. While its analysis also focused on free speech concerns,¹⁴⁹ the court’s reasoning in both the BLinC and ICF suits strongly supports the rationale behind a level-up presumption for equal protection claims where

145. *Bus. Leaders in Christ v. Univ. of Iowa (BLinC)*, 360 F. Supp. 3d 885, 899–903 (S.D. Iowa 2019).

146. *See id.* at 905–06.

147. *Id.* at 909.

148. *InterVarsity Christian Fellowship*, 408 F. Supp. 3d at 993. The court also noted that while university officials had “understood the preliminary injunction to mean that the university *could not selectively enforce* the Human Rights Policy against some [student organizations] but not others,” *id.* at 993 (emphasis added), they had nonetheless chosen to do just that and therefore were not entitled to qualified immunity against damages claims. *See id.* at 994.

149. *See BLinC*, 360 F. Supp. 3d at 906 (“Defendants have violated Plaintiff’s constitutional rights to free speech, expressive association, and free exercise of religion.”).

religious groups are treated differently than nonreligious ones. It also demonstrates that voluntary leveling down should not always be blindly accepted by courts as a good-faith effort (as it was in *Palmer*). Instead, it should be carefully scrutinized when circumstances suggest, as they did in *BLinC*, that a level-down remedy was chosen solely to deny benefits on account of a plaintiff's religious character. This same logic would undergird the Supreme Court's ruling in *Espinoza v. Montana Department of Revenue* the following year.

*C. Religious Discrimination in Educational Funding:
Espinoza v. Montana Department of Revenue*

Espinoza is a forceful rejection of level-down remedies in cases involving free exercise violations. The case involved a conflict between the Montana Constitution and a scholarship program enacted by the state legislature. Under the program, Montana citizens could receive up to \$150 in tax credit for donations made to qualifying scholarship funds for students at private schools.¹⁵⁰ The Montana Department of Revenue realized, however, that the tax program conflicted with a state constitutional provision prohibiting “any direct or indirect appropriation or payment” to aid any “sectarian” (that is, religiously-affiliated) institution.¹⁵¹ (Such provisions are often called “Blaine Amendments,” named for the nineteenth-century senator who, taking advantage of widespread anti-Catholic prejudice, attempted to introduce a similar amendment into the United States Constitution.)¹⁵² To avoid invalidation of the program under Montana's Blaine Amendment, the state Department of Revenue promulgated a rule excluding religiously-

150. See *The Supreme Court, 2019 Term—Leading Cases*, 134 HARV. L. REV. 410, 470 (2020).

151. MONT. CONST. art. X, § 6.

152. See Philip Hamburger, *Prejudice and the Blaine Amendments*, FIRST THINGS (June 20, 2017), <https://www.firstthings.com/web-exclusives/2017/06/prejudice-and-the-blaine-amendments> [<https://perma.cc/4TRJ-V3TJ>]. Thirty-eight states have Blaine Amendments in some form. See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2037 & n.10 (2017) (Sotomayor, J., dissenting).

affiliated schools from the tax credit program.¹⁵³ This created an obvious equal protection problem: religious schools could not receive any scholarship funds, while nonreligious schools could. Accordingly, plaintiffs with children attending religiously-affiliated schools brought suit.¹⁵⁴

The trial court held that the tax program did not require a discriminatory rule to avoid conflict with the Montana Constitution because a tax credit did not qualify as an “appropriation or payment” under the state constitution. It therefore decided in favor of the plaintiffs and enjoined the state from enforcing its discriminatory rule—a level-up remedy that would have placed religiously-affiliated schools on the same footing as their nonreligious counterparts.¹⁵⁵ On appeal, however, the Montana Supreme Court chose the opposite route, holding that the entire tax credit program was unconstitutional under Montana’s Blaine Amendment and that the Department of Revenue could not save it by enacting a discriminatory rule.¹⁵⁶ In essence, the Montana Supreme Court reversed the district court’s remedy and enacted a level-down remedy in its place, denying even *nonreligious* schools the benefit of the tax-credited scholarship.

The Supreme Court reversed.¹⁵⁷ The Court had established in previous cases that “expressly denying a qualified religious entity a public benefit solely because of its religious character” violated the Free Exercise Clause.¹⁵⁸ But *Espinoza* allowed the Court to take the next step: it now held that a judicial level-down remedy designed to prevent public benefits from reaching qualified religious entities is *also* unconstitutional. Observing that the level-down remedy was justified only by a Blaine Amendment that itself violated the Free Exercise Clause, Chief Justice Roberts rejected the argument that leveling

153. See *Espinoza v. Mont. Dep’t of Revenue*, 435 P.3d 603, 606 (Mont. 2018).

154. See *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2252 (2020).

155. See *Espinoza*, 435 P.3d at 608.

156. See *id.* at 615.

157. See *Espinoza*, 140 S. Ct. at 2263.

158. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017).

down “put all private school parents in the same boat.”¹⁵⁹ Rather, a level-down remedy here served only to ensure that the plaintiffs could not exercise their rights:

The program was eliminated by a court, and not based on some innocuous principle of state law. Rather, the Montana Supreme Court invalidated the program pursuant to a state law provision that expressly discriminates on the basis of religious status. . . . [S]eeing no other “mechanism” to make absolutely sure that religious schools received no aid, the court chose to invalidate the entire program. . . . [But] the elimination of the program flowed directly from the Montana Supreme Court’s failure to follow the dictates of federal law [under the Free Exercise Clause]. . . .¹⁶⁰

The Supreme Court’s ruling in *Espinoza* is a clear signal to lower courts that level-down remedies designed to prevent the exercise of constitutional rights are “‘odious to our Constitution’ and ‘cannot stand.’”¹⁶¹ The Montana Supreme Court reasoned that because the state’s Blaine Amendment required that no money be granted to religious schools, no program contemplating such a possibility could be constitutional.¹⁶² But its remedy denied benefits to all Montana schools expressly to avoid granting them to religiously-affiliated ones—exactly like the pool closings in *Palmer*. Such a remedy would have served to entrench the underlying problem rather than cure it. As Justice Alito pointedly observed in his concurrence, “[t]he argument that the [level-down] decision below treats everyone the same is reminiscent of Anatole France’s sardonic remark that ‘[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.’”¹⁶³ The First Amendment requires

159. *Espinoza*, 140 S. Ct. at 2262 (quoting *id.* at 2281 (Ginsburg, J., dissenting)). Three dissenters would have found the Montana Supreme Court’s remedy sufficient. *See id.* at 2281 (Ginsburg, J., dissenting) (joined by Justice Kagan); *id.* at 2293 (Sotomayor, J., dissenting).

160. *Id.* at 2262 (majority opinion).

161. *Id.* at 2263 (quoting *Trinity Lutheran*, 137 S. Ct. at 2025).

162. *See Espinoza v. Mont. Dep’t of Revenue*, 435 P.3d 603, 611–14 (2018).

163. *Espinoza*, 140 S. Ct. at 2274 (Alito, J., concurring) (quoting JOHN COURNOS, *A MODERN PLUTARCH* 35 (1928)).

more respect for free exercise rights than the Montana Supreme Court's level-down remedy could provide.

CONCLUSION

The Supreme Court has often suggested that level-up remedies are preferred to level-down remedies, but it has never given a legal foundation for that assertion. The most likely source of the preference for level-up remedies is the Constitution itself, at least when expressly guaranteed substantive rights are at issue. While it is an open question how far a constitutional level-up presumption extends, claims of religious discrimination inextricably intertwined with underlying free exercise concerns are certainly included. The First Amendment guarantees an affirmative right to religious free exercise that goes beyond mere nondiscrimination, and this right justifies a presumption that courts turn to level-up remedies where religious freedom is concerned.

The idea that "equal treatment" can be achieved through denying as well as extending rights translates all too easily into pyrrhic victories. While leveling down may technically eliminate disparities between groups, it is often no relief in any real sense of the word; "[m]isery loves company, but not that much."¹⁶⁴ To insist on leveling down in the name of equality calls to mind the warning words of Alexis de Tocqueville: "They call for equality in freedom; and if they cannot obtain that, they still call for equality in slavery."¹⁶⁵ At least where religious liberty, our "first freedom,"¹⁶⁶ is concerned, the Constitution guarantees the former.

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164. Karlan, *supra* note 10, at 2028.

165. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 97 (Henry Reeve trans., Alfred A. Knopf 1945) (1840).

166. See Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 *CARDOZO L. REV.* 1243, 1244 (2000).