LEVELING DOWN GENDER EQUALITY

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ABSTRACT

The U.S. Supreme Court recently revived its jurisprudence of "leveling down," that is, curing an equal protection violation of gender discrimination by denying the requested benefit to all rather than extending the benefit to the excluded class. This article challenges the continuation of the conventional acceptance of leveling down as an equally legitimate remedial option for gender discrimination. Instead, it argues for the adoption of an alternative remedial calculus of a strong presumption of leveling up remedies, overcome only by limited equitable considerations. Such a presumption better effectuates the substantive right of gender equality, as well as the correlative due process right to a meaningful remedy.

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INTRODUCTION

The Supreme Court resurrected its "leveling down" jurisprudence in 2017 when it remedied an equal protection violation of gender discrimination by denying, rather than extending, the requested benefit.[1] Previously,

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[1] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017).

the Court had condoned this approach of nullifying the benefit for everyone in only a few cases, all over thirty years old;[2] but, with its decision in *Sessions v. Morales-Santana*, the Court brought new life and currency to this anomalous circumscription of equality law.[3] In *Morales-Santana*, a six-Justice majority of the Supreme Court led by Justice Ruth Bader Ginsburg and joined by Chief Justice Roberts and Justices Kennedy, Breyer, Sotomayor, and Kagan struck down a gender-based distinction in the federal derivative citizenship law in the Immigration and Nationality Act ("INA") granting citizenship to children born abroad to one U.S. parent.[4] The statute had two different standards for determining derivative citizenship for children born abroad to unwed citizen mothers and fathers.[5] It seemed to be an easy case of invalidating facially unequal rules based on gender: one year prior U.S. residence was required for unwed mothers, but five years prior residence was required for unwed fathers.[6] However, the Court refused to grant the plaintiff-father the same benefit of the shorter time frame allotted to mothers. It instead equalized the gendered rules by denying the previous benefit of the shorter one-year residency requirement to mothers.[7] While Justice Ginsburg's decision in *Morales-Santana* purported to be a strong, historic decision on the merits of equality, the denial of meaningful relief actually weakened the meaning of equality, a consequence with a reach far beyond the contours of this one case.

This "leveling down" of the remedy—responding to inequality by reducing benefits to all rather than leveling up and extending benefits to the disadvantaged group—is unusual, but not unheard of.[8] It has been judicially endorsed in a few cases, in both dicta and dissent and in instances where courts have ratified the voluntary actions of defendants.[9] In one case, the city

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[2] *See, e.g.*, Heckler v. Mathews, 465 U.S. 728, 738 (1984); Palmer v. Thompson, 403 U.S. 217, 226 (1971).

[3] *Morales-Santana*, 137 S. Ct. at 1701.

[4] *Id.* at 1686.

[5] *Id.*

[6] *Id.* While the law in effect at the time respondent Morales-Santana was born required his father to have been present in the United States for a period of time totaling ten years prior to his birth, and at least five years after the age of fourteen, at the time of the lawsuit, the challenged law only required unwed fathers to have been present in the United States for five years prior to their child's birth, and at least two years after the age of fourteen. *See* 8 U.S.C. § 1401(7) (1958); 8 U.S.C. § 1409(a) (1958); 8 U.S.C. § 1401(g) (2012); 8 U.S.C. § 1409(a) (2012).

[7] *Morales-Santana*, 137 S. Ct. at 1701.

[8] *Id.* at 1699 ("Ordinarily, . . . 'extension, rather than nullification, is the proper course'" for an equal protection remedy.) (quoting Califano v. Westcott, 443 U.S. 76, 89 (1979)); *but 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) [hereinafter Brake, *Worse Off*] (describing the "acceptability of leveling down in response to inequality").

[9] *See, e.g.*, Heckler v. Mathews, 465 U.S. 728, 740 (1984) (dicta ratifying defendant's action); Califano v. Westcott, 443 U.S. 76, 89 (1979) (dicta); *Id.* at 94–96 (Powell, J., dissenting); Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan., J., concurring) (dicta).

of Jackson, Mississippi, remedied the inequality caused by its racially segregated swimming pools by closing down all pools.[10] In another, Congress legislated to redress a disparity in the Social Security law that gave extra benefits to married women, by reducing the women's benefits to the lower level previously applicable to married men.[11] In yet another example, a high school found to have discriminated on the basis of sex against a pregnant teen by denying her membership in the school's National Honor Society eliminated the honor society for all students.[12] More recently, the British Broadcasting Company ("BBC") responded to media investigations revealing that the company's women editors were paid substantially less than men editors by reducing the men's pay.[13] For the BBC, like other discriminatory actors, leveling down offered a quick and easy way to erase the inequality problem. Wrongdoers seem to choose this reductionist remedial option almost in defiance, refusing to grant a benefit to a party with the audacity to challenge inequality.

The Court in *Morales-Santana* similarly chose the leveling down remedy, asserting that it needed to defer to the wrongdoer, Congress, in the choice of remedy for the gender discrimination.[14] This is ironic given that the Court, in this same case, explicitly refused to grant deference to Congress in the merits part of the decision.[15] Departing from its previous decisions upholding gender distinctions for unwed citizen parents in the immigration and citizenship laws, the Court forcefully applied constitutional norms of equality to a different end.[16] Yet, in the same breath, the Court espoused the importance of deference to the wrongdoer, Congress, in its choice of remedy, even though Congress had not actually demonstrated its intent by word or action.[17]

This standard of deference to the discriminator, Congress, however, asks the wrong question, for it assumes that leveling down is an equally valid remedial option for curing inequality. The Court erred by failing to question the constitutional legitimacy of this nullification in light of the constitutional mandates of due process and equal protection. Had the Court engaged in an analysis of the remedy as thoroughly as it did of the right, it

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[10] Palmer v. Thompson, 403 U.S. 217, 219 (1971).

[11] *Heckler*, 465 U.S. at 734.

[12] Cazares v. Barber, 959 F.2d 753, 755 (9th Cir. 1992).

[13] Kimiko de Freytas-Tamura, *BBC, Criticized Over Pay Gap, Cuts Salaries of Some Male Journalists*, N.Y. TIMES (Jan. 26, 2018), http://www.nytimes.com/2018/01/26/business/media/bbc-pay-gap-html [https://perma.cc/3YTN-3TE4]. However, the U.S. Equal Pay Act prohibits such leveling down to redress wage disparities. 29 U.S.C. § 206(d)(1) (1963).

[14] *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699–1700 (2017).

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

[16] *Morales-Santana*, 137 S. Ct. at 1686; Flores-Villar v. United States, 564 U.S. 210 (2011), *aff'g by an equally divided court*, 536 F.3d 990 (9th Cir. 2008); Nguyen v. INS, 533 U.S. 53, 58–59 (2001); Miller v. Albright, 523 U.S. 420, 424 (1998).

[17] *See Morales-Santana*, 137 S. Ct. at 1699–1700.

might have discovered that more was demanded than mere neutral formality and equivalency of benefit across the board.[18] Equality itself, as a constitutional right, dictates more than just empty formalism.[19] And due process, I have argued, requires that rights be granted meaningful remedies.[20] Together, this means that where the operative substantive right is based on equal protection, as in *Morales-Santana*, a meaningful remedy is one that grants the "protection" promised. Equal protection does not merely mandate a logical parallelism of genders, but normatively incorporates "equal concern," opportunity, and benefit.[21] Examining the leveling down remedy in light of the requirements of equal protection, beyond the textualist inquiry of *Morales-Santana*, produces a different conclusion than the one reached by the Court. Asking the additional question of whether the plaintiff has received a meaningful remedy for the past inequality casts doubt on the validity of leveling down relief for gender discrimination.

This Article first examines the Court's decision in *Morales-Santana* and its justification for choosing the "mean remedy" of leveling down and denying a citizenship benefit to both children born abroad to unwed citizen mothers and those born abroad to unwed citizen fathers. Part II then explores the Court's general, but unexplained, impression that leveling up is ordinarily the proper remedial course. It provides a normative foundation for this remedial presumption grounded in the meaning of equal protection and in the due process right to a meaningful remedy. Given these constitutional norms, the Article then argues that the remedial calculus should be changed. Rather than accepting the Court's assumption, renewed in *Morales-Santana*, that leveling down and leveling up are equally valid remedial choices, it argues for a strong presumption of leveling up in cases of gender discrimination, subject only to limited exceptions for rebuttal. Part III of the Article explains that these exceptions permitting leveling down should be rare and justified only by equitable concerns that the leveling up itself would inflict

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[18] *See* Evan H. Camiker, Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1202–03 (1986) (arguing that courts should chose the constitutional remedy that "best promotes" constitutional norms); Eric S. Fish, *Choosing Constitutional Remedies*, 63 UCLA L. REV. 322, 327 (2016) (discussing Camiker's approach).

[19] *See* Brake, *Worse Off*, *supra* note 8, at 523–24; Camiker, *supra* note 18, at 1196–98.

[20] Tracy A. Thomas, *Restriction of Tort Remedies and the Constraints of Due Process: The Right to an Adequate Remedy*, 39 AKRON L. REV. 975, 984 (2006) [hereinafter Thomas, *Right to an Adequate Remedy*]; Tracy A. Thomas; *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1640–42 (2004) [hereinafter Thomas, *Ubi Jus*]; *see also* TRACY A. THOMAS, DAVID LEVINE & DAVID JUNG, REMEDIES: PUBLIC AND PRIVATE 9–11 (West 6th ed. 2017). *See also* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 529, 568 (2005).

[21] *See* Brake, *Worse Off*, *supra* note 8, at 524, 567; Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. 219, 221–22 (2009); Camiker, *supra* note 18, at 1198–1202; United States v. Virginia, 518 U.S. 515, 532, 534 (1996).

an undue burden on the defendant or third parties. Such a deferential rule to the plaintiff's rights better effectuates the meaning of equal protection and protects against judicial and voluntary action that, by the remedial formalism of leveling down, could eviscerate the very meaning of equality.

I. The Mean Remedy

The Court's nullification remedy in *Morales-Santana* has been dubbed "the mean remedy."[22] It has been declared "mean" because it is downright not nice to the plaintiff, and, in fact, makes everyone involved worse off.[23] Indeed, "[t]here is not a single human being whose life will be made better because of this opinion."[24] The plaintiff received nothing, despite having proven a constitutional violation of equal protection. It was "an empty victory for the individual who came to the Court seeking justice and recognition."[25] Moreover, third parties to the action, children of unwed mothers, will be made worse off in the future by having their previous derivative citizenship benefit stripped by the Court.[26] Legal commentators have characterized the dark contours of this leveling down decision, noting its "remedial grief" and "element of schadenfreude."[27] Thus, the remedial decision in *Morales-Santana* has been flagged as a "contender for the worst thing Justice Ginsburg has ever written for the Court."[28]

There is certainly a question as to why Justice Ginsburg would decide on a mean remedy, especially one that jeopardizes the impact of her equal protection decision itself. Ginsburg seemed to be satisfied that her opinion eradicated gender stereotypes generally and stopped the government from legislating in a gendered way in the future. It is enough, she held, that "the Government must ensure that the laws in question are administered in a

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[22] Ian Samuel, *Morales-Santana and the "Mean Remedy,"* PrawsfsBlawg (June 12, 2017), http://prawfsblawg.blogs.com/prawfsblawg/2017/06/12/index.html [https://perma.cc/VZQ5-RG2U].

[23] *See* Collins, *Equality*, *supra* note 15, at 171; Brake, *supra* note 8, at 537.

[24] Samuel, *supra* note 22.

[25] Collins, *Equality, supra* note 15, at 171.

[26] *See* Collins, *Equality*, *supra* note 15, at 171. This effect is mitigated for foreign-born children who reside with their American parent in the United States prior to the age of eighteen, per the Child Citizenship Act of 2000. Pub. L. No. 106-395, § 101, 114 Stat. 1631 (2000).

[27] Deborah L. Brake, *Remedial Grief: Leveling Down in* Morales-Santana, Human Rights at Home Blog (June 14, 2017) [hereinafter Brake, *Remedial Grief*], http://lawprofessors.typepad.com/human_rights/2017/06/remedial-grief-leveling-down-in-sessions-v-morales-santana.html [https://perma.cc/6YRR-GUXZ]; Michael Dorf, *Equal Protection and Leveling Down as Schadenfreude*, Dorf on Law Blog (June 14, 2017), http://www.dorfonlaw.org/2017/06/equal-protection-and-leveling-down-as.html [https://perma.cc/W5MG-58MM].

[28] Samuel, *supra* note 22; Tracy A. Thomas, *SCOTUS Denial of Equal Protection Remedy Jeopardizes Equality Law: What was Justice Ginsburg Thinking?*, Gender and the Law Prof Blog (June 13, 2017), http://lawprofessors.typepad.com/gender_law/2017/06/sctous-denial-of-equal-protection-remedy-jeopardizes-equality-law-what-was-justice-ginsburg-thinking.html [https://perma.cc/RNU8-FCZX].

manner free from gender-based discrimination."[29] When concurring Justices Thomas and Alito emphasized the lack of an appropriate individualized remedy as a reason why the Court should not have considered the merits of the case, Ginsburg brought them back to the structural impact of the decision: " '[A]s we have repeatedly emphasized, discrimination itself . . . perpetuat[es] "archaic and stereotypic notions"' incompatible with the equal treatment guaranteed by the Constitution."[30] Thus, Ginsburg was content to have remedied the structural effect of the law by constraining the government and was less concerned with providing the individualized remedy that is usually the hallmark of effective relief.[31] "Ruth Ginsburg," legal reporter Linda Greenhouse reminds us, "has always played a long game, with the ultimate goal, equality of the sexes, constantly in view. As this case turned out, the price for equality was high."[32]

A. On the Merits

The Court's mean remedial decision comes as a surprise in part because it follows a progressive decision on gender equality. In the merits part of the decision, the Court forcefully declared that the "gender line Congress drew" in the law of derivative citizenship for a child born abroad to one unwed American parent discriminated on the basis of gender in violation of the equal protection guarantees of the Fifth Amendment.[33] The federal derivative citizenship law required an unwed citizen-father to have ten years (subsequently changed to five years) physical presence in the United States prior to the child's birth in order to pass citizenship to his child born abroad.[34] However, it created an exemption for unwed citizen-mothers requiring only one year of physical presence.[35] Married parents, both mothers and fathers, have to follow the longer five-year rule.[36]

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[29] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017).

[30] *Id*. at 1698 n.21 (quoting Heckler v. Mathews, 465 U.S. 728, 739 (1984)).

[31] *See id.* at 1686 (holding that "the Government must ensure that the laws in question are administered in a manner free from gender-based discrimination" but refusing to grant Morales-Santana the individual citizenship status he sought).

[32] *See* 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-supreme-court.html?_r=0&referer=https://t.co/GUZouOgz60%3famp=1 [https://perma.cc/K66Y-MXLN].

[33] *Morales-Santana*, 137 S. Ct. at 1686. Justice Ginsburg noted that it was the equal protection guarantee of the Fifth Amendment, not the Fourteenth Amendment, that applied to this action by the federal, rather than a state, government. *Id.* at 1686 n.1.

[34] *See* 8 U.S.C. § 1401(7) (1958); 8 U.S.C. § 1409(a) (1958); 8 U.S.C. § 1401(g) (2012); 8 U.S.C. § 1409(a) (2012). The ten-year rule was the law in effect when Morales-Santana was born and thus was applicable to his case. *Morales-Santana*, 137 S. Ct. at 1687 n.2.

[35] 8 U.S.C. § 1409(c) (1958); 8 U.S.C. § 1409(c) (2012).

[36] 8 U.S.C. § 1401(g) (1994).

The plaintiff, Luis Morales-Santana, missed citizenship by a matter of days.[37] He was born in the Dominican Republic in 1962 to an unmarried American father and a Dominican mother.[38] His father left Puerto Rico, possessing American citizenship, for work in the Dominican Republic twenty days shy of satisfying the ten-year presence rule.[39] His parents married in 1970, about eight years after his birth, and the family moved to the United States in 1975 when he was thirteen.[40] In 1995, Morales-Santana was convicted of burglary, robbery, criminal possession of a weapon, and attempted murder, but subsequently contested his deportability on grounds of his citizenship as the son of an American citizen.[41]

The statutory provision in *Morales-Santana* was part of a broader citizenship statute that is "complex and messy" and "contains multiple sections that differentiate between unmarried mothers and unmarried fathers."[42] As to the particular provision challenged, Justice Ginsburg noted that "[h]istory reveals what lurks behind" Section 1409's gendered distinctions: "assumptions" that "[i]n marriage, husband is dominant, wife subordinate; [and] unwed mother is the natural and sole guardian of a nonmarital child."[43] These legal and social norms guided the evolution of the gender-differentiated citizenship statute over the years. Initially and until 1940, the law transmitted citizenship to the child of a married citizen father born abroad if the father resided in the United States for *any period of time* prior to the birth.[44] This citizenship law followed the "patrilineal norms that had long characterized domestic relations law," recognizing the father as master of the house, wife, and children, and thus applied only to married men.[45] Under the common law of "coverture," a married woman lost all legal rights, including those of parentage, upon marriage when her legal identity was incorporated or subsumed into that of the husband.[46] However, in 1934, upon active campaigning by feminists, Congress extended the citizenship law to citizen mothers, applying the then-existing law requiring only some residence in the

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[37] *Morales-Santana*, 137 S. Ct. at 1686.

[38] *Id.* at 1687–88.

[39] *Id.* at 1687.

[40] *Id*. at 1688.

[41] *See* Brief for the Petitioner at 7, Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (No. 15-1191).

[42] Collins, *Equality*, *supra* note 15, at 172.

[43] *Morales-Santana*, 137 S. Ct. at 1690–91.

[44] *See* Act of March 26, 1790, ch. 3, 1 Stat. 103 (1790); Rogers v. Bellei, 401 U.S. 815, 823–25 (1971) (discussing the Act of March 26, 1790 and the Nationality Act of 1940).

[45] Collins, *Equality*, *supra* note 15, at 178.

[46] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 430 (1765); *see* FEMINIST LEGAL HISTORY: ESSAYS ON WOMEN AND LAW 3 (Tracy A. Thomas & Tracey Jean Boisseau, eds., 2011); *see also* TRACY A. THOMAS, ELIZABETH CADY STANTON AND THE FEMINIST FOUNDATIONS OF FAMILY LAW 40 (2016) (discussing the history and legal implications of coverture).

U.S. prior to the child's birth.[47] These early citizenship statutes were silent as to children of unmarried parents, but, "at least since 1912," State Department administrators applied the law to unwed mothers, because under domestic relations law an unwed mother is the sole legal guardian with legal rights to an illegitimate child.[48]

In 1940, Congress, concerned about opening the floodgates of citizenship to disfavored groups, namely those of Japanese, Chinese, and Mexican heritage, added a residency time period to the statute.[49] The fear was that a foreign-born child under the influence of a foreign parent would turn out "more alien than American in character," but this effect could be counteracted by a citizen parent with lengthy ties to the United States.[50] The 1940 law thus required the parent's physical presence in the U.S. for ten years prior to the birth of the child, five of which had to occur after the age of sixteen.[51] However, Congress retained the prior rule requiring only some period of prior presence for unwed mothers, revising it slightly in 1952 to require a continuous presence of one year prior to the child's birth.[52] The justification for retaining the older de minimis time rule only for unwed mothers was that a mother of a nonmarital child "stands in the place of the father" and "has a right to the custody and control of such a child as against the putative father, and is bound to maintain it as its natural guardian."[53] The assumption was also that an "alien father, who might transmit foreign ways," would be "out of the picture" if not married to the mother.[54]

The 1952 version of the statute remains the rule for unwed mothers today. However, in 1986, Congress revised the rule for all fathers and mar-

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[47] Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797 (1934); *see also* Collins, *Equality*, *supra* note 15, at 184–86. The 1934 Act also added a requirement that children of mixed citizenship parents must reside in the U.S. for five years from ages fourteen to eighteen in order to retain that derivative citizenship. Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797, 797 (1934).

[48] Collins, *Equality*, *supra* note 15, at 178; *see also Hearing on H.R. 6127 Before the H. Comm. on Immigration and Naturalization*, 76th Cong. 43, 431 (1940) [hereinafter "1940 Hearings"]; Kristen A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2199–2205 (2014) [hereinafter "*Illegitimate Borders*"] (discussing the reasons behind the asymmetric regulation of citizenship regarding the illegitimate children of unwed mothers versus the illegitimate children of unwed fathers).

[49] 1940 Hearings, *supra* note 48, at 426; *see* Collins, *Equality*, *supra* note 15, at 184; *see* Collins, *Illegitimate Borders*, *supra* note 48, at 2206.

[50] 1940 Hearings, *supra* note 48, at 426–27.

[51] 8 U.S.C. § 601(g) (1940).

[52] 8 U.S.C. § 605 (1940); 8 U.S.C. § 1409(c) (1952).

[53] 1940 Hearings, *supra* note 48, at 431 (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 231 (11th ed. 1867)); Collins, *Illegitimate Borders*, *supra* note 48, at 2205.

[54] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1692 (2017); *see also* Collins, *Illegitimate Borders*, *supra* note 48, at 2203, 2205; *see also* Brief for Professors of History et al. as Amici Curiae Supporting Respondent at 32, Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (No. 15-1191) (explaining that "the sex-based ten-year presence requirement reveal[s] the outdated presumption that courses through the 1952 Act: mothers invariably raise nonmarital children and fathers do not.").

ried mothers, reducing the ten-year requirement to five years (two of which after the age of fourteen).[55] This was the statutory scheme at issue in *Morales-Santana*. Congress, however, took further action on the subject in the Child Citizenship Act of 2000, which provides for automatic citizenship for all foreign-born children of one U.S. parent when the child resides in the U.S. prior to the age of eighteen in the legal and physical custody of that parent.[56] This law applies to children exactly like Luis Morales-Santana, but it did not benefit him personally because the law was not retroactive and thus did not apply to foreign-born children prior to 2001.[57]

The merits decision in *Morales-Santana* appeared to be "a straightforward application of equal protection doctrine invalidating a gender-based statutory distinction."[58] In the majority opinion, Ginsburg waxed eloquently about the dangers of formal sex classifications and the legislative reliance on "stunningly anachronistic" stereotypes of gender and parenting roles; she attacked the citizenship law for "[p]rescribing one rule for mothers, another for fathers," based on "overbroad generalizations about the way men and women are."[59] The opinion provided a comprehensive summary of existing gender discrimination law, citing all of the prior precedential cases, although it added little new ground to equal protection jurisprudence.[60] Ginsburg repeated her preferred articulation of the judicial scrutiny standard that requires an "exceedingly persuasive justification," which some suggest is a strict rather than intermediate level of scrutiny.[61] She also added some dicta

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[55] *See* Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 12, 100 Stat. 3655, 3657 (1986) (codified as amended at 8 U.S.C. § 1401(g)).

[56] Child Citizenship Act of 2000, Pub. L. No. 106-395, § 101, 114 Stat. 1631 (2000).

[57] U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., FACT SHEET: CHILD CITIZENSHIP ACT OF 2000 (2000), 1–2 (Dec. 1, 2000) [https://perma.cc/S7EA-E38R].

[58] John Vlahoplus, Sessions v. Morales-Santana: *Beyond the Mean Remedy*, 18 CONN. PUB. INT'L L.J. at *2 (forthcoming). There is an argument that the citizenship presence rule does not facially classify on the basis of gender, as the statute groups all men and married women together under the longer time rule, *see* 8 U.S.C. § 1401(g), 8 U.S.C. § 1409(a), and groups unmarried women separately under the one-year-rule, *see* 8 U.S.C. § 1409(c). Viewed this way, the classification is not gender-based since women are included in both classifications. However, one could still argue that the citizenship statute distinguished on the basis of a fundamental right of parenting, and thus still rightfully triggered a heightened, indeed strict, scrutiny analysis that could not sustain gendered stereotypes of parenting and animus toward unmarried fathers. *Cf.* Zablocki v. Redhail, 434 U.S. 374, 382–83, 388 (1978) (holding that because statute's classification infringed on fundamental right of marriage when it separated unmarried, non-custodial, impoverished parents from all other parents, heightened scrutiny was triggered); Stanley v. Illinois, 405 U.S. 645, 651–52, 658 (1972) (extending fundamental right of parenting to unwed father and striking down state's presumption against unmarried father as contrary to Equal Protection Clause).

[59] *Morales-Santana*, 137 S. Ct. at 1689–90, 1693.

[60] *Id.* at 1690, 1692–96; *but see* Vlahoplus, *supra* note 58, at *2 (arguing that the "decision applies to immigration as well as naturalization laws," thus overruling key precedents, which "could significantly alter the constitutional rights of both citizens and aliens").

[61] *Morales-Santana*, 137 S. Ct. at 1698, 1690 (citing United States v. Virginia, 518 U.S. 515, 531 (1996)); *see also* United States v. Virginia, 518 U.S. 515, 531, 533 (1996)

from the Court's same-sex marriage decision in *Obergefell v. Hodges* concerning the need to interpret gender discrimination claims against an evolving nature of societal expectations.[62] Overall, the opinion comprehensively summarized existing equal protection law on gender, keeping the rules alive and applying them to a stubborn legislative context.

While the case, viewed from Ginsburg's majority opinion, appeared to be an easy one of striking down facially obvious gender distinctions based on gender stereotypes of parenting and women's maternal role, the Court had failed to reach this clear decision in four prior similar cases.[63] In this quartet of decisions, the Court prevaricated on the issue of gendered laws of derivative citizenship and immigration, twice failing to reach a majority decision and twice upholding different standards for unwed fathers.[64] Thus, "the gender-differentiated regulation of derivative citizenship ha[d] proved largely resistant to constitutional challenge."[65] In these prior cases, the two women Justices then on the Court, Ginsburg and O'Connor, dissented, appreciating the broader historical and social context in which these gendered distinctions operated.[66]

In *Morales-Santana*, Ginsburg finally achieved a majority to strike down gender-based immigration laws, converting her prior dissent in *Miller*

(articulating the "exceedingly persuasive justification" standard); *Id.* at 571, 573 (Scalia, J., dissenting) (noting that the government "urged" the Court to adopt strict scrutiny for gender classifications, which the Court "effectively" did as the exceedingly persuasive standard is more rigorous than intermediate scrutiny); Candace Saari Kovacic-Fleischer, United States v. Virginia*'s New Gender Equal Protection Analysis and Ramifications for Pregnancy, Parenting, and Title VII*, 50 VAND. L. REV. 845, 848, 873–74 (1997) (arguing that "exceedingly persuasive justification" standard first used in *United States v. Virginia* applies, but does not articulate, a strict scrutiny analysis); Steven A. Delchin, Comment, United States v. Virginia *and Our Evolving "Constitution": Playing Peek-A-Boo With the Standard of Scrutiny for Sex-Based Classifications*, 47 CASE W. RES. L. REV. 1121, 1130-34 (1997) (arguing that the decision possibly represents the Court's final step to strict scrutiny for sex-based classifications).

[62] *Morales-Santana*, 137 S. Ct. at 1690 (citing Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015)).

[63] Flores-Villar v. United States, 564 U.S. 210 (2011), *aff'g by an equally divided court*, 536 F.3d 990 (9th Cir. 2008) (4-4 split decision affirming the Ninth Circuit's decision to uphold Section 1409's different residency requirements for unwed mothers and fathers); Nguyen v. INS, 533 U.S. 53, 58–59, 61, 73 (2001) (upholding Section 1409's different requirements for proving maternity and paternity for derivative citizenship); Miller v. Albright, 523 U.S. 420, 424 (1998) (2-2-2-3 split opinion also upholding Section 1409's different standards for proof of paternity and maternity for derivative citizenship); Fiallo v. Bell, 430 U.S. 787, 792, 800 (1977) (upholding 8 U.S.C. § 1101(b)'s different gendered standards for "child" immigration preference).

[64] *Flores-Villar*, 564 U.S. 210 (no majority); *Miller*, 523 U.S. at 424 (1998) (no majority); *Nguyen*, 533 U.S. 53 at 61 (majority opinion upheld § 1409).

[65] Collins, *Equality*, *supra* note 15, at 173.

[66] In *Miller v. Albright*, Justice Ginsburg wrote the dissent, turning to history to expose the anachronistic gender stereotypes about those who care for children. 523 U.S. at 460–61 (Ginsburg, J., dissenting). In *Nguyen v. INS*, Justice O'Connor wrote the dissent, joined by Ginsburg, arguing that gender-based immigration laws must be "viewed not in isolation, but in the context of our Nation's 'long and unfortunate history of sex discrimination.'" 533 U.S. at 74 (O'Connor, J., dissenting) (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136 (1994)).

into a majority decision. Her decision gave a "clear and forceful repudiation of a body of gender-based citizenship laws that have long shaped the composition of the American polity," while also articulating "constitutional equality norms that have the potential to significantly shape how government officials regulate the family."[67] Thus, at the end of the day, this was an important decision.[68] The potential significance of this decision, however, to both equal protection law and Justice Ginsburg's legacy, is potentially threatened by her failure to deliver a strong decision on the remedy.

B. The Nullification Remedy

The Court's decision in *Morales-Santana* to deny any meaningful remedy to the plaintiff who had proven such anachronistic discrimination was shocking. The plaintiff effectively lost because the Court refused to grant his requested remedy of applying the one-year rule for unwed women to unwed men; instead, it applied the five-year rule to everyone.[69] "[T]his Court," Justice Ginsburg determined, "is not equipped to grant the relief Morales-Santana seeks."[70] Ginsburg acknowledged that the usual equal protection remedy is to extend protection and benefit to the class denied, rather than withdrawing the benefit for both classes.[71] She explained that "[t]here are 'two remedial alternatives,' our decisions instruct, when a statute benefits one class . . . and excludes another from the benefit," as "[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] "Ordinarily," she emphasized, "extension, rather than nullification, is the proper

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[67] Collins, *Equality*, *supra* note 15, at 171.

[68] *See* Collins, *Equality*, *supra* note 15, at 171; Marcia Zug, *Make Immigration Great Again: How* Morales-Santana *Could Signal the End of Sexist Immigration Law and Provide a Way to Fight the Travel Ban*, WAKE FOREST L. REV. ONLINE (Dec. 7, 2017), http://wakeforestlawreview.com/2017/12/make-immigration-great-again-how-morales-santana-could-signal-the-end-of-sexist-immigration-law-and-provide-a-way-to-fight-the-travel-ban [https://perma.cc/9ZGD-DRKD] (concluding that *Morales-Santana* is significant in the broader context of immigration law); Cary Franklin, Abstract, *Biological Warfare: Constitutional Conflict Over "Inherent Differences" Between the Sexes*, 2017 SUP. CT. REV. 169 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3136197 [https://perma.cc/52NT-KGQG] (arguing that *Morales-Santana* was "surprisingly transformative and consequential" and "struck a serious blow against the most formidable barrier [of biology] to equal protection where gay people, unmarried parents—and pregnant women—are concerned").

[69] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017). Justices Thomas and Alito agreed in concurrence that extending the one-year rule was not an appropriate remedy. *Id.* at 1701. Thus eight Justices unanimously supported the remedial decision to level down.

[70] *Id.* at 1698.

[71] *Id.* at 1699.

[72] *Id.* at 1698 (quoting Califano v. Westcott, 443 U.S. 76, 89, 99 (1979)).

course."[73] Nevertheless, she decided that "[a]lthough extension of benefits is customary in federal benefit cases, all indicators in this case point in the opposite direction."[74] Legislative intent was the hallmark of the inquiry, with the Court seeking to determine what Congress would have done if it had known its sex-based exemption was invalid.[75]

The Court concluded that "[put] to the choice, Congress, we believe, would have abrogated § 1409(c)'s exception preferring preservation of the general rule."[76] It employed a textual approach to delete the provision it demarcated as the modifying clause, the mother's exemption, and retained the general rule for unwed fathers. The Court stated that it relied on Congress's "intensity of commitment to the residual policy" of the general, longer rule.[77] It also noted the high "potential for 'disruption to the statutory scheme'" from extending the benefit to all unwed parents, which would create the "irrational" result of retaining a longer term for married parents.[78] Such "[d]isadvantageous treatment of marital children in comparison to nonmarital children," the Court held, "is scarcely a purpose one can sensibly attribute to Congress," as it would create a kind of reverse illegitimacy discrimination.[79] The Court therefore implicitly required that any future action of Congress in making the law uniformly applicable to all children born abroad to one U.S. citizen and one alien parent must be gender neutral and also the same for both wed or unwed parents.[80]

However, a court could just as easily have discerned a different intent for Congress, as the Second Circuit did when addressing the same case below.[81] The appellate court severed the longer general rule for unwed fathers, leaving in place a gender-neutral one-year rule that then applied to all unwed parents.[82] The "task," it said, was "not to devise the 'cleanest' way to alter the wording and structure of the statute, but to determine what result Congress intended in the event the statutory provisions were deemed unconstitutional."[83] "Neither the text nor the legislative history of the 1952 Act," the appellate court found, "is especially helpful or clear on this point."[84] The Second Circuit found it important to place the remedial question in historical

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[73] *Id.* at 1699 (quoting *Westcott*, 443 U.S. at 89, 99) (listing cases where the Court had extended benefits to all).

[74] *Id.* at 1700.

[75] *Id.*

[76] *Id.*

[77] *Id.* (quoting Heckler v. Mathews, 465 U.S. 728, 739 n.5 (1984)).

[78] *Id.* (quoting *Heckler*, 465 U.S. at 739 n.5).

[79] *Id.* In support, the Court cited *Clark v. Jeter*, 486 U.S. 456, 461 (1988), which held that discrimination against illegitimate children was subject to heightened judicial scrutiny. *Morales-Santana*, 137 S. Ct. at 1700 n.25.

[80] *Id.*

[81] Morales-Santana v. Lynch, 804 F.3d 520, 536–38 (2d Cir. 2015).

[82] *Id.* at 536.

[83] *Id.*

[84] *Id.* at 537.

context.[85] From 1790 to 1940, the historical practice had been unrestrained ability for unwed fathers and mothers to pass on citizenship to their foreign-born children despite minimal prior residency.[86] The statute at issue changing the rule to ten years (and then five) prior residency was a "significant departure from the long-established historical practice."[87] The appellate court hinted at the impermissible racial motives of the longer time rule, noting that Congress, in 1952, chose to retain the extended presence requirement after the U.S. emerged as a world power following World War II and the number of mixed-nationality children increased.[88] The appellate court then cemented its decision by relying on the general rule of leveling up, explaining that "binding precedent . . . cautions us to extend rather than contract" the benefit challenged.[89]

Another alternative approach suggested by Justice Kagan at oral argument was to omit any judicial injunction at all.[90] She proposed issuing merely a declaratory judgment specifying the adjudicated legal rights of the parties, and then allowing Congress the first opportunity to correct the constitutional infirmity.[91] The majority agreed in principle about a role for Congress in remediation, for Justice Ginsburg's broader jurisprudential belief has been that "equality—or any other goal—is best achieved if all branches of government have a stake in achieving it."[92] However, the Court refused to do nothing, instead imposing an "interim" remedy guiding the implementation of derivative citizenship until such time as Congress chose to act.[93] Given the potential delays in legislative correction, the interim solution, at least, was practical.[94]

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[85] *Id.* at 536.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 537; *see also* Vlahoplus, *supra* note 58 at *7, 10–14 (suggesting Congress's motive behind the longer time rule may have involved unconstitutional discrimination based on race or national origin).

[89] Morales-Santana v. Lynch, 804 F.3d at 537.

[90] Transcript of Oral Argument at 40, Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (No. 15-1911).

[91] *Id.*; *see also* Sabina Mariella, *Leveling Up Over Plenary Power: Remedying an Impermissible Gender Classification in the Immigration and Nationality Act*, 96 B.U. L. Rev. 219, 254 (2016) (suggesting that "[t]he Supreme Court could issue a declaratory judgment holding that the provision is unconstitutional, but stay an injunction . . . to give the legislature time to respond"); *but see* Jerfi Uzman, *Upstairs Downstairs:* Morales-Santana *and the Right to a Remedy in Comparative Law*, 9 ConLawNOW 139, 147, 156 (2017) (arguing that while some international courts like those in the Netherlands employ a "separation of powers approach" to award only declaratory relief as a remedy for equality discrimination rather than leveling up or down, such an approach "immediately falls short in terms of effective legal protection" because an individual claimant probably would not benefit from the new law).

[92] Greenhouse, *supra* note 31.

[93] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686, 1701 (2017).

[94] *See* Ruth Bader Ginsburg, *Address: Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 Clev. St. L. Rev. 301, 317 (1979) ("The legislature . . . cannot be convened on the spot. The interim solution, therefore, must come from

The interim remedial decision made clear the judicial animosity to gendered exceptions. Ginsburg provided illustrations of such animosity in a footnote, drawing a comparison to Title VII equal employment suits challenging laws providing benefits to only women workers, such as minimum wage, rest breaks, or lunch breaks: "Most courts, perhaps mindful of the mixed motives implicated in passage of such legislation (some conceiving the laws as protecting women, others as discouraging employers from hiring women) . . . have invalidated the provisions."[95] Ginsburg knew that protectionist efforts—from Blackstone's coverture of married women to employment rules and abortion laws—had historically worked to women's detriment.[96] Thus, her remedial solution of eliminating the preference for women in the immigration context fits within her bigger concern about stereotypes, backlash, and denial stemming from protectionism.

C. What was Justice Ginsburg Thinking?

At first glance, it might be easy to explain Justice Ginsburg's decision in *Morales-Santana* as a strategy for judicial consensus. Compromise on the remedy is certainly a common strategy to secure a majority decision, as remedies seem to be ancillary issues that can be easily conceded without appearing to compromise on the merits.[97] Ginsburg may have simply needed to garner sufficient votes for a decision on the merits—an important decision that would revoke some of the last remaining formal gender distinctions in citizenship law and create precedent with a potentially broad reach.[98] Such a monumental decision on gender equality would likely have been well worth

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the court. The court's function, then, is to serve as a short-term surrogate for the legislature.").

[95] *Morales-Santana*, 137 S. Ct. at 1700 n.27.

[96] *See also* Gonzalez v. Carhart, 550 U.S. 124, 184–85 (2007) (Ginsburg, J., dissenting).

[97] *See* Brown v. Board of Education, 347 U.S. 483, 495 (1954) (declaring new law requiring racial integration in schools but deferring to defendant to craft remedy); Brown v. Board of Education, 349 U.S. 294, 299 (1955) (refusing to mandate remedy for continued school desegregation, providing only broad parameters for relief); Collins, *Equality*, *supra* note 15, at 171 ("The remedial choice made by the Court in *Morales-Santana* may be unusual, but this is by no means the first time that the Court has moderated the use of remedial authority while exercise—and entrenching—its power to say what the law is in a highly contentious regulatory domain."); Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1765–68, 1795 (1991) (explaining doctrine of non-retroactivity as pragmatic accommodation of court by which it can more easily declare new substantive law by denying remedy in the particular case); *see also* Tracy A. Thomas, *Congress' Section Five Power and Remedial Rights,* 34 U.C. DAVIS L. REV. 673, 675–76 (2001) (illustrating how it is politically easier for Congress to legislate controversial issues via the remedy rather than the right).

[98] *See* Greenhouse, *supra* note 31.

the fight to Justice Ginsburg. The mean remedy may have been what it took to convince Chief Justice Roberts or Justice Kennedy to sign on.[99]

However, Ginsburg's decision in *Morales-Santana* suggests that it was not pragmatism that guided her remedial concession of leveling down, but rather deeper jurisprudential concerns about systemic gender norms and the proper balance of judicial and legislative power.[100] In the opinion, she wrote that "we must therefore leave it to Congress to select" the proper time rule "going forward" and that, "[i]n the interim, the Government must ensure that the laws in question are administered in a manner free from gender-based discrimination."[101] For the interim judicial solution, she stated, "the choice between" nullification and extension of benefit is "governed by the legislature's intent, as revealed by the statute at hand."[102] Her focus was on establishing policy and restraining the government, both systemic effects, rather than on alleviating the individual respondent's harm.

Interestingly, Justice Ginsburg made similar arguments in support of legislative deference and systemic rather than individualized relief in the context of leveling down remedies decades earlier in a 1979 speech she

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[99] *See id.* Justice Kennedy's switch was notable, given that he authored the majority opinion in *Nguyen v. INS*, in which he accepted stereotypical notions about the "biological inevitability" of maternal care and the mother's superior "opportunity for a meaningful relationship" due to the "event of birth." 533 U.S. 53, 65 (2001). He endorsed this gendered stereotype of parental care despite the contrary facts in the case where the mother had abandoned the child at birth and the biological father had raised the child from an early age in the United States. *Id.* at 57; Nguyen v. INS, 208 F.2d. 528, 530 (5th Cir. 2000). Kennedy's subsequent opinion in *Obergefell v. Hodges* noted concerns with animus directed at certain parents, in that case gay parents, and demonstrated a heightened sensitivity to the impact on children, perhaps foreshadowing a shift in his thinking. Obergefell v. Hodges, 135 S. Ct. 2584, 2590, 2600–01 (2015).

[100] *See* Greenhouse, *supra* note 31. Greenhouse explains Ginsburg's remedial decision in *Morales-Santana* by noting that the Justice is "something of a rare creature in the modern judicial lexicon: a judicial restraint liberal," meaning that "while her own commitments were to liberal outcomes, she displayed an equally strong commitment to letting Congress take the lead." *Id.* "In her view, equality—or any other goal—is best achieved if all branches of government have a stake in achieving it." *Id.*; *see also* Linda Greenhouse, *A Sense of Judicial Limits*, N.Y. TIMES (July 22, 1993), https://nytimes.com/1993/07/22/US/the-supreme-court-a-sense-of-judicial-limits.htmls [https://perma.cc/3WYJ-N7ZJ] ("For Judge Ginsburg, judicial restraint is not necessarily the end in itself that some of her questioners assume it to be, but rather the best means to achieving her vision of equality."); Melanie K. Morris, *Ruth Bader Ginsburg and Gender Equality: A Reassessment of Her Contribution*, 9 CARDOZO WOMEN'S L.J. 1, 23 (2002) (explaining that Ginsburg's "deference to discernible legislative intent" illustrates her "endorsement of judicial restraint," and that Ginsburg is the type of judge who "crafts narrow opinions and minimalist remedies endorsing limited judicial intervention in order to protect the exercise of fundamental rights").

[101] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017).

[102] *Id.* at 1699. In adopting this legislative intent standard, the majority cited to *Califano v. Westcott*, 443 U.S. 76 (1979), and the concurring opinion in *Welsh v. United States*, 398 U.S. 333 (1970), both of which articulated the legislative intent approach to selecting leveling up or leveling down relief; however, in these cases, the standard was used to support the choice of leveling up and to provide individualized benefits as relief to the petitioner, the exact opposite effect of the application of that standard in *Morales-Santana*. *Westcott*, 443 U.S. at 89–91; *Welsh*, 398 U.S. at 361–67 (Harlan, J., concurring).

presented as a scholar.[103] Then-Professor Ginsburg offered a "few guideposts" and considerations relevant to deciding whether to extend or nullify a benefit for an under-inclusive statute.[104] She admitted that as an advocate, she had easily requested extension of the benefit to the excluded group, and that most cases did in fact result in extension of the benefit.[105] However, the professorial Ginsburg grappled with the puzzle of the proper function of the judiciary in remedial decisions.[106] To her, the court's role at this juncture was to act as an interim legislature.[107] She noted, but did not endorse, the approach of abstaining from any remedial action, and instead embraced the legislative-like role of the court in crafting a temporary solution.[108] She emphasized that the most important part of the "judicial business" was not to abandon the constitutional review and that the choice of remedy was thus an ancillary issue.[109] Professor Ginsburg expressly rejected as "irrelevant" party choice and need for individualized benefit, though she acknowledged that such dismissal of interests was likely to "startle and disconcert."[110] She also discounted due process concerns raised by third parties affected by withdrawal of a prior benefit in leveling down, concluding simply that because the legislature could do so, so too could the courts.[111] Instead, she focused the inquiry on legislative-like policy considerations, such as: the "size of the class" benefited by the extension, the financial costs of the extension to the government or (more problematically) private parties, whether the remedy sought "access to a benefit" or merely "relief from a burden," and whether the remedy disrupted the legislative solution represented by the original enactment.[112] She favored leveling down most directly in cases where the remedy impacted a large class of people and imposed substantial financial costs on private parties.[113]

Justice Ginsburg did not employ her own proposed guidelines in *Morales-Santana.* She did not address the types of practical impacts that she had identified as relevant and determinative of the choice of remedy for an equal protection. Her own parameters would have supported leveling up. First, there was no direct financial cost, and any administrative burden was to the government. Second, the requested relief was simply a reduction of the burden of the five-year rule. Third, the class seeking relief by extension

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[103] *Id.* at 318.
[104] *Id.* at 318, 323.
[105] *See* Ginsburg, *supra* note 94, at 301, 304, 306, 324.
[106] *See* Ginsburg, *supra* note 94, at 301, 317, 324.
[107] Ginsburg, *supra* note 94, at 317.
[108] *See* Ginsburg, *supra* note 94, at 314, 317 (noting *Craig v. Boren*, 429 U.S. 190 (1976), where the Court had abstained from any remedy in deferring to state legislature to redress gender distinction in drinking age of eighteen for women and twenty-one for men).
[109] *See* Ginsburg, *supra* note 94, at 317–18.
[110] *See* Ginsburg, *supra* note 94, at 316, 318.
[111] *See* Ginsburg, *supra* note 94, at 321.
[112] Ginsburg, *supra* note 94, at 318–19, 323–24.
[113] Ginsburg, *supra* note 94, at 318–19, 323–24.

(unwed fathers with foreign-born children prior to 2001) was relatively small. And lastly, she misapplied the disruption factor by not considering that the nullification remedy limiting unwed mothers' citizenship transmission rights disrupted the legislative solution represented by the original law of protecting unwed mothers.

Ginsburg, did however, apply her professorial theory of the appropriate judicial function for leveling up remedies by focusing broadly on the idea of deference to the probable will of the legislature and curtailing discriminatory governmental action. In so doing, however, the decision misapplies the precedent of equal protection relief.[114] Specifically, she omitted consideration of key analytical parts of the applicable precedent in the gender cases of *Califano v. Westcott* and *Heckler v. Mathews* and the race case of *Palmer v. Thompson*, all of which would have demanded stronger evidence of legislative intent and judicial inquiry into equitable considerations.[115] This misreading resulted in an opinion that reduced the leveling down decision to a mere editorial formality of statutory textualism rather than a proper assessment of effective relief evaluating the costs, benefits, and individual harm to the petitioner. Ginsburg had the precedent for leveling up on her side, yet she adopted the countervailing view in the name of judicial restraint.

The relevant precedential cases routinely endorsed extension of benefit to the excluded class. In the sole case directly on point regarding a judicial remedy for sex discrimination against parents by a federal statute, the Court leveled up. In *Califano v. Westcott*, the Court struck down a federal law that provided welfare benefits to needy children when the father, but not the mother, was unemployed.[116] The Court unanimously agreed that the statute was an unconstitutional gender distinction based on a "baggage of sexual stereotypes" presuming the father was the primary breadwinner while the mother was "the center of home and family life."[117] The Court split five to four on the question of the appropriate remedy, with the majority deciding to level up.[118] The majority extended the welfare benefits to the children of all

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[114] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698–1700 (2017).

[115] *See* Heckler v. Mathews, 465 U.S. 728, 739 n. 5, 742 (1984); Califano v. Westcott, 443 U.S. 76, 89–93 (1979); Palmer v. Thompson, 403 U.S. 217, 224–25 (1971) (not cited in *Morales-Santana*).

[116] *Westcott*, 443 U.S. at 89.

[117] *Id.* (quoting Orr v. Orr, 440 U.S. 268, 283 (1979) and Taylor v. Louisiana, 419 U.S. 522, 534 n.15 (1975)).

[118] *Id.* at 90. The dissent would have leveled down, withdrawing unemployment benefits from all parents until such time as Congress acted itself. *Id.* at 94–95 (Powell, J., dissenting as to remedy). It cavalierly dismissed concerns about hardships to needy children from denying all unemployed parents benefits, opining that Congress could conserve the funds while it deliberated and perhaps make retroactive payments later. *Id.* at 96. The focus for the dissent was on "accommodat[ing] as fully as possible the policies and judgments expressed in the statutory scheme as a whole," and cautioning that the Court "should not use its remedial powers to circumvent the intent of the legislature." *Id.* at 94. It was relevant to the dissent that Congress had acted in legislating the father provision to "tighten standards for eligibility and reduce program costs" by replacing a prior statute that had temporarily awarded benefits to both unemployed parents. *Id.*

unemployed parents by replacing the statutory term "father" with the gender-neutral equivalent, "parent."[119]

Justice Ginsburg's majority opinion in *Morales-Santana* also failed to engage with nuances in the precedential cases, and thus missed several important distinctions. First, Ginsburg neglected to recognize that past cases established a stronger standard for discerning and verifying the defendant's or legislature's intent, rather than merely its probable will. Where that intent controlled leveling down decisions, as in *Heckler* and *Palmer*, the defendants had acted after a judicial finding of constitutional discrimination to remedy the problem themselves.[120] In *Heckler*, Congress remedied a finding of discrimination from a gender distinction in the Social Security Act by eliminating the prior exception for women that allowed them, but not men, to recover both employee and spousal benefits by enacting a "pension offset" to reduce the double recovery.[121] In *Palmer*, the defendants responded to the judicial finding of race segregation in city swimming pools by shutting down all city pools.[122] In these cases, the courts did not need to guess at intent or ask "what would the legislature have probably intended" because the legislature's intent was clear from its action. Moreover, in *Palmer*, the Court went

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[119] *Id.* at 92. No party asked the court to level down because the parties had generally agreed on extension of benefits, though they disagreed on the scope of the extension. *Id.* at 90–91. The government would have extended benefits to families only when the one "principal wage-earner," whether mother or father, was unemployed. The Court, however, extended benefits to families with either an unemployed mother or and father without limitation to the one principal earner, resulting in benefits granted to secondary workers even where the principal earner was still employed and potentially dual family benefits if both the mother and father were unemployed. *Id.* at 91. The Court rejected the option of substituting in the words "principal wage earner" as too disruptive of the legislative scheme, even though this option would have imposed lower financial costs. *Id.* at 91–92.

A similar suggestion was made by Sabina Mariella to substitute the words "primary caretaker" for the term "mother" in Section 1409(c)'s one-year rule in order to focus the remedy on the asserted legislative concern of extending citizenship to only children of those single parents who have established a close connection with their child. Mariella, *supra* note 91, at 252–53, 252 n.194 (citing Justice Breyer's suggestion in Miller v. Albright, 523 U.S. 420, 487 (1998) (Breyer, J., dissenting)). Primary caretaker rules also retain some gendered problems, family law scholars have noted, as they still embody many of the same gender stereotypes in defining who and what constitutes primary caregiving. *See* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 672 (5th ed. 2013).

[120] *Heckler*, 465 U.S. at 734; *Palmer*, 403 U.S. at 219.

[121] *Heckler*, 465 U.S. at 732–33, 742. Congress allowed for a transitional period of five years during which the "unreduced" dual benefit for women could continue, which was upheld by the *Heckler* Court. *Id.* Thus, the Court in *Heckler* only indirectly considered the issue of leveling down by evaluating Congress' selected remedy rather than making its own judicial determination of leveling up or down. Nevertheless, *Heckler* remains one of the most instructive cases for analyzing leveling down remedies. *See* Dorf, *supra* note 27 (identifying *Heckler* as "the leading case" on leveling down for equal protection); Brake, *Worse Off*, *supra* note 8, at 544–45 (noting *Heckler* as "the most prominent reference to remedial principles that might set limits on leveling down").

[122] *Palmer*, 403 U.S. at 219.

a step further to verify the defendant's intent.[123] The Court noted that closing the pools was due to economic costs of operating the pools and to "preserve peace" rather than to perpetuate racial animus.[124] While four dissenting Justices disagreed with this finding of credible intent and instead found evidence that the elimination of benefit was racially motivated, they agreed with the approach of subjecting the defendant's stated intent to some level of judicial scrutiny.[125]

Second, Ginsburg's use of precedent in *Morales-Santana* neglected to note that in addition to legislative intent, the Court has evaluated other equitable considerations like costs and harms in selecting between extension and nullification remedies. That was the import of the Court's decision in *Califano v. Westcott* where the Court concluded that "equitable considerations surely support[ed] its choice" of extension in that particular case.[126] These equitable considerations included the many needy children on welfare and the potential hardship to these beneficiaries and other "innocent recipients" from elimination of federal welfare benefits.[127] The *Westcott* Court also noted that while "cost may prove a dispositive factor in other contexts," it was not dispositive in that case even though it would have been less costly to terminate current recipients' eligibility than extend payments to additional parents.[128] The *Westcott* Court did not purport to identify all considerations that might be relevant, but did emphasize that such considerations were part of the analytical choice of leveling up or down.[129] Then-Professor Ginsburg recognized this important point in her 1979 speech, in which she identified some of these equitable considerations, though she did not draw on them in the *Morales-Santana* decision.[130]

Third, Ginsburg misread the precedent by assuming that leveling down is identified as an equally viable remedial option. Instead, the precedent clearly emphasized that while there are two theoretical choices, leveling up or leveling down, extension is generally preferred. In *Westcott*, the majority noted: "[T]here exist two remedial alternatives: 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 the exclusion."[131]

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[123] *See* Brake, *Worse Off, supra* note 8, at 526–30. The Court did not subject the defendant's motivations for the chosen remedy to heightened constitutional scrutiny, as it did to the initial segregation, but it did verify the asserted reasons through some factual inquiry and discussion. *Palmer*, 403 U.S. at 219, 224–25.

[124] *Palmer*, 403 U.S. at 219, 224–25.

[125] *See id*. at 235 (Douglas, J., dissenting); *id*. at 240–41 (White, J., dissenting).

[126] Califano v. Westcott, 443 U.S. 76, 90 (1979).

[127] *Id.*

[128] *Id.* at 93.

[129] *Id.* at 90.

[130] *See* Ginsburg, *supra* note 94, at 318, 323–24.

[131] *Westcott*, 443 U.S. at 89 (quoting Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring)).

However, the *Westcott* majority continued, "[i]n previous cases involving equal protection challenges to underinclusive federal benefits statutes, this Court has suggested that extension, rather than nullification, is the proper course."[132] The Court cited the many cases in which it had "regularly" extended such benefits.[133] *Westcott*'s assumption of the potential availability of leveling down was based on dicta in an earlier case of statutory interpretation, *Welsh v. United States*, which noted in a concurring opinion that a court could theoretically extend or nullify a statutory benefit, but then decided in favor of extending the requested benefit of the military draft conscientious objector.[134] Justice Harlan, in his *Welsh* concurrence, identified the appropriateness of extending rather than nullifying the statutory benefit, which he argued was "mandated by the Constitution in [that] case" and was especially appropriate where nullification would interfere with a legislative desire to benefit third parties.[135]

Justice Ginsburg, however, did not apply these distinctions in her opinion in *Morales-Santana*, even though such precedent would have supported leveling up. The lack of clear, established legislative intent, the influence of racism and nativism on the formation of the ten-year rule, equitable considerations of harm to children, and the strong judicial preference for extension all supported leveling up. Yet Ginsburg was content to level down, a decision to which no Justice dissented. The majority of the Court may not have seen this as a "mean remedy" because the decision at least removed maternal protectionist exceptions long-embedded in the law and advanced the greater good of systemic elimination of legislating on gendered grounds.[136] This satisfaction with a mere normative result in *Morales-Santana*, providing prospective guidance on egalitarian norms, however, ignores the practical implications of the remedial decision which are far more substantial, and more harmful, than this theoretical victory suggests.

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[132] *Id.*

[133] *Id.* at 90 (citing Califano v. Goldfarb, 430 U.S. 199 (1977), *aff'g* 396 F. Supp. 308 (E.D.N.Y. 1975); Califano v. Silbowitz, 430 U.S. 924 (1977), *summarily aff'g* 397 F. Supp. 862 (S.D. Fla. 1975); Jablon v. Califano, 430 U.S. 924 (1977), *summarily aff'g* 399 F. Supp. 118 (D. Md. 1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), *aff'g* 367 F. Supp. 981 (D.N.J. 1973); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, *aff'g* 345 F. Supp. 310 (D.D.C. 1972); Richardson v. Griffin, 409 U.S. 1069 (1972), *summarily aff'g* 346 F. Supp. 1226 (D. Md. 1972).

[134] *Welsh*, 398 U.S. at 344, 361–66 (Harlan, J., concurring) (extending the statutory benefit of military draft conscientious objector for religious reasons to non-religious objectors).

[135] *Id.* at 361–66, 366 n.18; *see* Fish, *supra* note 18, at 349.

[136] That was the ultimate take-away from *Heckler v. Mathews*, where the Court accepted Congress's leveling down of reducing Social Security benefits for women to achieve formal equality. In the context of a standing discussion, the Court emphasized the importance of the male plaintiff vindicating his stigmatic injury, which could be prospectively remedied by the court, thereby constraining the government. *See* Heckler v. Mathews, 465 U.S. 728, 738–40 (1979).

II. The Presumption of Leveling Up

The Court's analysis in accepting the legitimacy of leveling down is flawed in its remedial calculus.[137] This calculus is based on an analysis that incorrectly assumes the equal validity of leveling down as a remedial choice.[138] It fails to grapple with what the Second Circuit called the "vexing" remedial problem of constitutional import.[139] The Court in *Morales-Santana* seemed to support both sides of the issue. On the one hand, it dictated that leveling up is usually the appropriate remedy: "Ordinarily, we have reiterated, 'extension, rather than nullification, is the proper course.'"[140] It gave no explanation for this ordinary course, but noted the overwhelming majority of cases in which the Court had endorsed leveling up.[141] On the other hand, the *Morales-Santana* Court also endorsed the equal validity of leveling down, stating that both extension and nullification are equally available remedial options.[142] "How equality is accomplished," the Court in *Morales-Santana* stated, "is a matter on which the Constitution is silent."[143]

The Constitution, however, is not in fact silent as to remedy.[144] Constitutional norms often control to prioritize the remedial option of extension of benefits.[145] As Professor Evan Camiker argued in his key article on constitu-

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[137] Professor Uzman similarly rejects the Court's "second-guessing approach," which prioritizes an unknown legislative intent, as arbitrary, not "evidence-based," and potentially "chilling" to litigation. Uzman, *supra* note 91, at 157. He explains that "[c]omparative analysis shows . . . that legislative intent is neither a necessary nor even convenient basis for remedial policy." *Id.* at 159. Instead, Uzman recommends a "more flexible approach" of "proportionality and balancing." *Id.* at 140, 159.

[138] *See* Brake, *Worse Off*, *supra* note 8, at 516–17; Brake, *Remedial Grief*, *supra* note 27.

[139] Morales-Santana v. Lynch, 804 F.3d 520, 535 (2d Cir. 2015).

[140] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1699 (quoting Califano v. Westcott, 443 U.S. 76, 89 (1979)).

[141] The European Court of Justice (ECJ) only allows for courts to level up, although 'the legislature remains free to choose a different path." Uzman, *supra* note 91, at 144–45. This might be explained by the ECJ's emphasis on "legal certainty and effective legal protection" or because the Court deems nullification of benefits for third parties to not be within the judicial power. *Id.* at 146.

[142] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698 (2017).

[143] *Id.* (quoting Levin v. Commerce Energy, Inc., 560 U.S. 413, 426–27 (2010))

[144] *See* Camiker, *supra* note 18, at 1198.

[145] *See id.* at 1185, 1193–96, 1201–04. Professor Camiker explains that while the doctrinal right of equal protection may be satisfied by similar treatment, either by nullification or extension, constitutional norms or inchoate substantive constitutional values often dictate extension. *Id.* at 1185. These norms may be unrelated to the norm motivating the doctrinal right, for example constitutional values of due process and fairness may dictate the retroactivity of a Fourth Amendment remedy. *Id*. at 1193 n.29. Or the same norm may motivate both the decision as to the doctrinal right and the remedial choice. *Id*. at 1193 n.29. Applying these theories, Camiker offers the example of the First Amendment and its norm of equal treatment prohibiting different treatment of speakers, but also its norm of public debate which "express[es] a constitutional preference for a particular remedy" that "prefers the remedial choice of 'more speech, less silence.'" *Id.* at 1194-96. In another example, he explains how the gender equality norm against women's disempowerment and economic and social subordination guides the remedial choice in ex-

tional remedies, "courts should choose the remedy that better advances the relevant constitutional norms."[146] Rather than adopting a mere editorial function of striking or adding language, or focusing on discerning legislative intent, courts should instead look to the substantive constitutional norms themselves.[147] These norms include the specific rule "providing that a judge should not choose a remedy that undermines the very constitutional provision being vindicated."[148] They also encompass a "broader rule providing that a judge's choice should be guided by inchoate norms stemming from the Constitution."[149]

Once the constitutional parameters of the remedial choice are understood, it becomes clear that leveling down should not be considered a typically available option. Rather, the Constitution requires that leveling up be the presumptively correct remedy. The constitutional norms of equality and remedy provide the foundation for understanding why leveling up should be the ordinary course of action. Thus, the remedial calculus needs to change, first to reject the equal validity of leveling down in favor of a presumption of leveling up, and then to permit leveling down only in rare cases of compelling and equitable interests.

A. The Meaning of Equality

In assuming the equal validity of leveling up and leveling down, the Court tied the remedial option to the scope of the operative right. Specifically, it noted that "[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."[150] The Court is correct here that the reach of a remedy is measured by the contours of the operative right.[151] For it has endorsed the equitable rule of remedies that the scope of the remedy should match the scope of the right.[152] However, the Court incorrectly limited the definition of the right to only formal equal treatment.

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tending the maternity leave benefit of state pregnancy discrimination laws to similarly disabled male workers rather than nullifying such benefit for women. *Id*. at 1201.

[146] Fish, *supra* note 18, at 327 (citing Camiker, *supra* note 18, at 1202).

[147] Camiker, *supra* note 18, at 1185, 1202–04; Fish, *supra* note 18, at 327, 342.

[148] Fish, *supra* note 18, at 327, 343, 343 n.84 (citing Schachter v. Canada, [1992] 2 S.C.R. 679, 701–02 (Can.) as a case "discussing the irony of striking down welfare benefits for single mothers on 'equality' grounds"); Camiker, *supra* note 18, at 1196–1202.

[149] Fish, *supra* note 18, at 327.

[150] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698 (2017) (quoting Heckler v. Mathews, 465 U.S. 728, 740 (1984)).

[151] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 399 (1971) (Harlan, J., concurring); Michael Morley, *The Federal Equity Power*, 59 B.C. L. Rev. 217, 220 (2018) (arguing that the equitable principles a court must apply to a claim for injunctive relief arise from the source of law giving rise to that cause of action).

[152] Missouri v. Jenkins, 515 U.S. 70, 88 (1995); Milliken v. Bradley, 433 U.S. 267, 280 (1977) ("[L]ike other equitable remedies, the nature of the desegregation remedy is

Equality or equal protection means more than "mere equal treatment."[153] Law scholar Deborah Brake explains: "the Court's justifications of its most revered equal protection rulings support the conclusion that the constitutional guarantee of equality is, at bottom, about more than equal treatment."[154] The Court has stated that equality means equal opportunity of access, option for benefit, and advantage, which comes by extension of the benefit or opportunity denied.[155] Additionally, scholars, especially feminist scholars, have long argued that equality normatively means more than mere equal treatment.[156] They have specifically raised this critique of the equality right in the context of leveling down cases, observing that the Court's leveling down cases starkly reduce equality to mere equal treatment, a pure parallelism that omits the underlying core constitutional concepts of equal protection.[157] Professor Brake argues that equality instead is a concept of "equal concern," embodying the respect and concern for all people, beyond the formalistic parallelism of equally bad treatment.[158] Moreover, equality encompasses the "protection" part of equal protection to include benefit, advantage, and opportunity.[159] A pure parallelism approach reads out the

to be determined by the nature and scope of the constitutional violation."); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) ("As with any equity case, the nature of the violation determines the scope of the remedy.").

[153] Brake, *Worse Off*, *supra* note 8, at 524, 561–67; *see* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472–73 (2004) [hereinafter Siegel, *Equality Talk*] (describing two very different purposes that are ascribed to the Equal Protection Clause, which each embody a distinct vision of egalitarianism).

[154] Brake, *Worse Off*, *supra* note 8, at 563; *see also* Brake, *Worse Off*, *supra* note 8 at 567 (arguing that "equality itself must be about something larger than equal treatment.").

[155] *See* United States v. Virginia, 518 U.S. 515, 532, 534 (1996).

[156] *See* Brake, *Worse Off*, *supra* note 8, at 516, 524; Siegel, *Equality Talk*, *supra* note 153, at 1472–73. Even the most confined definition of equality stemming from the Supreme Court's accepted anticlassification principle mandates something beyond mere formal classification. It also expresses "the normative conviction that anticlassification embodies the tradition's fundamental value, the value of individualism," and a commitment to individuals rather than just groups. Siegel, *Equality Talk*, *supra* note 153, at 1472. At the other end of the theoretical spectrum, the antisubordination principle of equality focuses not on the formal classification, but on "the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups." *Id.* at 1472–73.

[157] *See* Brake, *Worse Off*, *supra* note 8, at 516, 524; Jean Marie Doherty, Note, *Law in an Elevator: When Leveling Down Remedies Let Equality Off in the Basement*, 81 S.CAL. L. REV. 1017, 1019–20 (2008).

[158] Brake, *Worse Off*, *supra* note 8, at 561–67, 561 n.171 (relying upon theorist Ronald Dworkin, who stated that "the right to treatment as an equal is fundamental, the right to equal treatment derivative," and his identification of the overriding norm of equality law as "the principle that all human beings deserve to be regarded with equal concern and respected as equals," in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 272–73 (1977)).

[159] *See* CONG. GLOBE, 43d Cong., 2d Sess. 1793 (1875) (stating that the Equal Protection Clause means "that no State shall deny to any man the equal advantage of the law, the equal benefit of the law, the equal protection of the law"); CONG. GLOBE, 43d Cong., 1st Sess. S. app. 358 (1874) ("[W]hen the [F]ourteenth [A]mendment declares that every person shall be entitled to the equal protection of the laws, it means to the equal benefit of the laws of the land."); Christopher R. Green, *The Original Sense of the*

benefit or protection meaning of equality, leaving a hollow right. Under this broader meaning of equality, denying a benefit in order to rectify inequality becomes more clearly improper, for it fails to honor or effectuate the ultimate meaning of the operative constitutional right.

Appreciating the manner in which leveling down dilutes the normative value of equality provides better illustration to the critiques of leveling down articulated by the dissenting Justices in *Palmer*. There, they explained how a leveling down remedy itself may be "an expression of [an] official policy" of discrimination by denying benefit to a disfavored class: "The Equal Protection Clause is a hollow promise if it does not forbid such official denigrations of the race the Fourteenth Amendment was designed to protect."[160] Leveling down reduces equality to formal sameness, to equal treatment be it good or bad, which denies benefit or opportunity, and thus continues the social and legal consequences of past discriminatory harm. In this way, it perpetuates inequality, reinforces discriminatory biases, stereotypes, and animus, and allows discriminatory conduct, in practice, to go unchecked. Thus, equality is actually never accomplished, but only used occasionally to check the temporary privilege of the favored class.

Leveling down for gender inequality also produces significant disincentives.[161] If litigation can lead ultimately to denial of a benefit to the petitioner and also to those currently with an advantage, this litigation risk and penalty may threaten plaintiffs with retaliation and backlash. Justice Douglas, dissenting in *Palmer v. Thompson*, explained this effect when the city remedied racially segregated swimming pools by closing down all pools:

> The closing of the City's pools has done more than deprive a few thousand Negros of the pleasures of swimming. It has taught Jackson's Negroes a lesson: In Jackson, the price of protest is high. Negroes there now know that they risk losing even segregated public facilities if they dare to protest segregation. Negroes will now think twice before protesting segregated public parks, segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether, and at the same time engendering further animosity from a white community which has lost its public facilities also through the Negroes' attempts to desegregated the facilities.[162]

The same effect of engendering animosity and loss of benefit was the result when a pregnant teen complained about exclusion from the high school Na-

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(Equal) Protection Clause: Pre-Enactment History, 19 GEO. MASON UNIV. CIV. RTS. L.J. 1, 3 (2008) ("The Equal Protection Clause does not require all laws to be equal. Rather, the requirement of equal protection is a requirement that the government supply 'protection of the laws,' and do so equally.").

[160] Palmer v. Thompson, 403 U.S. 217, 240–41 (1971) (White, J., dissenting).

[161] *See* Brake, *Worse Off*, *supra* note 8, at 516–18, 522; Camiker, *supra* note 18, at 1207.

[162] *Palmer*, 403 U.S. at 235 (Douglas, J., dissenting).

tional Honor Society; the school eliminated the honor society for all students, subjecting the teen to the other students' wrath and depriving all student-members of the honor society—a benefit potentially relevant to college admission.[163] Additionally, when BBC female editors complained about unequal pay, the company responded by reducing the male editors' pay; thus, by speaking out, the women exposed themselves to peer retaliation and harmed their colleagues by prompting a reduction in their pay.[164] Such backlash places equality plaintiffs in the proverbial "double-bind" of losing by gaining equality.[165] This double-bind creates social justice incentives not to sue. In this way, the ability of citizens to act as private attorney generals to help enforce the public laws of gender equality are compromised, and fewer actions will be brought to challenge discriminatory conduct. Ultimately, then, fewer equality cases will be pursued, and gendered social norms will be allowed to go unchecked.[166]

B. The Right to a Meaningful Remedy

The Constitution also speaks to the way in which equality is accomplished through mandates that courts provide a minimum redress of meaningful relief.[167] As I have argued elsewhere, the right to a meaningful remedy, arising out of general precepts of equity and grounded in due process requires, at minimum, an adequate remedy to redress the plaintiff's individual harm.[168] Yet, courts have omitted this additional inquiry in assuming the validity of leveling down relief. Adding this into the analysis of extending or nullifying benefits significantly alters the existing assumption that leveling down relief is appropriate.

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

[164] *See* Freytas-Tamura, *supra* note 13.

[165] Brake, *Worse Off*, *supra* note 8, at 516 & n.6 (citing MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 8–10 (2d ed. 2003) on "the prevalence of double binds confronting subordinated groups" and the definition of "double binds as 'situations in which options are reduced to a very few and all of them expose one to penalty, censure or deprivation.'").

[166] *See* Brake, *Worse Off*, *supra* note 8, at 516, 522.

[167] *See* Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 210 (1990) (Stevens, J., dissenting) ("[T]he Federal Constitution constrains the minimum remedy a State may provide.").

[168] Thomas, *Ubi Jus*, *supra* note 20, at 1636–42; Thomas, *Right to an Adequate Remedy*, *supra* note 20, at 977, 984; THOMAS, LEVINE & JUNG, *supra* note 20, at 25. Benjamin Plener Cover has grounded the right to a meaningful remedy in the First Amendment's right to petition the courts, which is supported by the many state constitutional provisions providing a right to a remedy and a right to petition the courts. Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C. DAVIS L. REV. 1741, 1743–45 (2017).

1. *Ubi Jus, Ibi Remedium*

The right to a meaningful remedy has been located within the general equitable powers of the court.[169] The legal maxim *ubi jus, ibi remedium* generally dictates that "where there is a right, there must be a remedy."[170] This "principle that rights must have remedies is ancient and venerable."[171] It was first articulated in Anglo-American law in 1703 when the Chief Justice of the King's Bench stated:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise of enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for . . . want of right and want of remedy are reciprocal. . . . Where a man has but one remedy to come at his right, if he loses that he loses his right.[172]

This idea of a remedial right was incorporated into early American law. In one of the foundational cases of the nascent legal system, *Marbury v. Madison*, the Court stated that the foundations of justice require that violations of rights are vindicated with remedies.[173] Quoting Blackstone's commentaries summarizing the existing common law, the *Marbury* Court stated that "[i]t is a settled and invariable principle . . . that every right, when withheld, must have a remedy, and every injury its proper redress."[174] For in the absence of such "proper redress," legal rights become empty, unenforceable aspirations.[175]

Judicial "[r]emedies perform two critical functions in the law: they define abstract rights and enforce otherwise intangible rights."[176] "Rights standing alone are simply expressions of social values," mere ideals, or promises.[177] As Justice Homes observed, "[l]egal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to the

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[169] *See* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1541–42 (1972); Thomas, *Ubi Jus*, *supra* note 20, at 1637–38; Thomas, *Right to an Adequate Remedy*, *supra* note 20, at 985. This section draws closely on my work in a prior article, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, *supra* note 20.

[170] *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 23 (1768); THOMAS, LEVINE & JUNG, *supra* note 20, at 9.

[171] Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 71 (2001).

[172] Ashby v. White (1703) 92 Eng. Rep. 126, 136 (KB).

[173] Marbury v. Madison, 5 U.S. 137, 163 (1803).

[174] *Id.* (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 109 (1768)).

[175] Thomas, *Ubi Jus*, *supra* note 20, at 1639; Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 678 (1987) [hereinafter Zeigler, *Rights Require Remedies*].

[176] Thomas, *Ubi Jus*, *supra* note 20, at 1638.

[177] Thomas, *Ubi Jus*, *supra* note 20, at 1638–39; *see also* Zeigler, *Rights Require Remedies*, *supra* note 175, at 678.

grasp."[178] It is the remedy that makes the spirit of the right "real and tangible by providing the necessary specificity and concreteness to otherwise abstract guarantees."[179] The remedy's enforcement power is critical to convert the pronouncements of ideals into operational rights beyond mere "advice or recommendation."[180] As the Supreme Court declared in 1838, it would be a "monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist"; withholding an effective remedy effectively neutralizes the attendant substantive right by denying any operative meaning to that norm.[181]

The fundamentality of the right to a remedy then is established by its history and centrality to Anglo-American jurisprudence.[182] Generally, classification of a right as fundamental for purposes of constitutional inquiry depends on if it has been "historically recognized or is central to the concept of ordered liberty."[183] Doctrinal support for this jurisprudential maxim can be found in the Court's *Bivens* and due process tax cases.[184] These cases also refine the general command of a remedy into one demanding an adequate or meaningful one. In the tax cases, the Court held that the Due Process Clause of the Fourteenth Amendment and its prohibition against arbitrary state action and denial of liberty and property interests required a remedy that provided meaningful relief to the plaintiff.[185] The Court noted that "a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination."[186] The state "retains flexibility" to choose whether to extend the discriminatory exemption to all or instead withdraw the exemption altogether.[187] However, the state is obligated to ensure that its choice still provides a successful plaintiff with a minimally "adequate" remedy that provides "meaningful" relief.[188] The Court defined this by saying that it need not be fully or precisely what the plaintiff demands, but must be meaningful in that it "satisfies the minimum federal require-

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[178] The Western Maid, 257 U.S. 419, 433 (1922).

[179] Thomas, *Ubi Jus*, *supra* note 20, at 1638.

[180] Thomas, *Ubi Jus*, *supra* note 20, at 1639 (quoting THE FEDERALIST No. 15 (Alexander Hamilton)); *see also* Florida v. Georgia, 58 U.S. 478, 481 (1854) ("The essence of a right is that it may be exercised contentiously, adversely. *Ubi jus ibi remedium*.").

[181] Thomas, *Ubi Jus*, *supra*, note 20, at 1640 (quoting Kendall v. United States, 37 U.S. (12 Pet.) 524, 624 (1838)); *see also* Dellinger, *supra* note 169, at 1534.

[182] Thomas, *Ubi Jus*, *supra* note 20, at 1636–38; Thomas, *Right to an Adequate Remedy, supra* note 20, at 985.

[183] Thomas, *Right to an Adequate Remedy, supra* note 20, at 985 (citing Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)).

[184] Thomas, *Ubi Jus*, *supra* note 20, at 1640–41; Thomas, *Right to an Adequate Remedy, supra* note 20, at 993.

[185] *See* Reich v. Collins, 513 U.S. 106, 108 (1994); Harper v. Va. Dep't of Taxation, 509 U.S. 86, 101 (1993); McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, 496 U.S. 18, 31, 39 (1990).

[186] *McKesson*, 496 U.S. at 39; *Harper*, 509 U.S. at 100.

[187] *McKesson*, 496 U.S. at 39, 51; *see also Harper*, 509 U.S. at 102.

[188] *McKesson*, 496 U.S at 31, 39, 41, 50; *Harper*, 509 U.S. at 102; *Reich*, 513 U.S. at 108, 114.

ments" and does not "confine" a plaintiff to "a lesser remedy."[189] As a result of this analysis, the Court decided that a prospective-only remedy, which applied the tax in the future in a non-discriminatory way, was insufficient.[190] Instead, the state was required to provide a "meaningful backward-looking" remedy of a tax refund for the tax determined to be unconstitutional.[191]

The historical principle of the right to a meaningful remedy is also visible in the majority of state constitutions mandating the right to a remedy in open court.[192] Such proclamations of a right to a remedy relate back to Sir Edward Coke's interpretation of the Magna Carta in the earliest foundations of Anglo-American law.[193] Take one example, the Ohio Constitution, which provides that "every person, for an injury done him . . . shall have remedy by due course of law."[194] The Ohio Supreme Court has construed this provision as encompassing a fundamental right to a "*meaningful* remedy" that provides "*satisfaction* for injuries or damages sustained."[195] It observed that "[d]enial of a remedy and denial of a *meaningful* remedy lead to the same result: an injured plaintiff without legal recourse."[196]

The general command of the right to a remedy in court thus requires the further judicial inquiry of whether such remedy is meaningful or adequate. "Meaningful" relief means a remedy that is effective—produces the result of making the value of the operative right concrete.[197] It makes a tangible difference in negating the consequences of the illegal harm. It is adequate if it provides enough relief, in an amount that is sufficient to redress the harm.[198] A proper remedy provides the plaintiff "satisfaction for injuries sustained."[199] At its core, the question of whether a remedy is meaningful must be considered from the perspective of the plaintiff.

2. *The Plaintiff's Rightful Position*

The question then becomes whether leveling down is a "meaningful" remedy *to the plaintiff*. This analysis is at its core a plaintiff-based inquiry. It

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[189] *McKesson*, 496 U.S at 39, 51; *Harper*, 509 U.S. at 102; *Reich*, 513 U.S. at 108, 114.

[190] *McKesson*, 496 U.S at 31; *Harper*, 509 U.S. at 100–02.

[191] *McKesson*, 496 U.S at 31; *Harper*, 509 U.S. at 101; *Reich*, 513 U.S. at 114.

[192] Thomas, *Ubi Jus*, *supra* note 20, at 1638.

[193] Thomas, *Ubi Jus*, *supra* note 20, at 1638; Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. Rev. 1309, 1320 (2003); David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. 1197, 1199 (1992).

[194] Ohio Const. art. 1, § 16.

[195] Sorrell v. Thevenir, 633 N.E.2d 504, 513 (Ohio 1994) (emphasis added); Gaines v. Preterm-Cleveland, Inc., 514 N.E.2d 709, 716 (Ohio 1987) (emphasis in original).

[196] *Gaines*, 514 N.E.2d at 716 (emphasis in original).

[197] Thomas, *Ubi Jus*, *supra* note 20, at 1642.

[198] *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 101–02 (1993) (holding that meaningful relief for tax discrimination may include full refunds or some lesser order as long as it rectifies the past harm).

[199] *Sorrell*, 633 N.E.2d at 513.

focuses on the scope of the plaintiff's individualized factual injury, asking whether the proposed relief adequately redresses the factual harm suffered. The fundamental goal of equitable relief is to place "the plaintiff in her rightful position, that is, the position she would have been in but for the harm."[200] Importantly, the proper remedy is both prospective and retrospective. A court's order works prospectively to stop the harm in the future, but also works, in effect, retroactively, by undoing the ongoing consequences of the past harm.[201]

Indeed, Justice Ginsburg in *United States v. Virginia* made clear that the plaintiff's rightful position was the targeted goal for assessing the appropriateness of an equal protection remedy.[202] She wrote: "A remedial decree . . . must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination].'"[203] This means not only that ongoing discrimination must be eliminated, but also that the remedy must "eliminate [so far as possible] the discriminatory effects of the past."[204] In *Virginia*, Ginsburg refused to accept the defendant's choice of a remedy that failed to provide such individualized relief. The Court had found that the Virginia Military Institute ("VMI"), a public school, violated equal protection by denying women admission to the school.[205] To remedy the unconstitutional gender discrimination, the defendant did not want to extend the denied opportunity of a military education at VMI to women, but instead wanted to create a separate military education for women at another college.[206] Justice Ginsburg, for the majority of the Court, rejected this lesser separate and not-quite-equal remedy, holding that the women had a right to receive the equal benefit of the education at VMI.[207] Equality, she emphasized, was the right to be granted the benefit denied.[208] The key question for the Court was not the defendant's choice, but the plaintiff's denied benefit.[209]

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[200] THOMAS, LEVINE & JUNG, *supra* note 20, at 33; *see* Brief for Amici Curiae Constitutional Law, Federal Courts, Citizenship, and Remedies Scholars in Support of Respondent at 4, *Lynch v. Morales-Santana*, 136 S. Ct. 2545 (2016) (No. 15-1191) [hereinafter "Con Law Scholars Brief] (citing DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 265 (4th ed. 2010)).

[201] THOMAS, LEVINE & JUNG, *supra* note 20, at 33; *see also* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 265 (4th ed. 2010) (describing the purposes of injunctions).

[202] *See* United States v. Virginia, 518 U.S. 515, 547 (1996).

[203] *Id*. (quoting Milliken v. Bradley, 433 U.S. 267, 280 (1977)).

[204] *Id*. (quoting Louisiana v. United States, 380 U.S. 145, 154 (1965)).

[205] *Id.* at 519.

[206] *Id.* at 526.

[207] *Id*. at 534.

[208] *See id.* at 534, 547–48.

[209] *See id*. VMI later contemplated leveling down by closing and reopening as a private school, which would have perhaps circumvented the state action component for an equal protection violation, but was unable get sufficient funding. *To Keep an All-Male VMI, Its Alumni Considering Buying It*, N.Y. TIMES, (July 1, 1996), https://www.nytimes.com/1996/07/01/us/to-keep-an-all-male-vmi-its-alumni-consider-buying-it.html [https://perma.cc/LD7G-FLG7]; Melissa Nimit, Book Note, 2 MARGINS: MD. L.J. RACE, RELIG-

This individualized inquiry into restoring the plaintiff to her rightful position is the core tenet of the corrective justice theory of remedies. It is the conventional, accepted view that the appropriate remedial goal is to, at least, make the plaintiff whole: "In short, corrective justice promises determinacy and an unambiguous moral force by its focus on the repair of prior wrongs and the assignment of remedial burdens to wrongdoers."[210] Equity may then intervene to tailor this individualized remedy, such as by taking into account other social or practical facilitators which must be redressed to avoid repetition of harm (prophylactic relief) or considerations of undue burdens on the defendant from the restoration.[211]

The *Bivens* line of cases also lends support to the individualized focus of the meaningful remedy inquiry. In *Bivens*, the Court implied a damages remedy for an unconstitutional search and seizure by federal actors, finding that neither injunctive relief nor exclusion of the evidence would be adequate for this particular plaintiff, who was not threatened with future arrest or prosecution.[212] In his concurrence, Justice Harlan stated: "For people in Bivens' shoes, it is damages or nothing."[213] The Court evaluated the remedy from the perspective of "Bivens' shoes," considering the practical effect of relief on the particular plaintiff, not simply the more generalized availability of injunctive relief or exclusion of the improperly seized evidence to help other plaintiffs.[214] While the Court has since imposed further restrictions on the availability of *Bivens*-type implied remedies, it has continued to inquire as to whether adequate alternative remedies are available.[215] Adequacy of remedy is thus a key factor in evaluating remedial alternatives.

Requiring individualized relief particular to the plaintiff also finds grounding in standing doctrine.[216] "Standing to sue" is a doctrine that "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong" and is a constitutional requirement of Article III restricting the judicial power to "cases or controversies."[217] To

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ION, GENDER & CLASS 281, 285 (2002) (reviewing LAURA FITZGERALD, BREAKING OUT: VMI AND THE COMING OF WOMEN (2001)); William Henry Hurd, *Gone With the Wind? VMI's Loss and the Future of Single-Sex Public Education*, 4 DUKE J. GENDER & L. & POL'Y 27, 27 n.3 (1997) (noting lower courts suggested privatization was an option).

[210] Kent Roach, *The Limits of Corrective Justice*, 33 ARIZ. L. REV. 859, 859 (1991).

[211] *See id.* at 859–60; THOMAS, LEVINE & JUNG, *supra* note 20, at 97.

[212] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 409–10 (1971) (Harlan, J., concurring).

[213] *Id.* at 410.

[214] *See id.*

[215] *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1875–76 (2017); *see* Bernard W. Bell, Symposium, *Reexamining* Bivens *after* Ziglar v. Abbasi, 9 CONLAWNOW 77, 79, 95 (2018).

[216] *See* Andrew Coan & David Marcus, Symposium, *Article III, Remedies, and Representation*, 9 CONLAWNOW 97, 97–98 (2018); Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 652 (2006); *see* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 21 (1984).

[217] Spokeo v. Robins, 136 S.Ct. 1540, 1547 (2016). .

possess standing to sue, the proper plaintiff in a case must establish individualized injury, not merely generalized harm. She must show that there is a specific, concrete injury to her that can be remedied in the case.[218] So too, at the end of a case, this individualized harm must be the focus of the remedy, which addresses the particulars of the loss suffered by this plaintiff. The standing analogy thus shows that the pivotal question for determining the appropriate remedy in a case is individually focused as a constitutionally mandated threshold matter.

The leveling down remedy in *Morales-Santana* starkly illustrates the denial of a meaningful, individualized remedy to the plaintiff.[219] Leveling down clearly provided no tangible benefit to the individual plaintiff. The Court refused his request for extension of the one-year rule to unwed fathers, pending further action by Congress. Mr. Morales-Santana obtained no retrospective relief for the past discriminatory rule applied to his detriment. Thus, that past harm was allowed to languish, uncorrected or redressed by the Court. At best, the leveling down remedy provides only structural, prospective relief, restraining the government but not restoring the individual.[220] The government, going forward, will not be able to legislate derivative citizenship on a gendered basis. However, this prospective equal treatment has no impact on Mr. Morales-Santana, whose citizenship opportunity has already passed as of the date of his birth. The leveling down remedy does not provide retrospective structural relief, nor could it, as that would require stripping citizenship from children of unwed mothers during the past period during the operation of the past gendered law. Prospectively stopping gender stereotypes from operating in the future to third parties may seem satisfactory to Justice Ginsburg, but it is not an individualized remedy adequately

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[218] *Id.* at 1548–49; Warth v. Seldin, 422 U.S. 490, 498–99 (1975); Coan & Marcus, *supra* note 216, at 97. In *Heckler v. Mathews*, a leveling down case, the Court found sufficient standing when the plaintiff's prospective unequal treatment by the Social Security laws could be remedied by future denial of the exceptional benefit (receipt of both full worker and spousal benefits) to all people. 465 U.S. 728, 738–40 (1984). Similarly, in *Sessions v. Morales-Santana*, the majority was satisfied that the remedy controlled the government's behavior going forward. 137 S. Ct. 1678, 1701 (2017). However, unlike in *Heckler*, the future formal equal treatment would not even apply to the individual plaintiff since the plaintiff was not subject to future citizenship laws; his own citizenship was determined at the date of his birth. Thus, there was no prospective relief that could have provided him with individualized relief of any type.

[219] *See* Collins, *Equality*, *supra* note 15, at 171; Richard Re, Morales-Santana*'s Many Judgments*, PrawfsBlawg (June 13, 2017), http://prawfsblawg.blogs.com/prawfsblawg/2017/06/morales-santanas-ambiguous-judgments-scotus-symposium.html [https://perma.cc/CJ5M-V3AP]; David Isaacson, Sessions v. Morales-Santana*: The Problems of Leveling Down*, Insightful Immigration Blog (June 21, 2017), http://blog.cyrusmehta.com/2017/06/sessions-v-morales-santana-the-problems-of-leveling-down.html [https://perma.cc/7KA3-SMP5].

[220] *See* Alden v. Maine, 527 U.S. 706, 747 (1999) (discussing the necessity of injunctive relief to make the government conform to the standards of the federal constitution); *see also* Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1736 (1991) (arguing that remedies are required to keep government officials "within the bounds" of the Constitution).

providing meaningful, tangible redress for the specific harms suffered by the individual plaintiff. At the end of the day, this particular plaintiff received nothing: no retrospective relief for the past discrimination and no prospective relief since he was not subject to the citizenship laws going forward.

III. Leveling Down as a Rare Exception

Approaching the question of leveling down from the view of remedies and constitutional rights, rather than statutory textualism, shows that the Court, in the leveling down cases, has been asking the wrong question, or at least an incomplete one. The judicial query has been skewed to one side—that of the discriminating actor. There is almost a reverential deference to the discriminator, even though the person or entity at this remedial stage is an adjudicated wrongdoer, proven to have engaged in discriminatory, unconstitutional action. Instead, the operative constitutional norms require a presumptive deference to the plaintiff, as discussed above in Section II.[221] Only rarely should the presumption be overcome if there is an undue burden to the defendant based on governmental interests or equitable concerns.[222]

Traditional judicial inquiries of constitutional scrutiny and equitable remedial balancing support the exceptionalism of leveling down. In both these analytical contexts, prioritizing defendants' interests is the exception, rather than the rule; considerations about the defendants and their interests may overcome, but not determine, the general presumption, which is otherwise focused on rectifying the plaintiffs' individualized harm. First, in standard equal protection analyses of strict or intermediate judicial scrutiny, fundamental rights cannot be overcome absent an important or significant governmental interest that is tailored to the government action.[223] Applying this to the remedial context, the permissibility of leveling down would not merely be a question of the defendant's intent, but whether that intent provides an important interest for the government to regulate in the manner of leveling down. Second, the defendant's interests operate only as one subordinate factor in the conventional equitable balancing of hardships for injunctive relief.[224] The injunctive remedial calculus relegates the defendant's interest to overcoming the injunction only where the burden from the injunction itself

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[221] *See supra* Section II.

[222] *See* Zeigler, *Rights Require Remedies*, *supra* note 175, at 727–28.

[223] *See* Erwin Chemerinsky, Constitutional Law: Principles and Policies 529, 638 (1997) (noting that violations of fundamental rights are typically subject to strict scrutiny and that "[u]nder strict scrutiny a law is upheld if it is proven necessary to achieve a compelling government purpose"); Craig v. Boren, 429 U.S. 190, 197–98 (1976) (applying intermediate scrutiny for gender distinctions); Zablocki v. Redhail, 434 U.S. 374, 382–83, 388 (1978) (applying equal protection analysis to discrimination on the basis of a fundamental right).

[224] *See* eBay Inc. v. MercExchange, 547 U.S. 388, 391 (2006); Thomas, Levine & Jung, *supra* note 20, at 62, 79.

is disproportionality undue.[225] Both constitutional scrutiny and equitable balancing inquiries factor in the defendant's interests as a check on the remedy, but not as a dispositive consideration.

In addition, these analytical contexts of constitutional scrutiny and equitable balancing of injunctive relief prioritize a role for weighing many equitable concerns in addition to the defendant's interests. The Court itself identified the role of equitable considerations in evaluating the propriety of leveling down in its decision in *Califano v. Westcott*—the sole case to reach a majority decision and directly engage with the issue of leveling up (or down) in the context of a gender inequality.[226] These equitable considerations included the costs of extension and the potential hardship to these beneficiaries and "innocent recipients" from nullification.[227] The Court in *Morales-Santana* erroneously omitted this key part of the precedential inquiry into equitable considerations, which would have made all the difference. In the derivative citizenship context, there was no equitable consideration of the defendant's interest that justified a departure from the usual presumption of leveling up.

A. Judicial Inquiries of Defendant's Interests and Equitable Concerns

Analyzing the defendant's interests in remedying constitutional harm comes through in several different ways in the existing doctrinal frameworks. Inquiries of scrutinizing governmental action, implying remedies, and equitable balancing all include some role for evaluating defendant's equitable burdens and interests. These interests, however, generally factor in only as a check on the proposed relief, rather than serving as a determinant of the proper remedial course. In other words, the defendant's interests can, on rare occasions, prevent equitable relief, but only where those interests are significant or unduly burdensome.

The first analytical context of considering defendant's interests is seen in the heightened scrutiny given to governmental action infringing constitutional rights. Under the typical intermediate scrutiny analysis for gender discrimination, a governmental actor must show that the contested gender "classifications . . . serve important governmental objectives" and are "substantially related to achievement of those interests."[228] For strict scrutiny, implicated for a fundamental right, the government's law must be narrowly tailored to compelling interests.[229] Thus, in the context of choosing the ap-

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[225] *See eBay*, 547 U.S. at 391; Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008); THOMAS, LEVINE & JUNG, *supra* note 20, at 79.

[226] Califano v. Westcott, 443 U.S. 76, 90–93 (1979).

[227] *Id.*

[228] *Craig*, 429 U.S. at 197–98; *see* United States v. Virginia, 518 U.S. 515, 532–33 (1996).

[229] *See* CHEMERINSKY, *supra* note 223, at 529, 638; Plyler v. Doe, 457 U.S. 202, 216–27 (1982) (summarizing general rule that strict scrutiny applies to laws that infringe

propriate remedy for gender inequality, recognizing the plaintiff's right to a meaningful, individualized remedy is not the end of the analysis. Even given this fundamental right to a remedy, the remedy, like all fundamental rights, may be denied or burdened if that nullification is necessary to a compelling state interest.[230] Therefore, "[s]trict scrutiny analysis . . . provides a calculus through which courts can assess the denial of a remedy."[231] This heightened scrutiny would require inquiry into the important (or substantial) reasons why a court or defendant chose to level down, not just an inquiry into the intent.

Thinking of the remedial analysis through heightened scrutiny helps explain why the Court in *Palmer* did not blindly accept the defendant's proffered excuse for closing down the segregated swimming pools.[232] While the Court did not subject the remedy to a strict scrutiny analysis, it did perform some inquiry into the asserted reasons for closing the pools and whether those were race based.[233] Recognizing the remedy as a fundamental right might raise this inquiry to the level of mandated scrutiny analysis, under which such racial animus would not be an important governmental reason justifying the action.[234] The Court was narrowly split: while the dissenters found evidence of "racially motivated action," the majority accepted explanations of financial costs as justifications for the city closing the segregated swimming pool.[235] Had the *Morales-Santana* Court included this scrutiny of the defendant's intent in its analysis of leveling down, the legislative history of intent to discriminate against Mexican and Asian people may have been relevant to whether the Court should adopt a remedy that perpetuated the general, ten-year rule designed for this discrimination.[236]

The second analytical consideration of the defendant's interests is factored into the remedial calculus in the *Bivens* context of implying remedies for constitutional harms.[237] There, the issue is whether the plaintiff "is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts," or whether there are "special factors coun-

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fundamental rights); *see, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 342 (1972) (applying strict scrutiny to durational residence laws that burdened fundamental right to vote).

[230] *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795–97 (2006). "Courts routinely uphold laws when applying strict scrutiny, and they do so in every major area of the law in which they use the test." *Id*. at 795–96. Winkler found that over a span of thirteen years, laws survived strict scrutiny thirty percent of the time, more often in religious liberty cases and less often in cases of suspect class discrimination, free speech, freedom of association, and other fundamental rights. *Id*. at 796–97.

[231] Thomas, *Ubi Jus*, *supra* note 20, at 1643.

[232] *See* Palmer v. Thompson, 403 U.S. 217, 221–25 (1971).

[233] *See id.* at 223–24.

[234] *See* Loving v. Virginia, 388 U.S. 1, 11–12 (1967).

[235] *Palmer*, 403 U.S. at 225; *id.* at 235 (Douglas, J., dissenting).

[236] *See* Vlahoplus, *supra* note 58, at *7, 11; Collins, *Equality, supra* note 15, at 184; Collins, *Illegitimate Borders, supra* note 48, at 2195.

[237] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

selling hesitation."[238] These special factors include "a number of economic and governmental concerns" of the defendant, including those related to the military, national security, sensitive functions of the executive branch, and fiscal policy.[239] In many of the *Bivens* cases, these special factors have proven determinative in the choice of remedy, but only because the courts have also found that adequate alternative remedies exist for the individual plaintiff.[240]

The third analytical context in which the defendant's interests are typically evaluated for constitutional remedies is that of equitable balancing for injunctive relief. The standard test for assessing the appropriateness of injunctive relief is to evaluate (1) the threat of harm to the plaintiff, (2) the irreparable injury to the plaintiff, (3) any undue burden or hardship to the defendant from the injunction, and (4) interests of third party individuals or public policy more generally.[241] The burden or hardship to the defendant outweighs the plaintiff's interest in injunctive relief to restore her to her rightful position only where that hardship is undue or disproportionate to the value of a remedy to the plaintiff.[242] Defendants' interests are entered into the calculus only to see if there is an undue burden from the imposition of such relief. Undue burden is a high standard, requiring a showing of some significant harm to the defendant, not merely what the defendant desires.[243] These relevant burdens might include economic waste, disproportionate costs, threat to the operation or shutdown of a business, or interference with the defendant's constitutional rights.[244] The defendant's and plaintiff's interests

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[238] *Id.* at 396–97; *see* Ziglar v. Abbasi, 137 S. Ct. 1843, 1856–58 (2017).

[239] *See Ziglar*, 137 S. Ct. at 1856, 1860–61; United States v. Stanley, 483 U.S. 669, 683 (1987); Chappell v. Wallace, 462 U.S. 296, 300–01 (1983).

[240] *See* Gebser v. Lago Vista, 524 U.S. 274, 277, 283 (1998) (considering the appropriate remedy for an implied right of action under Title IX due to teacher's sexual harassment of student). In *Gebser*, the Court stated that "the general rule that all appropriate relief is available in an action brought to vindicate a federal right . . . yields where necessary to carry out the intent of Congress or to avoid frustrating the purposes of the statute involved." *Id.* at 285 (quoting Franklin v. Gwinnett County Pub. Sch., 503 U. S. 60, 68 (1992) and Guardians Assn. v. Civil Serv. Comm'n of New York City, 463 U. S. 582, 595 (1983) (opinion of White, J.)). The legislative intent is a check on the scope of the remedy, not itself determinative of the relief.

[241] THOMAS, LEVINE & JUNG, *supra* note 20, at 61–62 (emphasis omitted); *see* eBay Inc. v. MercExchange, 547 U.S. 388, 391 (2006); *see also* Winter v. Natural Res. Def. Council, 555 U.S. 7, 19–20 (2008).

[242] THOMAS, LEVINE & JUNG, *supra* note 20, at 79, 97.

[243] *See* THOMAS, LEVINE & JUNG, *supra* note 20, at 79.

[244] *Id*; *see also* JAMES M. FISCHER, UNDERSTANDING REMEDIES 289 (3d ed. 2014) (noting that "the underlying premise" of the undue hardship requirement for injunctive relief "is the avoidance of economic waste"). *See, e.g.,* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 773–74 (1994) (denying injunction in part due to undue burden on defendant's political speech); Boomer v. Atl. Cement Co., 257 N.E.2d 870, 872–73 (N.Y. 1970) (denying injunction because it would shut down factory, displacing workers and wasting capital investment); Smith v. Staso Milling Co., 18 F.2d 736, 739 (2d Cir. 1927) (denying injunction in part due to undue burden on defendant that would be caused by shutting down operation of business that employed significant labor and had invested significant capital costs).

are not equally weighed at this juncture because the defendant is an adjudicated wrongdoer, less deserving of deference.[245] The Supreme Court has repeatedly rejected attempts to truncate this equitable balance by adopting presumptions or remedial rules that alter this inquiry in favor of one side.[246] Equity thus structures the defendant's concerns as the exception, a countervailing check on potential unfairness imposed by a court imposing corrective justice.

This remedial calculus of the equitable balance seemed to guide the Supreme Court in its consideration of leveling down in *Califano v. Westcott*.[247] It highlighted the importance of the extension of benefits to redress the irreparable injury to the plaintiffs from the inequality, and then noted additional equitable concerns of impact on third parties, including harm to children being denied welfare and potential costs of implementation.[248] Those interests of the public and third parties, weighed together with the irreparable harm to the plaintiffs, supported the usual presumption of leveling up.[249]

The analytical inclusion of equitable concerns is also seen in the tax cases considering the question of prospective leveling down and the right to a meaningful remedy. In these cases, equitable concerns of the defendant are of limited, rather than priority, value. The Supreme Court noted,

> "Our decision . . . in *McKesson* . . . makes clear that once a State's . . . statute is held invalid . . . the State is obligated to provide relief consistent with federal due process principles. When the State comes under such a constitutional obligation, *McKesson* establishes that equitable considerations play only the most limited role in delineating the scope of that relief."[250]

In *McKesson,* the Court found that neither of the two equitable considerations cited, money and uniformity, were "sufficient [grounds] to override the constitutional requirement that Florida provide retrospective relief."[251]

The Supreme Court also relied on equitable balancing to determine the appropriate remedy in another gender inequality case, *City of Los Angeles*

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[245] More heavily weighing the plaintiff's interests but allowing for considerations of the defendant's interests accommodates accepted remedial theories of corrective justice and equity. From a corrective justice perspective, this rule restores the plaintiff to her rightful position, while equity then gives flexibility to consider defendant's practical burdens of implementation. *See* Roach, *supra* note 210, at 859–60, 864; THOMAS, LEVINE & JUNG, *supra* note 20, at 97.

[246] *See eBay*, 547 U.S. at 394 (rejecting presumption of injunction in favor of defendant for patent infringement); *Winter*, 555 U.S. at 21–22, 26–31 (rejecting presumption of preliminary injunction without full analysis of all equitable factors).

[247] Califano v. Westcott, 443 U.S. 76, 90 (1979).

[248] *Id.*

[249] *Id.*

[250] Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 181 (1990) (citing McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, 496 U.S. 18, 36–51 (1990)).

[251] *McKesson Corp.*, 496 U.S. at 44 (1990).

Department of Water and Power v. Manhart.[252] In *Manhart*, the City of Los Angeles charged women employees about fifteen percent more for their pension benefit because women, on average, lived longer than men and thus potentially received larger pensions.[253] The Court struck down the sex-based classification in monthly pension contributions under Title VII.[254] The women plaintiffs sought restitution of the return of the past overpayments.[255] In determining remedies, the Court previously noted that in Title VII cases, the strong presumption is that "[t]he injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed."[256] Retroactive relief should be denied only "for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[257] Accordingly, the Court had awarded such retrospective relief of returned payments in a prior case where men had challenged a state retirement plan that allowed women to retire five years earlier.[258] The *Manhart* Court, however, departed from this usual remedial presumption. It held that the "presumption in favor of retroactive liability can seldom be overcome, but it does not make meaningless the district courts' duty to determine that such relief is appropriate."[259] To determine the appropriate remedy, the Court evaluated the equitable concerns of imposing such retrospective relief and weighed them against the presumption of meaningful relief. These concerns included the cost to the governmental defendant and its ability to satisfy pension obligations, the potential harm to other pension beneficiaries, and the broader public impact on the economy of "drastic" changes in existing insurance structures.[260] Given these special circumstances, the Court found that the usual presumption of retroactive relief was overcome, and denied the restitution.[261]

Thus, in all of these contexts—heightened scrutiny, implied remedies, and equitable balancing—defendant's interests and concerns are evaluated, but not as the primary determinant of remedial choice. Instead, they provide

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[252] *See* L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 719–20 (1978).

[253] *Id.* at 704–05.

[254] *Id.* at 711. By then, the city had already abandoned the disparate practice due to intervening state law. *Id.* at 706. The Equal Employment Opportunity Commission (EEOC) had also amended its regulations to clarify that such gender distinctions in pensions were illegal. 29 C.F.R. § 1604.9(f).

[255] *Manhart*, 435 U.S. at 706.

[256] Albemarle Paper Co. v. Moody, 422 U.S. 405, 418–19 (1975) (quoting Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867)).

[257] *Manhart*, 435 U.S. at 719 (citing *Albemarle Paper Co.*, 422 U.S. at 421).

[258] Fitzpatrick v. Bitzer, 427 U.S. 455, 450 (1976).

[259] *Manhart*, 435 U.S. at 719.

[260] *Id.* at 721–23.

[261] *Manhart*, 435 U.S. at 723; *but see* Tracy A. Thomas, *Rewritten Opinion in* Manhart, *in* FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE U.S. SUPREME COURT 233 (Kathryn Stanchi, Linda Berger & Bridget Crawford eds., 2016) (disagreeing with this conclusion and rewriting the opinion to reflect an accurate understanding of both equality and remedial rights).

a check on the imposition of equitable relief to avoid inequity caused by the judicial remedy itself. As such, they appropriately fit into a remedial calculus that considers them subordinate to the rule of presumptive meaningful relief for the plaintiff.

B. Equitable Interests Relevant to Leveling Down

In these remedial contexts, there are several specific equitable concerns that emerge as relevant to overcoming the presumption of full retrospective relief like leveling up. These include costs and economic burdens, harms to third parties, and military or national security interests. They do not always merit overcoming the usual remedial presumption, but are the types of concerns that might.

Cost or economic impact is a key factor taken into account.[262] In *Califano v. Westcott*, the Supreme Court noted that "cost might prove a dispositive factor" in choosing whether to level up in a gender inequality case.[263] In *Westcott*, there were undeniably potential costs from extending the unemployment benefits to families of unemployed mothers rather than confining the payments to families with unemployed fathers as primary breadwinners. Despite this potential, however, the Court held that cost considerations were not "controlling" in the case.[264] "This Court," it declared "is ill-equipped both to estimate the relative costs of various types of coverage, and to gauge the effect that different levels of expenditures would have upon the alleviation of human suffering."[265]

In other contexts, costs have been dispositive in overcoming leveling up. In *Heckler v. Mathews*, Congress acted to remedy an unconstitutional gender distinction in the Social Security law by leveling down to reduce spousal payments for all workers.[266] This was primarily a function of cost, as extending the dual benefit to all workers would have been significant.[267] In a footnote in *Morales-Santana*, Justice Ginsburg similarly noted how costs drove prior decisions of the courts in striking down women-protective employment practices, such as maximum hours and minimum wage laws under Title VII. "Most courts," she said, invalidated such provisions by "taking into account the economic burdens extension would impose on employers," and thus did not extend the benefits to all workers due to the financial bur-

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[262] *See* Califano v. Westcott, 443 U.S. 76, 93 (1979); *Manhart*, 435 U.S. at 720–23; Palmer v. Thompson, 403 U.S. 217, 224–26 (1971); Ginsburg, *supra* note 94, at 305, 322–23.

[263] *Westcott*, 443 U.S. at 93.

[264] *Id.*

[265] *Id.*

[266] Heckler v. Mathews, 465 U.S. 728, 731–32, 734 (1984).

[267] *See id.* at 732.

den on the private employer from paying all workers more or reducing workers hours for all.[268]

Harms to third parties are also relevant to the question of choosing an appropriate equitable remedy. In *Westcott*, the potential harms to "300,000 needy children" by denying families unemployment benefits were a key factor in choosing the presumptive remedy of leveling up. Leveling down there "would [have] impose[d] hardship on beneficiaries whom Congress plainly meant to protect."[269] In *Manhart*, the potential harm to other retirees in the pension was a determinative factor in denying retroactive relief.[270] Additionally, the absence of similar harm in *Heckler*, where Congress eliminated a double recovery but preserved the regular worker benefit, may have influenced the Court in upholding the legislative choice to level down.[271]

Finally, broader national policy concerns might enter the equitable calculus in choosing the appropriate remedy. In *Manhart*, the potential "drastic" impact on altering the entire national insurance industry was taken into consideration.[272] In the Supreme Court's leading preliminary injunction case, *Winter*, the Court considered the negative impact on national security from a remedy restricting military training operations and found it sufficient to deny the plaintiff's request relief.[273] Also, in *Westcott*, the dissent noted that concern about "other hardships [that] might be occasioned in the allocating of limited funds" by mandating Congress' use of funds for this particular benefit program rather than other uses was another reason to level down.[274]

Applying these equitable concerns to *Morales-Santana* does not support the leveling down remedy the Court chose. First, there were no obvious problematic financial or administrative costs with leveling up. The main effect of extending the benefit would have been to allow more individuals to claim citizenship from the past. There was no stated harm to national security that would have been negatively impacted by extending the citizenship rule to children of unwed fathers in the past. Nor was there any fiscal or economic impact from extending the citizenship rule, and thus no effect on the government coffers. Second, harms to children from the nullification remedy were indeed significant from the denial of citizenship status to children previously born to unwed citizen fathers, as well as to children born to unwed citizen mothers or fathers in the future. This kind of harm to children alone was sufficient in *Westcott* to justify leveling up.[275] Other third parties were also negatively impacted here by leveling down, namely unwed

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[268] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1700 n.27 (2017).
[269] *Westcott*, 443 U.S. at 90.
[270] *See* L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 721, 723 (1978).
[271] *See* Heckler v. Mathews, 465 U.S. 728, 742 (1984).
[272] *See Manhart*, 435 U.S. at 721.
[273] *See* Winter v. Natural Res. Def. Council, 555 U.S. 7, 24–26 (2008).
[274] *Westcott,* 443 U.S. at 96 (Powell, J., dissenting).
[275] *See id.* at 90.

mothers with children born abroad who will no longer be able to confer citizenship status as they previously did.[276] Such harms to children and U.S. women are significant and would likely tip the balance away from leveling down.

The one potential concern the Court in *Morales-Santana* identified with leveling up was that it would create a distinction between married and unmarried parents that might result in reverse illegitimacy discrimination.[277] It is not the case, however, that such a distinction would be automatically invalid under current law. Some legitimacy discrimination survives constitutional scrutiny, as illustrated by cases treating unmarried fathers differently for purposes of parentage and adoption.[278] Especially where there might be some important reason for the distinction, such as the need for single parents to pass on their citizenship in order to prevent their children from being stateless, such judicial scrutiny might be satisfied.[279] Moreover, existing family law commonly distinguishes rights on the basis of marital status: "Family law places marriage at the very foundation of legal regulation. Indeed, the most fundamental divide in family law is between married and unmarried couples, and this schism carries over to how the law addresses nonmarital

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[276] Con Law Scholars Brief, *supra* note 116, at 14. Injunctive relief normally cannot apply to non-parties to the action, and third parties cannot be made to take action in order to effectuate remediation. *See* Regal Knitwear Co. v. NLRB, 324 U.S. 9, 13 (1945) ("The courts, nevertheless, may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law."); United States v. Paccione, 964 F.2d 1269, 1275 (2d Cir. 1992) ("[A] court generally may not issue an order against a nonparty."); 11A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2956, at 335 (3d ed. 2018) ("A court ordinarily does not have power to issue an order against a person who is not a party and over whom it has not acquired in personam jurisdiction."); Milliken v. Bradley, 418 U.S. 717, 745–46 (1974) (court could not order non-party suburban school districts to take action as part of interdistrict remedy where districts did not act with defendant school to create segregation). Thus, there is an argument to be made that the Court is without judicial power to act upon the rights of third parties. *Cf* Uzman, *supra* note 91, at 146 (positing that the ECJ might "consider[ ] nullification of benefits for third parties as contrary to the judicial function").

[277] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1700 (2017).

[278] JOHN DEWITT GREGORY, PETER NASH SWISHER & ROBIN FRETWELL WILSON, UNDERSTANDING FAMILY LAW 127 (4th ed. 2013); *see* Nguyen v. INS, 533 U.S. 53, 71 (2001) (upholding different standards for unwed father to establish paternity under citizenship law); Mathews v. Lucas, 427 U.S. 495, 500 (1976) (applying intermediate scrutiny to uphold distinctions between marital and nonmarital children under Social Security law); Lalli v. Lalli, 439 U.S. 259, 273–75 (1978) (upholding intestacy statute preventing illegitimate children from inheriting without legal order of filiation); *see also* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2562 (2013) (upholding adoption, in part, because only unwed, natural mother, and not unwed biological father, had legal custody of child at birth); Michael H. v. Gerald D., 491 U.S. 110, 118–30 (1989) (upholding state law treating unwed fathers differently than married parents); Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1691 (2015) (arguing that legitimacy case precedent does not require equal treatment of marital and nonmarital children, but instead supports the robust power of states to define parenthood).

[279] The government cited "preventing 'statelessness'" as a justification for Section 1409's shorter time rule for unwed mothers. *Morales-Santana*, 137 S. Ct. at 1694.

children."[280] Indeed, even legal institutions like the courts, which are meant to oversee the family, are often structurally "designed for married families that have been formally recognized by the state."[281] Accordingly, state judicial processes and jurisdiction may be segregated based on marital status, with married parents proceeding through domestic relations court attendant with certain procedural and substantive rights, while unmarried parents proceed through juvenile or probate court with less expertise and supportive processes.[282] Thus, a citizenship remedy in *Morales-Santana* that would have led to a temporary distinction between married and unmarried parents (until Congress legislated again), would not necessarily have been constitutionally problematic and would in fact have been consistent with current domestic relations law. While some scholars argue that such marital distinctions in family law should change,[283] these changes in statutory law generally come from the legislature, which, as Ginsburg notes, is the proper entity to ultimately remedy the citizenship distinction of federal law.[284]

Conclusion

The fundamental problem with the Supreme Court's jurisprudence of equal protection remedies has been a blind acceptance of leveling down. Its assumption that leveling down is just as valid as the alternative of leveling up is not supported by existing jurisprudence. Instead, commands of constitutional scrutiny inherent in equal protection, due process, and judicial equity all support a strong presumption in favor of leveling up. Leveling down should only be available in very rare cases, which the Court has seemingly recognized. The Court's expansion of leveling down in *Morales-Santana* cannot continue to be the equal protection norm. Asking the additional question about meaningful relief for inequality, as this Article does, moves the courts away from a formalistic parallelism and into a substantive inquiry that provides a way to analyze and challenge the precedent that now lies there like an open wound. The potential negative impact of the Court's remedial decision in *Morales-Santana* cannot be overstated. Leveling down is a "dark cloud" deterring individuals from bringing equality claims and threatening equal protection's normative value.[285] "[L]itigants faced with the possibility of such an outcome must either risk injuring others by challenging the ine-

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[280] Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 Stan. L. Rev. 167, 170 (2015).

[281] *Id.*

[282] Dale Margolin Cecka, *Inequity in Private Child Custody Litigation*, 20 CUNY L. Rev. 203, 208, 210, 233–35 (2016).

[283] Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. Rev. 1647, 1648 (2015).

[284] *Morales-Santana*, 137 S. Ct. at 1686, 1701; *see* Martha Albertson Fineman, The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies 228–36 (1995); Huntington, *supra* note 280, at 172.

[285] Brake, *Worse Off*, *supra* note 8, at 522.

quality, or forego litigation and endure what they believe is an unconstitutional deprivation of rights."[286] There is now current, modern precedent solidifying the dangers of equal protection challenges—the denial of benefit to all. This is the fear all lawyers have in bringing equal protection challenges: that they will win the battle but lose the war. Now there is confirmation of that fear and citable precedent for denial. There is now a new decision, with votes of both liberal and conservative Justices, providing a roadmap for future courts to deny the "extension" remedy and instead order the "withdrawal" of benefit in cases of gender discrimination. In the time since the decision in *Morales-Santana*, courts have already seen the case used as an invitation to leveling down remedies, though so far courts have resisted those requests.[287] Still, such a case does not leave a promising legacy for gender equality jurisprudence, but instead takes one giant constitutional step backwards.

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[286] Sabina Mariella, Note, *Leveling Up Over Plenary Power: Remedying an Impermissible Gender Classification in the Immigration and Nationality Act*, 96 B.U. L. Rev. 219, 238 (2016).

[287] *See, e.g.*, Gegenheimer v. Stevenson, No. 1:16-CV-1270, 2017 WL 2880867, at *4 (W.D. Tex. July 5, 2017); McLaughlin v. Jones, 401 P.3d 492, 498–501 (Ariz. 2017) (invalidating state's parenting laws that granted men but not women the marital presumption of custody and extended the presumption to women rather than eliminating the sex-based privilege for men).