NOTES

ESPINOZA'S ENERGIZED EQUALITY AND ITS IMPLICATIONS FOR ABORTION FUNDING

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This Note argues that the Supreme Court has recently created a subsidized equality right in the Free Exercise Clause—by perceiving previously constitutional state action as discrimination against religion—and that this right's logic is inconsistent with how the Court articulated funding rights in the abortion context prior to its decision in Dobbs v. Jackson Women's Health Organization*. This Note's goal is two-fold. First, it will explain the legal principle driving the change in Free Exercise Clause doctrine: an energized equality. Although the expanding anti-discrimination principle is having transformative effects in the law of religious exemptions, this Note's primary aim is to explore the implications of this change in the religious funding context, as much public commentary already has focused on legal developments in the former category. This Note's second goal is to demonstrate how the Court's articulation and application of this energized equality principle in religious funding cases reflect its political prioritization of free exercise rights. In these cases, on the basis of religious equality, the Court is willing to recognize violations of free exercise rights, whereas in nearly identical factual scenarios not explicitly involving religion, it is blind to inequality. This Note focuses on abortion funding pre-*Dobbs *as an example to demonstrate this logical inconsistency.*

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INTRODUCTION

With the death of Justice Ruth Bader Ginsburg and the appointment of Justice Amy Coney Barrett, the Supreme Court gained a key vote for unbridled religious autonomy.[1] This vote has proved consequential. Despite a number of Supreme Court commentators' insistence that the Court's decision in *Fulton v. City of Philadelphia*[2] demonstrates that the law of religious liberty has not changed as radically as many progressives feared it would,[3] decisions on funding of religious institutions[4] and on COVID-19 regulations[5]—in which

[1] *See* Emma Green, *The True Victors of Trump's Supreme Court Nomination*, THE ATLANTIC (Sept. 25, 2020), https://www.theatlantic.com/politics/archive/2020/09/trump-supreme-court-conservative-legal-movement/616505 [https://perma.cc/6H65-UVST] ("Barrett's nomination is the culmination of a decades-long strategy to advance judges steeped in a conservative judicial philosophy that tends to . . . promote an expansive view of religious liberty.").

[2] In *Fulton*, the City of Philadelphia refused to contract with Catholic Social Services (CSS) for the provision of foster care services unless CSS certified same-sex couples as foster parents. Because the city's non-discrimination section of the foster care contract did not provide for religious exemptions (even though the Commissioner had discretionary authority to grant exemptions), the Court held that it violated the Free Exercise Clause of the First Amendment. 141 S. Ct. 1868, 1878, 1882 (2021).

[3] *See, e.g.*, Mary Catherine Roper, *What* Fulton v. City of Philadelphia *Means for LGBQ&T Families and Individuals*, ACLU PA. (June 18, 2021, 2:00 PM), https://www.aclupa.org/en/news/what-fulton-v-city-philadelphia-means-lgbqt-families-and-individuals [https://perma.cc/DJ3W-VDRB] (characterizing the decision's impact as minimal); Ian Millhiser, *An Epic Supreme Court Showdown over Religion and LGBTQ Rights Ends in a Whimper*, VOX (June 17, 2021, 1:50 PM), https://www.vox.com/2021/6/17/22538645/supreme-court-fulton-philadelphia-lgbtq-catholic-social-services-foster-care-john-roberts-religion [https://perma.cc/4JL6-76ZB] (stating that the case is "unlikely to have many implications outside of" Philadelphia); David Cole, *Surprising Consensus at the Supreme Court*, N.Y. REV. BOOKS (Aug. 19, 2021), https://www.nybooks.com/articles/2021/08/19/surprising-consensus-at-the-supreme-court [https://perma.cc/6C2K-BBRJ] (characterizing the decision as "extremely narrow"). *But see* Walter Olson, Fulton v. City of Philadelphia*: Yes, It Was a Big Deal*, CATO (June 22, 2021, 1:32 PM), https://www.cato.org/blog/fulton-v-city-philadelphia-yes-it-was-big-deal [https://perma.cc/6DVF-JDAC] (arguing that the decision indicated a change in religion clause jurisprudence and would impact government programs in other cities).

[4] *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

Justice Barrett's vote has been crucial—suggest otherwise. The Court's decisions in these contexts have locked in changes to free exercise doctrine that elevate religious rights and, in so doing, put important anti-discrimination protections and civil liberty guarantees at risk.[6]

The Court's doctrinal changes have mostly involved an expansion of the Free Exercise Clause's anti-discrimination principle, which offers its protection to claimants when a "law . . . discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[7] Under this basic principle as it existed before *Fulton*, as long as a law was neutral toward religion—meaning its object was not to discriminate—and generally applicable, it was valid under the First Amendment, even if it placed a burden on religious exercise.[8] Pursuant to this version of the doctrine, a state also could decide not to fund religious programs to protect its anti-establishment interests without violating the Free Exercise Clause.[9]

Now, after *Fulton* and a series of cases overturning COVID-19 regulations, even a generally applicable or neutral law may be invalid under the Free Exercise Clause if it treats any "comparable"—a term

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[5] *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."). After Justice Barrett was confirmed, the Court began enjoining COVID-19 regulations because they were likely to violate free exercise rights. *Compare* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (mem.) (Roberts, C.J., concurring) ("Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause . . . [because] [s]imilar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts . . . [and] spectator sports . . . [and] only dissimilar activities, such as operating grocery stores [were treated more leniently]."), *with* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (per curiam) (enjoining COVID-19 regulations—similar to those reviewed in *South Bay*—which restricted the number of individuals allowed to attend religious ceremonies at any particular time because the regulations "single[d] out houses of worship for especially harsh treatment" while there were other "essential" businesses that were permitted to "admit as many people as they wish[ed]").

[6] *See* Elizabeth Reiner Platt, Katherine Franke & Lilia Hadjiivanova, Columbia L. Sch. L., Rts. & Religion Project, We the People (of Faith): The Supremacy of Religious Rights in the Shadow of a Pandemic 4 (2021), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Reports/We%20The%20People%20%28of%20Faith%29%20Report.pdf [https://perma.cc/2MCQ-ZQ5D] ("The Supreme Court's new approach provides religious activity with a level of constitutional protection greater than nearly any other fundamental right, including the right to free speech, abortion, and racial equality," meaning that these other rights "enjoy lower-tier status.").

[7] Church of Lukumi Bablu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).

[8] *See* Emp. Div. v. Smith, 494 U.S. 872, 879 (1990).

[9] *See infra* Sections I.B and II.A (discussing Locke v. Davey, 540 U.S. 712, 715 (2004)).

that's proven incredibly broad in the Court's application—secular activity more favorably than a religious one,[10] or if it grants an exemption to a law for non-religious reasons but not for religious ones.[11] Further, a law's "object" is no longer the subject of constitutional inquiry; religion instead takes a "most favored nation" status, meaning that "a law must have universal application to be considered nondiscriminatory vis-à-vis religion."[12]

As it applies to a state's authority to exclude religion from some funding programs, the expanding anti-discrimination principle also has dramatic implications, as three recent Supreme Court cases demonstrate. The first case is *Trinity Lutheran Church of Columbia, Inc. v. Comer*, in which the Court held that religious institutions could not be banned from competing for government funds that were available to secular institutions.[13] Second is *Espinoza v. Montana Department of Revenue*, in which the Court held that the Free Exercise Clause's equality principle required Montana to offer scholarships to students attending religious schools when it also made those scholarships available to students attending private secular schools.[14] And third is *Carson v. Makin*, in which the Court specifically required taxpayers in Maine to fund religious instruction at private schools.[15] By requiring the state to make funding available to institutions or individuals to avoid a violation of their free exercise rights, the Court

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[10] *See infra* Section II.C (discussing *Tandon*, 141 S. Ct. at 1294 (2021) (per curiam)).

[11] *See supra* note 2. The Court's diminishing toleration of secular exemptions is especially clear when one considers that the Oregon law at issue in *Smith* permitted medical exemptions to the law, and yet, according to the Court, did not violate the Free Exercise Clause. *See Smith*, 494 U.S. at 874 ("Oregon law prohibits the knowing or intentional possession of a 'controlled substance' unless the substance has been prescribed by a medical practitioner."). For a full discussion of *Smith* see *infra* Section I.B. *See also infra* Section II.C (discussing *Tandon*).

[12] PLATT ET AL., *supra* note 6, at 12; *see also* Jim Oleske, Tandon *Steals* Fulton*'s Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG (Apr. 15, 2021, 10:13 AM), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990 [https://perma.cc/V5UE-UFAJ] (reporting that "the most-favored-nation approach [to the Free Exercise Clause is] now the law of the land as a result of *Tandon*").

[13] *See* 137 S. Ct. 2012, 2025 (2017) ("[T]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand.").

[14] *See* 140 S. Ct. 2246, 2261 (2020) ("A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.").

[15] *See* No. 20-1088, slip op. at 16–18 (U.S. June 21, 2022) (striking down Maine's nonsectarian requirement for its tuition assistance program as violative of the First Amendment, even though Maine imposed the requirement to prevent state funding of religious instruction).

narrowed a state's authority to act safely in the "play in the joints."[16] The play in the joints is the space between the religion clauses where state action is "'permitted by the Establishment Clause but not required by the Free Exercise Clause'—and vice versa."[17] It is here that states have the discretion to craft policies that balance interests inherent in the Establishment Clause and Free Exercise Clause.[18] *Trinity Lutheran Church*, *Espinoza*, and *Carson* radically narrow that space.

These doctrinal changes—expanding the types of law that qualify as neither neutral nor generally applicable and narrowing the play in the joints—create an energized equality principle in the Free Exercise Clause. It is energized in the sense that it is more powerful than both the equality principle previously articulated by the Court and the operation of equality principles in other areas of constitutional law.

The goal of this Note is two-fold. First, it will explain the legal principle driving the change in free exercise doctrine—an energized equality principle. Although the expanding anti-discrimination principle renders transformative effects in the law of religious exemptions, this Note's primary aim is to explore this change's implications in the religious funding context—such as when the state decides to provide funding to students attending private religious schools.[19] This Note's second goal is to demonstrate how the Court's articulation and application of this energized equality principle in religious funding cases

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[16] Locke v. Davey, 540 U.S. 712, 718 (2004) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)).

[17] Joy Milligan, *Religion and Race: On Duality and Entrenchment*, 87 N.Y.U. L. REV. 393, 454 (2012) (quoting *Locke*, 540 U.S. at 719).

[18] For a description of the play in the joints, see, for example, KENT GREENAWALT, WHEN FREE EXERCISE AND NONESTABLISHMENT CONFLICT 77–78 (2017) (describing the "'play in the joints' outlook" as one that "will allow states some range to determine the extent of granting aid for non-religious education and denying it for religious education"); Grant Sullivan, *Symposium: What "Play in the Joints" Remains After* Espinoza*?*, SCOTUSBLOG (July 1, 2020, 12:49 PM), https://www.scotusblog.com/2020/07/symposium-what-play-in-the-joints-remains-after-espinoza [https://perma.cc/QWU7-R4MA] (describing how *Espinoza* minimized the play in the joints). *Locke v. Davey* is a concrete example of this concept. In that case, the Supreme Court upheld a provision of the Washington Constitution that barred a state scholarship program from funding students who pursued a degree in devotional theology. *Id.* at 715. Although the Establishment Clause permitted Washington to allocate these funds to students pursuing devotional theology degrees, the Free Exercise Clause did not require the state to do so. In other words, Washington's decision to not fund students pursuing devotional theology degrees was not required by the Establishment Clause, and neither was it forbidden by the Free Exercise Clause. *Id.* at 719, 725. Because Washington was acting within the play in the joints between the Establishment Clause and the Free Exercise Clause, it could exercise its discretion without violating the First Amendment. *Id.*

[19] This Note focuses on funding cases because much public commentary has already focused on legal developments in the law of religious exemptions. *See supra* note 3.

reflects its political prioritization of free exercise rights. In these cases, on the basis of religious equality, the Court is willing to recognize violations of free exercise rights, whereas in nearly identical factual scenarios not explicitly involving religion, it is blind to inequality. This Note focuses on abortion funding as an example to demonstrate this logical inconsistency, especially because abortion is often pitted against religious freedom.

Part I of this Note provides an overview of some of the key case law. It focuses on the diminishing power of the Establishment Clause, a shift that underpinned the Court's rulings in *Trinity Lutheran Church*, *Espinoza*, and *Carson*. Part I also explains Free Exercise Clause case law predating *Trinity Lutheran Church*, *Espinoza*, and *Carson* to emphasize how those three cases empowered the free exercise equality principle. Part II fleshes out this principle by explaining how the Court articulated it in *Trinity Lutheran Church*, *Espinoza*, and *Carson*. Finally, Part III explores the implications of the energized equality principle. Specifically, it argues that the energized equality principle effectively creates a subsidized equality right—a fundamental right to government funding on an equality rationale—and presses on the logical inconsistency of not applying it to other areas of constitutional rights, using abortion as an example.

I
The Path to Energized Equality

The text of the First Amendment's religion clauses reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[20] Although this language "is at best opaque," there is some settled meaning, at least at its core.[21] The first clause—the Establishment Clause—prevents official state sponsorship, promotion, or entanglement with religion.[22] The second

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[20] U.S. Const. amend. I.

[21] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[22] *See, e.g.*, *id.* ("[W]e must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" (quoting Walz v. Tax Comm'n, 397 U.S. 644, 688 (1970))); Adrianne M. Spoto, Note, *Fostering Discrimination: Religious Exemption Laws in Child Welfare and the LGBTQ Community*, 96 N.Y.U. L. Rev. 296, 320 (2021) ("At its most basic level, the Establishment Clause prevents government from adopting an official religion . . . ."); Marci A. Hamilton & Michael McConnell, Nat'l Const. Ctr., First Amendment – The Establishment Clause Common Interpretation 2, https://constitutioncenter.org/media/const-files/1st_Amendment_-_Establishment_Clause_Annotation_Format.pdf [https://perma.cc/5NPU-W8HB] ("Virtually all jurists agree that it would violate the Establishment Clause for the government to compel attendance or financial support of a religious institution as such, . . . [or] for the government to interfere with . . . religious doctrine . . . .").

clause—the Free Exercise Clause—provides the right to practice any religious beliefs.[23] Beyond these two core principles, however, the meaning of the religion clauses is not settled, and the tension between them has never been fully reconciled.[24]

The purpose of this Part is to hone in on the Establishment Clause and Free Exercise Clause doctrine most crucial to the evolution of the energized equality principle. Over the course of seventy years, the Court has weakened the Establishment Clause, making it possible for the Court in *Trinity Lutheran Church*, *Espinoza*, and *Carson* to completely ignore it.[25] This Part will explore that shift. Further, to make clear how *Trinity Lutheran Church*, *Espinoza*, and *Carson* energize the equality principle, this Part will explain how the free exercise anti-discrimination principle operated in the past.

A. Establishment Clause

In 1947, *Everson v. Board of Education*[26] established a principle of neutrality in Establishment Clause jurisprudence that defined the Court's tenor in religion cases for decades to come.[27] At issue in this case was a New Jersey program which authorized boards of education to reimburse parents for money they spent on bus fares to transport their children to school.[28] This program reimbursed bus fares both for children going to public schools and for children attending private Catholic schools.[29] A taxpayer sued, alleging that the program vio-

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[23] *See* Emp. Div. v. Smith, 494 U.S. 872, 877 (1990) ("The free exercise of religion means . . . the right to believe and profess whatever religious doctrine one desires."); *see also* FREDERICK GEDICKS & MICHAEL MCCONNELL, NAT'L CONST. CTR., FIRST AMENDMENT – THE FREE EXERCISE CLAUSE COMMON INTERPRETATION 1, https://constitutioncenter.org/media/const-files/1st_Amendment_-_Free_Exercise_Clause_Annotation_Format.pdf [https://perma.cc/ST2V-T86F] (noting that the Free Exercise Clause "makes plain the protection of actions as well as beliefs, but only those in some way connected to religion.").

[24] *See* Jesse R. Merriam, *Finding a Ceiling in a Circular Room:* Locke v. Davey*, Federalism, and Religious Neutrality*, 16 TEMP. POL. & C.R. L. REV. 103, 103 (2006) ("However, while these propositions—that religion is distinct and that there is tension between the Religion Clauses—are clear and settled, the Court has struggled mightily to reconcile them.").

[25] *See* Nelson Tebbe, *Five Thoughts on* Espinoza, AM. CONST. SOC'Y (July 1, 2020) [hereinafter Tebbe, *Five Thoughts*], https://www.acslaw.org/expertforum/five-thoughts-on-espinoza [https://perma.cc/M774-XF9U] ("[*Espinoza*] represented the continuation of an ongoing constitutional program, launched years ago by members of the majority, to weaken the Establishment Clause and strengthen the Free Exercise Clause.").

[26] 330 U.S. 1 (1947).

[27] Donald L. Drakeman, Everson v. Board of Education *and the Quest for the Historical Establishment Clause*, 49 AM. J. LEGAL HIST. 119, 120 (2007) (explaining that *Everson* is the "foundation of modern church-state constituional analysis").

[28] *See Everson*, 330 U.S. at 3 (summarizing the New Jersey program).

[29] *Id.*

lated the First Amendment Establishment Clause.[30] The Court rejected this claim. It reasoned that, although a state could not be forced to provide transportation to religious schools simply because it provided that transportation to public schools, the Court could not *prohibit* New Jersey from providing that aid.[31] The Court grounded this reasoning in a neutrality principle: "[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."[32] Still, the Court firmly disavowed New Jersey's authority to "pass laws which aid one religion, aid all religions, or prefer one religion over another."[33] Although the bus fare subsidy toed the line between contributing "tax-raised funds" to a religious institution—which the Establishment Clause prohibited—and a general "public welfare" benefit—which could not be withheld from religious individuals on the basis of their religious belief—the Court concluded that because the subsidy was closer to a welfare benefit, neutrality required the Court's non-intervention.[34] To the Court in *Everson*, neutrality meant not interfering with a state's authority to give some benefits to students attending religious schools, as long as that benefit did not qualify as state endorsement of a religion.[35]

A series of Supreme Court decisions during the 1990s and 2000s locked into place an approach to interpreting the Establishment

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[30] *See id.* at 5.

[31] *See id.* at 16 ("While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful . . . to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens . . . .").

[32] *Id.* at 18. Legal scholars have also characterized this neutrality in *Everson*'s holding as an equality principle. *See, e.g.*, William P. Marshall, *What Is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 198 (2000) (arguing that there is an equality principle that unifies religious clause jurisprudence and that this principle is present in *Everson*: "The Court's holding in the case . . . [is] equality oriented . . . . The state would not be constitutionally prohibited from providing transportation to parochial school students on an equal basis with the transportation that it provided to children attending public schools.").

[33] *Everson*, 330 U.S. at 15.

[34] *See id.* at 16. Later cases approved aid to religious schools as long as that aid served a secular purpose, not a religious one. *See* Bd. of Educ. v. Allen, 392 U.S. 236, 248 (1968) (recognizing that religious schools can serve secular and religious purposes and that providing secular textbooks to religious schools avoids Establishment Clause concerns because textbooks fall on the secular side of the line).

[35] *Everson*, 330 U.S. at 18 ("[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.").

Clause that *permitted* religious institutions' access to state funds.[36] This permission was the necessary precursor to the Court's decision to *require* such access to funding in *Espinoza* and *Carson*.[37] One such case was *Rosenberger v. Rector*.[38] In this case, a religious student group at the University of Virginia, a public university, challenged a university rule which barred otherwise available university funds from religious groups.[39] The student group applied for university funds to subsidize the publication of their Christian evangelical magazine.[40] The rule prohibited university funds from subsidizing religious activity based on Establishment Clause concerns.[41] The school was worried that funding the religious group would imply that it endorsed Christianity.[42] Invoking the neutrality principle, however, the Court held that because the university program was otherwise neutral toward religion (it was obviously not created to benefit religion), granting funds to religious organizations would not violate the Establishment Clause.[43]

This decision both contradicted Supreme Court precedent[44] and arguably belied an originalist interpretation of the Establishment Clause.[45] As the dissent noted, "[t]he Court today, for the first time, approve[d] direct funding of core religious activities by an arm of the State."[46] *Rosenberger* diminished the Establishment Clause's strength by energizing a principle of equality embedded within the Religion

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[36] *See* NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 210–11 (2005) (noting that a string of Supreme Court cases during the 1990s and 2000s diminished Establishment Clause restrictions preventing religious institutions from receiving government aid).

[37] *See infra* Section II.B.

[38] 515 U.S. 819 (1995).

[39] *See id.* at 822–23 (summarizing the facts).

[40] *See id.* at 825–26 (describing the Christian magazine).

[41] *See id.* at 837 ("[T]he University had argued at all stages of the litigation that inclusion of WAP's [the religious student group] contractors in SAF [the university funding organization] funding authorization would violate the Establishment Clause.").

[42] *See id.* at 841 ("The . . . apparent concern that Wide Awake's religious orientation would be attributed to the University is not a plausible fear . . . .").

[43] *See id.* at 840 ("The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause.").

[44] *See id.* at 874–75 (Souter, J., dissenting) (listing cases that "categorically condemned state programs directly aiding religious activity").

[45] *See* FELDMAN, *supra* note 36, at 209 ("[T]he Supreme Court . . . adopt[ed] a position almost squarely the opposite of the original intent of the Establishment Clause. The framers meant the Establishment Clause" to protect against "a citizen's tax dollars . . . [being] used to support religious teachings with which he . . . disagree[d]."). *But see Rosenberger*, 515 U.S. at 852–53 (Thomas, J., concurring) (arguing that a correct originalist interpretation of the Establishment Clause demonstrates a "long tradition of allowing religious adherents to participate on equal terms in neutral government programs").

[46] *Rosenberger*, 515 U.S. at 863 (Souter, J., dissenting).

Clauses.[47] This conceptual move was key to the Court's ruling in *Espinoza*.

Rosenberger provided the legal foundation upon which state funds could be expended to support other religious activities, including schools. In *Zelman v. Simmons-Harris*, that is exactly what happened.[48] In this case, an Ohio statute permitted the state to provide vouchers to low-income parents in struggling school districts in Cleveland.[49] All private schools, including private religious schools, were permitted to participate in the program.[50] This meant that an eligible low-income parent could receive a voucher from the state and then use that voucher to pay for their child's tuition at a religious school. The majority reasoned that this did not raise an Establishment Clause concern for two reasons. First, the Court determined that the Ohio program was "neutral in all respects toward religion."[51] It reasoned that all schools, both public and private, could participate, and parents of any religion, or no religion, could also participate.[52] Second, the Court explained that the vouchers were not given directly to the schools, but were instead provided to the parents, who then chose where to send their children.[53] According to the Court, the state was not coercing parents to send their children to religious schools.[54] That "46 of the 56 private schools" participating in the program were religious and that "96% of scholarship recipients . . . enrolled in religious schools" did not diminish the neutrality of the program or the parents' ability to make a genuine choice.[55]

As Justice Stevens explained in dissent, however, religious schools are responsible for indoctrinating young believers, which effectively meant that, through the vouchers, Ohio funded religious indoctrination.[56] Traditionally, this would have categorically raised

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[47] *See* FELDMAN, *supra* note 36, at 208 (arguing that conservative law professor Michael McConnell won the majority in *Rosenberger* and weakened the Establishment Clause by framing the case as an issue of discrimination against religion).

[48] 536 U.S. 639 (2002).

[49] *See id.* at 644–46 (describing the Ohio school voucher program).

[50] *Id.* at 645.

[51] *Id.* at 653.

[52] *Id.*

[53] *Id.* at 652.

[54] *See id.* at 655–56 (arguing that the Ohio program was not "coercing parents into sending their children to religious schools" because the vouchers could be used in all Cleveland schools, including public ones).

[55] *Id.* at 655–56, 658; *see also id.* at 658 ("The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.").

[56] *See id.* at 685 (Stevens, J., dissenting) ("The fact that the vast majority of the voucher recipients who have entirely rejected public education receive religious indoctrination at

Establishment Clause concerns. As Justice Souter wrote in dissent: "[E]very objective underlying the prohibition of religious establishment is betrayed by this scheme."[57] To the dissenters, the Ohio program violated a principal holding in *Everson* that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[58]

Zelman's reading down of the Establishment Clause meant that municipalities could create school voucher programs that gave religious schools access to state funds, regardless of the ultimate use of those funds. A diminished Establishment Clause created space for religious liberty proponents to make powerful, previously foreclosed Free Exercise Clause arguments, which is exactly what happened in *Espinoza*. The next Section discusses three Free Exercise Clause cases that explain how the equality principle filled the gap left by the Establishment Clause and set the stage for the Court's reasoning in *Espinoza*.

B. Free Exercise Clause

Although the Court had weakened the Establishment Clause by the early 2000s, the reach of the Free Exercise Clause was also limited at that time—at least to some degree. This clause prevents, for example, state action that would entangle the state with a church's internal affairs, even if that action was grounded in a principle of neutrality.[59] The principles of "neutrality" and "general applicability" in Free Exercise Clause doctrine theoretically further limit the scope of the equality principle: If a law is neutral and generally applicable, it does not violate the Free Exercise Clause, even if it imposes a burden on an individual's religious practice.[60] The strength of these limitations, given their various exceptions, however, is hotly debated.[61] This

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state expense does, however, support the claim that the law is one 'respecting an establishment of religion.'").

[57] *Id.* at 711 (Souter, J., dissenting).

[58] *Id.* at 687 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947)).

[59] *See* Marshall, *supra* note 32, at 200–02 (describing the ways in which the equality principle in the religion clauses is limited).

[60] *See* Emp. Div. v. Smith, 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

[61] *Compare* Brief of Religious Liberty Scholars as Amici Curiae Supporting Petitioners at 3, Stormans, Inc. v. Wiesman, 579 U.S. 942 (2016) (No. 15-862) ("Laws that burden religion and apply to some but not all analogous secular conduct are not generally applicable. Even a single secular exception that undermines the state's asserted interest

Section focuses on three free exercise cases to explore the equality principle's contours pre-*Espinoza* and underline that case's energizing effect.

Employment Division v. Smith set forth the doctrinal test for determining violations of the Free Exercise Clause. Under *Smith*, even if a law places a burden on religious exercise, it does not violate the Free Exercise Clause if it is a "neutral law of general applicability."[62] In this case, the Court held that Oregon's prohibition of the use of peyote, including for religious reasons, did not violate the Free Exercise Clause.[63] As a result, the state's decision to deny a member of the Native American Church unemployment compensation because he smoked peyote in a religious ceremony did not violate his free exercise rights.[64] Although *Smith* potentially limits individuals' ability to vindicate their religious liberty rights, it comports with equality principles in that it neither privileges religious liberty nor permits religion to be treated with animus.[65]

Strict scrutiny applies, however, to laws that target religious behavior and are not neutral or of general applicability.[66] When a court applies strict scrutiny, the state action under review must further a compelling governmental interest and must be narrowly tailored to achieve that interest. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court struck down municipal ordinances which imposed criminal sanctions against the ritual killing of animals.[67] Hialeah passed these ordinances in response to fears that members of

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shows that a law is not generally applicable."), *and* Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 880 (2001) (arguing that *Smith* and *Lukumi* establish an equality rule "under which religious practice is entitled to a kind of most-favored-nation status"), *with* James M. Oleske, Jr., Lukumi *at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. 295, 331 (2013) ("In short, a broad selective-exemption rule that goes beyond situations suggesting discriminatory intent cannot be reconciled with the Supreme Court's current understanding of the Free Exercise Clause."), *and* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 199 (2002) ("[T]he very foundation for the most favored nation framework is intellectually incoherent.").

62 *Smith*, 494 U.S. at 879 (quoting *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring)).

63 *Id.* at 890.

64 *Id.*

65 *See* Marshall, *supra* note 32, at 198 ("In classic equal protection fashion, *Smith* held that claimants are not entitled to receive exemptions from neutral laws under the Free Exercise Clause. However, religious claimants would be entitled to relief upon a showing that the government singled out religion for adverse treatment.").

66 *See, e.g.*, David L. Hudson Jr., *Strict Scrutiny*, THE FIRST AMEND. ENCYC., MID. TENN. ST. UNIV. (Aug. 16, 2021), https://www.mtsu.edu/first-amendment/article/1966/strict-scrutiny [https://perma.cc/XLB7-295Y] ("If a law is considered neutral and of general applicability, the standard applied is a form of rational basis rather than strict scrutiny.").

67 508 U.S. 520, 524 (1993); *see id.* at 527–28 (describing the ordinances).

the Santeria religion, who conduct ritual animal sacrifices as a form of devotion, were going to form a church in the city.[68] The Court held that the ordinances were not neutral toward religious behavior because they "were enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice."[69] According to the Court, the ordinances were not facially neutral toward religion because they employed words such as "ritual" and "sacrifice," which have a "religious origin."[70] Further, a resolution adopted in conjunction with the ritual animal sacrifice ordinances stated that "residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals"—a statement that the Court reasoned was clearly associated with the Santeria religion.[71] On top of that, the Court pointed to numerous statements in the public record which demonstrated that city council members and other city officials displayed "significant hostility" toward the Santeria religion.[72]

On the issue of general applicability, the Court reasoned that although "[a]ll laws are selective to some extent, . . . categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice."[73] Although the Court declined to define general applicability with precision, it concluded that these regulations fell well below the constitutional standard because the statute was under-inclusive; it did not effectuate the state's alleged interest in the law—to prevent cruelty to animals and protect public health.[74] The Court reasoned that the regulations only burdened the ritual sacrifice of animals; it did not burden all, or any other, slaughter and disposal of animals.[75] Therefore, because the laws were not neutral toward religion and were not generally applicable, the Court determined they had to pass strict scrutiny, meaning they had to be narrowly tailored to advance a compelling government interest.[76] Ulti-

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[68] *See id.* at 525–26 (describing Santeria practices and the community's reaction to the religion).

[69] *Id.* at 540 (quoting Pers. Admin. v. Feeney, 442 U.S. 256, 279 (1979)).

[70] *Id.* at 533–34.

[71] *Id.* at 535.

[72] *Id.* at 541 (recounting the hostile statements that members of the city council made about the Santeria religion).

[73] *Id.* at 542.

[74] *Id.* at 543 ("Respondent claims that [the ordinances] advance two interests: protecting the public health and preventing cruelty to animals. The ordinances are underinclusive for those ends.").

[75] *See id.* at 543–45 (describing in detail why the law was underinclusive).

[76] *See id.* at 533 ("Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their

mately, the Court held that the ordinances did not pass strict scrutiny and consequently violated the Free Exercise Clause.[77]

Although strict scrutiny applies to laws that are not neutral or generally applicable, that does not mean that all laws which mention religion are unconstitutional. In *Locke v. Davey*, the Supreme Court upheld a provision of the Washington Constitution that barred a state scholarship program from funding students who pursued a degree in devotional theology.[78] The Court determined that although the Establishment Clause permitted Washington to allocate these funds to students pursuing devotional theology degrees, the Free Exercise Clause did not require the state to do so.[79] This case fell within the "play in the joints" between the two clauses.[80]

According to the Court, because the individual student, and not the school, received the money, he broke the "link between government funds and religious training," alleviating any constitutional Establishment Clause concerns.[81] The state independently determined, however, that it had antiestablishment interests in not providing the funding to support students seeking religious training.[82] The Court reasoned that this interest was substantial because states have sought to avoid supporting religious leaders through funding since the nation's founding.[83] To further distinguish this case from *Lukumi*, the Court noted that the "[s]tate's disfavor of religion (if it can be called that) is of a far milder kind . . . ."[84] Instead of implementing criminal penalties for not following the law as in *Lukumi*, the "[s]tate [in this case] has merely chosen not to fund a distinct category of instruction."[85] As such, the Court found that the state's decision to deny

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religious motivation, the law is not neutral; and it is invalid unless it [passes strict scrutiny]." (citations omitted)).

77 *See id.* at 547 ("The Free Exercise Clause commits government itself to religious tolerance . . . [and] [t]he laws here in question were enacted contrary to [that] constitutional principle[].").

78 540 U.S. 712, 715 (2004).

79 *See id.* at 719 ("[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.").

80 *Id.* at 719; *see supra* notes 16–18 and accompanying text (explaining the meaning of "play in the joints").

81 *Locke*, 540 U.S. at 719.

82 *See id.* at 722 (describing the state's antiestablishment interest).

83 *See id.* (reasoning that Washington's antiestablishment interest was "scarcely novel" and that "we can think of few areas in which a state's antiestablishment interests come more into play. Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion.").

84 *Id.* at 720.

85 *Id.* at 721.

funding for students seeking devotional theology degrees was not constitutionally suspect.[86]

The Court's reasoning in *Locke* further refined *Lukumi.* According to the Court, even if a state acts specifically to address religion, strict scrutiny will not necessarily apply. Instead, the Court evaluates whether the state's action demonstrates some degree of hostility to religion.[87] From *Locke*, it is clear that a state's historical antiestablishment interests permit it to deny funding to an individual seeking religious training as a minister, even if the Establishment Clause would not require such action. In this way, *Locke* provided a crucial backstop for states to protect the separation of church and state. It also limited the Free Exercise Clause's equality principle by recognizing that a state could act in the play in the joints to further its antiestablishment interests. Despite a weakened Establishment Clause, in certain circumstances states could still deny religious groups funding without violating the Free Exercise Clause. Professor Nelson Tebbe argues that this principle is consistent with other areas of constitutional law, in which "officials are permitted to subsidize the exercise of certain rights without aiding others."[88] Further, Tebbe offers good reasons to decline funding religious activity, including: "promoting equal citizenship for members of minority faiths (or no faith at all), fostering community concord, or respecting taxpayers' freedom of conscience." [89] The degree to which later cases expand or constrict these interests, and the role of energized equality in doing so, is the topic of the next Part.

II
ENERGIZED EQUALITY: *TRINITY LUTHERAN CHURCH*, *ESPINOZA*, AND *CARSON*

Trinity Lutheran Church, *Espinoza*, and *Carson* pull states' ability to exclude religion onto shakier constitutional ground by mini-

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[86] *See id.* at 720, n.3 (distinguishing *Rosenberger* from *Locke* on speech grounds and concluding that the scholarship program in *Locke* "is not a forum for speech" and that "cases dealing with speech forums are simply inapplicable." Because the "purpose of [the scholarship program was] to assist students from low- and middle-income families with the cost of postsecondary education, not to 'encourage a diversity of views from private speakers'" the Court did not apply *Rosenberger*'s rule to this case (quoting U.S. v. Am. Libr. Ass'n, 539 U.S. 194, 206 (2003))).

[87] *See id.* (clarifying that the state dealing "differently with religious education for the ministry than with education for other callings . . . [is] not evidence of hostility toward religion," and that therefore this case is distinct from *Lukumi*).

[88] Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1267 (2008) [hereinafter Tebbe, *Excluding Religion*].

[89] *Id.*

mizing the play in the joints. Both the Establishment Clause and the Free Exercise Clause are phrased in absolute terms.[90] However, as the Court has acknowledged, adhering to the religion clauses in a literal sense would render them inoperable.[91] As such, the Court has granted states leeway to act in the play in the joints between the Establishment Clause and the Free Exercise Clause. The Court put this principle in action in *Locke*.[92] However, starting with *Trinity Lutheran Church*, the Court began to significantly minimize the play in the joints.[93]

By analyzing *Trinity Lutheran Church*, *Espinoza*, and *Carson*, this Part will identify how the Court has energized the Free Exercise Clause equality principle by narrowing one of the clause's key limitations—a state's antiestablishment interests. This narrowing effect is crucial to the Court's move in *Espinoza*—creating a subsidized equality right to free exercise of religion. I will conclude this Part by summarizing the energized equality principle. Part III will then explore the potential implications of this doctrinal shift.

A. Trinity Lutheran Church

The Court in *Trinity Lutheran Church v. Comer*[94] empowered the Free Exercise Clause by narrowing two limitations on the equality principle—a state's anti-establishment interests and the *Smith* purpose analysis. This case involved a Missouri grant program that subsidized institutions to resurface their playgrounds to increase child safety.[95] The state department responsible for awarding the grants concluded that under the Missouri Constitution,[96] religious entities could not compete for the funds.[97] As a result, a child learning center affiliated with Trinity Lutheran Church was precluded from receiving

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[90] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

[91] *See* Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, . . . either of which, if expanded to a logical extreme, would tend to clash with the other. . . . [R]igidity could well defeat the basic purpose of these provisions . . . .").

[92] *See supra* Section I.B (describing the Court's reasoning in *Locke*).

[93] *See* Erin Morrow Hawley, *Symposium: Putting Some Limits on the "Play in the Joints"*, SCOTUSBLOG (June 26, 2017, 5:28 PM), https://www.scotusblog.com/2017/06/symposium-putting-limits-play-joints [https://perma.cc/XX2C-ZCQL] (explaining "where the play in the joints stops").

[94] 137 S. Ct. 2012 (2017).

[95] *See id.* at 2017 (summarizing the facts).

[96] Article I, section 7 of the Missouri Constitution forbids "money . . . taken from the public treasury, directly or indirectly, [to go] in aid of any church, sect or denomination of religion . . . ." *Id.* (quoting MO. CONST. art. I, § 7).

[97] *Trinity Lutheran Church*, 137 S. Ct. at 2018.

the grant, despite the fact that it otherwise qualified.[98] In evaluating whether this prohibition was unconstitutional, the Court applied strict scrutiny because it reasoned that the Department expressly discriminated against the Church "solely because it [was] a church."[99] The Court determined that the state's alleged antiestablishment interest in preventing state aid from flowing directly to religious institutions was not compelling enough to justify excluding the learning center from the competition.[100] It reasoned that because the Establishment Clause did not require religious exclusion, the Free Exercise Clause limited the state's authority to act to further antiestablishment goals.[101] The equality principle in the Free Exercise Clause therefore required the state to open the grant competition to religious institutions.[102] Otherwise, the Court explained, Trinity Lutheran Church would be compelled to decide between receiving a "generally available public benefit" and its "religious character."[103]

Trinity Lutheran Church was a radical departure from the Court's religion clauses doctrine.[104] First, as Justice Sotomayor noted in her dissent, requiring a state to directly fund a religious entity historically violated the Establishment Clause.[105] Second, she explained that even if the Court failed to acknowledge the Establishment Clause conflict, the Court should find the state's prohibition on funding permissible under *Locke*.[106] As in *Locke,* the state had both historical and sub-

98 *See id.* (noting that the child learning center placed fifth in the grant competition).

99 *Id.* at 2022.

100 *See id.* at 2023–24 (distinguishing the antiestablishment interest in this case from the antiestablishment interest in *Locke*).

101 *Id.* at 2024 ("[T]he state interest . . . in achieving greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise Clause.").

102 *See id.* at 2025 ("[T]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand.").

103 *Id.* at 2024.

104 *See* Ira C. Lupu & Robert W. Tuttle, Trinity Lutheran Church v. Comer*: Paradigm Lost?*, 1 AM. CONST. SOC'Y SUP. CT. REV. 131, 133 (2017) ("[T]he Supreme Court's decision in *Trinity Lutheran* . . . represents a stunning and thoroughly unacknowledged move from the religion-distinctive principle of 'no funding' to one of nondiscrimination.").

105 *See Trinity Lutheran Church*, 137 S. Ct. at 2028 (Sotomayor, J., dissenting) (listing a string of precedents which hold that "payments from the government to a house of worship[] would cross the line drawn by the Establishment Clause"). Justice Sotomayor leveraged information from Trinity Lutheran Church's briefing and website to argue that the Child Center, which applied for the funding, was an arm of the Church's ministry. *See id.* at 2027 (pointing out that the "Learning Center serves as 'a ministry of the Church and incorporates daily religion and developmentally appropriate activities into . . . [its] program'" (alterations in original) (quoting Petition for Writ of Certiorari at 101a, *Trinity Lutheran Church*, 137 S. Ct. 2012 (No. 15-577))).

106 *See id.* at 2036–38 (describing the similarities between *Trinity Lutheran Church* and *Locke*).

stantial antiestablishment interests in avoiding supplying direct state aid to religious institutions.[107] Due to the state's significant interest, Justice Sotomayor reasoned that this case should have fallen within the play in the joints between the Establishment Clause and the Free Exercise Clause—the space between the two clauses in which one clause permits state action that the other clause does not prohibit.[108]

The majority, however, sidestepped *Locke* by recasting it into a case about discrimination on the basis of religious status versus religious use.[109] According to the majority, *Locke* denied funding to the student seeking a theology degree because of what he intended to do, not because of who he was.[110] But the majority characterized what happened to Trinity Lutheran Church differently; it was discriminated against on the basis of its status as a religious institution, not on the basis of what it planned to do with the funding.[111] The Court explained that discrimination on the basis of status therefore triggered Free Exercise Clause strict scrutiny.[112] This recharacterization empowered the Court to dodge the *Smith* purpose analysis, which, as it made clear in *Locke*, required "evidence of hostility toward religion."[113] And yet, this status-use analysis was not present in *Locke*.[114]

For these reasons, *Trinity Lutheran Church* marked a departure from previous religion clauses doctrine.[115] Specifically, the majority

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107 *See id.* at 2034–35 (documenting Virginia, Maryland, Vermont, and other states' histories of banning "taxation for religion" and comparing that interest to Washington's antiestablishment interest in *Locke* (quoting LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 50 (2d ed., rev. 1994))).

108 *See id.* at 2036 ("If there is any '"room for play in the joints" between' the Religion Clauses, it is here." (quoting Locke v. Davey, 540 U.S. 712, 718 (2004))).

109 *See id.* at 2038 ("In all cases, the dispositive issue is not whether religious 'status' matters—it does, or the Religion Clauses would not be at issue—but whether the government must, or may, act on that basis.").

110 *See id.* at 2023 (majority opinion) ("Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*.").

111 *See id.* at 2022 ("The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant.").

112 *See id.* at 2019 ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" (alteration in original) (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533, 542 (1993))).

113 Locke v. Davey, 540 U.S. 712, 721 (2004).

114 The *Locke* Court did not analyze whether funding a student's pursuit of a religious degree was religious status or use. Instead, the Court weighed the state's antiestablishment interest against the plaintiff's free exercise rights. *See supra* Section I.B (discussing *Locke*).

115 *See Trinity Lutheran Church*, 137 S. Ct. at 2027 (Sotomayor, J., dissenting) ("The Court today profoundly changes that relationship [between church and state] by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church.").

initiated a shift in Free Exercise Clause doctrine by focusing the constitutional inquiry on the line between status and use, and not hostility or antiestablishment concerns. Now, the Free Exercise Clause analysis articulated in *Locke* is applicable only when religious use is at issue; when religious status is at issue, there is a presumption against constitutionality. This presumption minimizes the play between the joints and mandates that when a state offers a benefit to some, it must also offer it to religious groups to avoid a Free Exercise violation.

B. Espinoza *and* Carson

Espinoza v. Montana Department of Revenue reified the Court's abandonment of antiestablishment concerns as a limiting principle on the free exercise equality principle.[116] This case dealt with a scholarship program that the Montana state legislature established to provide a tuition subsidy to parents to send their children to private schools.[117] Under the program, the state provided a tax credit to any individual who "donate[d] to a participating 'student scholarship organization.'"[118] These donations were then awarded to students in the form of scholarships to pay tuition at private schools.[119] Scholarship recipients could use the scholarship only at schools that met the state's "accreditation, testing, and safety requirements," which included nearly all Montana private schools.[120] Students who wanted to attend private religious schools, however, could not use the scholarship money to pay tuition because Montana's state constitution contained a "no-aid" provision forbidding any government aid to sectarian schools.[121] In response to this ban, parents of scholarship recipients who wanted to send their children to religious schools sued, alleging that the program's administration discriminated against them on the "basis of their religious views."[122] The Montana Supreme Court struck

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116 *See* 140 S. Ct. 2246, 2251 (2020) (framing the case purely in terms of the Free Exercise Clause).

117 *Id.*

118 *Id.* (citation omitted).

119 *See id.* (explaining the scholarship system). Also, "[t]he Montana Legislature allocated $3 million annually to fund the tax credits, beginning in 2016." *Id.*

120 *Id.*

121 *See id.* at 2252 (quoting the Montana "no-aid" provision).

122 *Id.* The Montana Department of Revenue interpreted the no-aid provision in the Montana Constitution to exclude students attending religious schools from this program. *Id.* Due to this interpretation, the Department promulgated Rule 1, which changed the definition of qualifying schools in the program to exclude sectarian schools. *Id.* The parents challenged this administrative rule as contrary to the statute which created the scholarship program. *Id.* The Montana Supreme Court held that changing the definition was beyond the Department's authority. *Id.* at 2253. The Montana Supreme Court reasoned that

down the program for violating the state constitution's "no-aid" provision.[123]

The Supreme Court held that because Montana offered aid to students attending private schools but not religious schools, it discriminated against religious parents who wanted to send their children to religious schools.[124] The Court concluded that this refusal to provide aid infringed on the schools' and the parents' free exercise rights.[125] Due to this perceived free exercise violation, the Court reasoned that the Montana Supreme Court was wrong to decide that the program violated the state's constitution because the state constitutional provision as applied to this scholarship program itself violated the Free Exercise Clause.[126] And, according to the Court, in the absence of a state law violation, the state supreme court had no authority to terminate the program.[127] This line of reasoning led the Court to its final conclusion: The state *had* to offer aid to religious schools if that aid also was offered to private secular schools.[128] This was so despite the fact that Montana asserted that it had an interest in "separating church and State 'more fiercely' than the Federal Constitution,"[129] which the Court determined was a permissible state interest in *Locke*.[130] The Court instead reasoned that "[a] State's interest 'in achieving greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise Clause.'"[131]

The Court relied on its reasoning in *Trinity Lutheran Church* and determined that strict scrutiny applied because the discrimination in

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without the definition change the program violated the no-aid provision, and subsequently struck down the entire program. *Id.*

123 *Id.* at 2251.

124 *See id.* at 2261 ("A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.").

125 *See id.* ("[T]he infringement of religious liberty here . . . burdens not only religious schools but also the families whose children attend or hope to attend them.").

126 *Id.* at 2262.

127 *See id.* ("[I]n the absence of . . . a state law violation, the Court would have had no basis for terminating the program.").

128 *See id.* at 2282 (Breyer, J., dissenting) ("It may be that, under our precedents, the Establishment Clause does not *forbid* Montana to subsidize the education of petitioner's children. But the question here is whether the Free Exercise Clause *requires* it to do so. The majority believes that the answer to that question is 'yes.'").

129 *See id.* at 2260 (majority opinion) (citation omitted).

130 *See supra* Section I.B (discussing *Locke*).

131 *Espinoza*, 140 S. Ct. at 2260 (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017)).

this case was discrimination on the basis of religious status, not use.[132] To several Justices, however, the status-use distinction was not clear. Justice Gorsuch, reiterating his concerns from *Trinity Lutheran Church*, urged that the same standard should apply regardless of whether status or use was at issue.[133] Justice Breyer argued that from the perspective of the parents, this is a "use" case because the parents were looking to use the funds to ensure their children "obtain a religious education."[134] For the religious schools, too, the question "boil[ed] down to what the schools would *do* with the support."[135]

In *Carson v. Makin*, Chief Justice Roberts, too, abandoned the status-use distinction as a means of finding a violation of the Free Exercise Clause.[136] This case involved a Maine school-funding program in which the state provided a tuition voucher to students who lived in rural areas where there were no public schools.[137] For eligibility, Maine required that schools must "meet certain basic requirements under [the state's] compulsory education law" and must be nonsectarian.[138] The First Circuit, in upholding Maine's program, partially distinguished it from the program in *Espinoza* by reasoning that the funding restrictions in that case were purely status-based, whereas Maine's were use-based restrictions.[139] Chief Justice Roberts rejected this distinction, and in doing so, re-wrote his reasoning in *Espinoza*: "In *Trinity Lutheran Church* and *Espinoza*, we held that the Free Exercise Clause forbids discrimination on the basis of religious status. But those decisions never suggested that use-based discrimination is any less offensive . . . ."[140] The Court thus overturned Maine's funding program and required Maine not only to fund a religious school, but also to fund religious instruction when it provided funding to private secular education. This decision elevates the equality principle to an imperial status within the religion clauses, calling into question any

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[132] *See id.* at 2256 ("This case also turns expressly on religious status and not religious use. The Montana Supreme Court applied the no-aid provision solely by reference to religious status.").

[133] *See id.* at 2275 (Gorsuch, J., concurring) ("Not only is the record replete with discussion of activities, uses, and conduct, any jurisprudence grounded on a status-use distinction seems destined to yield more questions than answers.").

[134] *Id.* at 2285 (Breyer, J., dissenting).

[135] *Id.*

[136] No. 20-1088, slip op. at 16–18 (U.S. June 21, 2022).

[137] *See id.* at 2 (summarizing the facts).

[138] *Id.* at 2–4.

[139] *Id*. at 6 (summarizing the First Circuit's decision).

[140] *Id.* at 16.

role the Establishment Clause or other limiting principles may play.[141] This energized equality principle has transformative power.

C. *Summary of the Energized Equality Principle*

In *Trinity Lutheran Church*, *Espinoza*, and *Carson*, the Court energized the free exercise equality principle to overcome its prior limitation—a state's antiestablishment interest. In *Locke*, although the Court acknowledged that the Washington Constitution drew "a more stringent line than that drawn by the U.S.," it considered Washington's antiestablishment interest in not "procuring taxpayer funds to support church leaders" to be significant and historical enough to justify the state's refusal to fund ministerial education.[142] In *Espinoza*, on the other hand, the Court dismissed the state's antiestablishment interest and instead concluded that "it need not consider how Montana's funds would be used because, in its view, all distinctions on the basis of religion . . . are similarly and presumptively unconstitutional."[143] The energized equality principle thus formally narrowed what a state could consider as a valid antiestablishment interest by classifying Montana's antiestablishment interest as discrimination on the basis of religious status and employing a presumption against constitutionality.[144] This significantly narrowed the play in the joints between the Establishment Clause and the Free Exercise Clause and required the state to act to avoid free exercise rights violations.[145] By requiring affirmative state funding action to avoid religious discrimination, the Supreme Court essentially created a subsidized equality right to free exercise of religion.

Cases in the law of religious exemptions also have had a significant energizing effect on the Free Exercise Clause equality principle. Instead of relying on the *Smith* principle of neutrality and general applicability when determining whether a law that burdens religion qualifies as a free exercise violation, the Court, in its recent religious

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141 *See* Tebbe, *Five Thoughts*, *supra* note 25 ("Not only has the Court narrowed the 'play in the joints' between the religious clauses, in other words, but it has created tensions between the principles driving the clauses themselves.").

142 Locke v. Davey, 540 U.S. 712, 722–24 (2004) (describing how state constitutions throughout history enacted "formal prohibitions against using tax funds to support the ministry").

143 Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2288 (2020) (Sotomayor, J., dissenting).

144 *Id.* at 2256 (majority opinion).

145 *See supra* Section II.B (explaining that the Court in *Espinoza* determined that the state could not offer public funds to children attending private secular schools and deny that funding to students attending private religious schools without violating the latter students' free exercise rights).

exemption cases, presumptively has concluded that any law that touches religion and fails to treat it identically with nearly all secular activity violates the Free Exercise Clause. *Tandon v. Newsom* is one recent example.[146]

In *Tandon*, the Court determined that California's COVID-19 policy limiting gatherings in homes, including religious gatherings, to three households should be enjoined pending appeal.[147] Instead of inquiring into whether the law was neutral or expressed animus toward religion, as the Court did in *Lukumi*,[148] it summarily concluded that the policy likely violated the Free Exercise Clause because it "treat[ed] some comparable secular activities more favorably than at-home religious exercise . . . ."[149] This was despite the fact that, as Justice Kagan explained in dissent, the secular institutions treated differently—hair salons and hardware stores, for example—were not comparable: "[T]he law does not require that the State equally treat apples and watermelons."[150] The most relevant comparable activity, at-home secular gatherings, was treated identically to religious at-home gatherings.[151]

The Court also gave religion a "most favored nation"[152] status in *Fulton v. City of Philadelphia*, when it determined that a non-discrimination provision in Philadelphia's standard foster care contract failed to satisfy the requirements of *Smith*.[153] The Court determined that the city's non-discrimination provision was not generally applicable because a Philadelphia city official had discretion—which they never used—to grant exemptions to that same provision, and the city did not provide religious exemptions to it.[154] In other words, according to the Court, the potential for secular exemptions, granted at the official's discretion, meant that religious exemptions could not be simultaneously denied.[155] Compare this to *Smith*, where the Court held that Oregon did not violate the Free Exercise Clause when it failed to grant a religious exemption to its law criminalizing peyote possession, even though it did provide for a medical exemption to the

146 141 S. Ct. 1294 (2021) (per curiam).

147 *Id.* at 1296.

148 *See supra* Section I.B.

149 *Tandon*, 141 S. Ct. at 1297.

150 *Id.* at 1298 (Kagan, J., dissenting).

151 *Id.*

152 PLATT ET AL., *supra* note 6, at 11 n.15; *see also* Oleske, *supra* note 12 (reporting that "the most-favored-nation approach [to the Free Exercise Clause is] now the law of the land as a result of *Tandon*").

153 141 S. Ct. 1868, 1877–78 (2021).

154 *See id.* at 1878; *see also supra* note 2.

155 *Id.*

law.[156] In both cases, it was the Court's energized conception of equality that empowered it to draw broad comparisons and forsake an inquiry into the laws' intent.[157]

In all, through its recent funding and religious exemptions cases, the Court has unleashed the Free Exercise Clause. Two of the prior limitations on the Free Exercise Clause equality principle—a state's antiestablishment interests and the *Smith* hostility inquiry—are close to being relics of constitutional law.

III
The Implications of *Espinoza*'s Energized Equality Principle

Trinity Lutheran, *Espinoza*, and *Carson* have far-reaching implications for religion clauses jurisprudence and other areas of constitutional law. In this Part, by comparing how the Court articulated an infringement of liberty in *Espinoza* to how it defined liberty infringement in pre-*Dobbs* abortion cases, I first will identify the exceptional nature of the subsidized equality right expressed in *Espinoza* and *Carson.* I will then compare the pre-*Dobbs* abortion right to the free exercise right in order to highlight the Court's logical inconsistency in applying principles of equality, laying bare its political prioritization of religious liberty rights. Although there is no longer a fundamental right to an abortion,[158] making this comparison is still useful because it helps to demonstrate that the conservative majority on the Court applies an energized equality principle to its favored rights while failing to do so for the rights it disfavors.

A. Subsidized Equality Rights: Defining an Infringement of Liberty

In *Espinoza*, the Court characterized Montana's refusal to grant scholarship aid to parents sending their children to religious schools as an infringement of the parents' and the schools' free exercise rights.[159]

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156 *See* Emp. Div. v. Smith, 494 U.S. 872, 874 (1990) ("Oregon law prohibits the knowing or intentional possession of a 'controlled substance' unless the substance has been prescribed by a medical practitioner.").

157 *See* Burt Neuborne, *When Religious Liberty Collides with Public Health*, N.Y. Rev. Books (Dec. 8, 2020), https://www.nybooks.com/daily/2020/12/08/when-religious-liberty-collides-with-public-health [https://perma.cc/27KF-RRBT] (analyzing the Court's recent COVID-19 cases to explain that the new "iron law of secular-religious equality" is replacing the *Smith* doctrine which "confin[ed] judicial enforcement of the free exercise clause to purposeful efforts to harm religion").

158 Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 5 (U.S. June 24, 2022) ("*Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . .").

159 *See supra* Section II.B (describing the Court's reasoning in *Espinoza*).

This characterization is at odds with how the Court has described funding-related infringements of fundamental liberties in other areas of constitutional law.[160] For example, in *Harris v. McRae*, the Court upheld the Hyde Amendment against a constitutional Fifth Amendment Due Process Clause challenge, failing to connect the lack of funding to infringement of the then-existing abortion right.[161] The Hyde Amendment is a rider attached to a funding bill which bars using federal funds to pay for abortion.[162] The Court reasoned that while abortion is a fundamental liberty, the Due Process Clause only protects against "unwarranted government interference"[163] and does not "confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom."[164] In fact, the Court acknowledged that "[t]o hold otherwise would mark a drastic change in our understanding of the Constitution."[165] This meant that Congress could constitutionally withdraw funding for abortion that it had previously guaranteed to poor people through Medicaid. The Court did not conceive of withholding funding as an infringement of abortion rights because it deemed that poor people still had "the same range of choice in deciding whether to obtain a medically necessary abortion as [they] would have had if Congress had chosen to subsidize no health care costs at all."[166] Their lack of choice, the Court reasoned, resulted from poverty, not government action.[167] As such, the Court reasoned there was no constitutional obligation to ensure that low-income pregnant people had access to abortion.[168]

The contrast between the *Harris* and *Espinoza* Courts' respective conceptions of a funding-related fundamental liberty infringement is significant. A subsidy was also at issue in *Espinoza*, but the Court concluded that it infringed free exercise rights to refuse to fund education for those attending private religious schools when funding was

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160 *See* Tebbe, *Five Thoughts*, *supra* note 25 ("For some time, it's been the rule that while government may not unduly burden the exercise of fundamental liberties, it need not support or subsidize them.").

161 *See* 448 U.S. 297, 318 (1980) ("[W]e conclude that the Hyde Amendment does not impinge on the due process liberty recognized in *Wade*.").

162 *See id.* at 301.

163 *Id.* at 317–18.

164 *Id.*

165 *Id.* at 318.

166 *Id.* at 317.

167 *See id.* at 316 ("The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.").

168 *See id.* at 317 (holding that "[n]othing in the Due Process Clause supports" the idea that Congress has an affirmative obligation to fund abortion).

provided for students attending private secular schools.[169] The Court conceptualized the constitutional deprivation as coercion: Religious adherents had to choose between getting a subsidy or choosing a religious school.[170] But a poor pregnant person seeking an abortion faces a similar scenario: Exercise their fundamental liberty to get an abortion without a subsidy from the state—which for many people is simply not an option[171]—or decide not to get an abortion and receive state subsidies to remain pregnant, including, for example, funding for prenatal screenings.[172] However, the Court did not conceive of the state's refusal to fund abortion as infringing on a fundamental liberty.[173] Unlike in *Espinoza*, where a student's lack of choice was attributed to state action, indigency was deemed the cause of lack of choice in *Harris*.[174]

To remedy Montana's infringement of the plaintiff's free exercise rights, the Court ordered the state to make funds available to children attending religious schools.[175] Essentially, the Court in *Espinoza* did what it reasoned it could not do in *Harris*—order "an entitlement to such funds as may be necessary to realize all the advantages of that freedom."[176] This entitlement is a subsidy for free exercise of religion, and it is radically different from the Court's treatment of entitlements to subsidies in the abortion context.

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169 *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020) ("The Department's argument is especially unconvincing because the *infringement of religious liberty* here broadly affects both religious schools and adherents." (emphasis added)).

170 *See id.* at 2257 ("[T]he provision puts families to a choice between sending their children to a religious school or receiving such benefits."). That parents sending their children to secular private schools had access to the state funds and parents sending their children to religious schools did not was key to the Court's ruling in *Espinoza*. *See supra* Section II.B. The next Section of this Part explores the degree to which this equality interest is also present in the Due Process Clause.

171 *See* Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, 19 GUTTMACHER POL'Y REV. 46 (2016), https://www.guttmacher.org/gpr/2016/07/abortion-lives-women-struggling-financially-why-insurance-coverage-matters [https://perma.cc/S2GV-JRCG].

172 *See* Ivette Gomez, Usha Ranji, Alina Salganicoff & Brittni Frederiksen, *Medicaid Coverage for Women*, KFF (Feb. 17, 2022), https://www.kff.org/womens-health-policy/issue-brief/medicaid-coverage-for-women [https://perma.cc/59V2-FA8S].

173 *See Harris*, 448 U.S. at 317–18.

174 *See id.* at 316 ("The financial restraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather her indigency.").

175 *See supra* Section II.B.

176 *Harris*, 448 U.S. at 317–18.

B. The Logical Inconsistency Between Equality in the Free Exercise Clause and Substantive Due Process Rights

The difference in treatment of subsidies in the free exercise and abortion contexts was not logically sound. Petitioners in *Espinoza* and *Harris* challenged the state for deciding to fund one activity while concurrently refusing to fund another similar activity. In *Espinoza*, Montana funded tuition for some students attending private secular schools but not for students attending private religious schools.[177] In *Harris*, the state provided funding for childbirth but not abortion.[178] In *Espinoza*, but not in *Harris*, the Court concluded that the refusal to fund infringed upon a fundamental liberty.[179] As legal scholar Michael McConnell recognizes, both cases raise similar constitutional questions, and it is logically inconsistent to argue that, as a constitutional matter, religion and abortion should be analyzed differently when the question is about state funding.[180]

In fact, *Locke* drew implicitly on the Court's logic in *Harris*, strengthening the analogy between abortion rights and free exercise rights. In describing Washington's decision not to fund Locke's religious education, Chief Justice Rehnquist minimized the impact on the student by reasoning that "[t]he State has merely chosen not to fund a distinct category of instruction."[181] The Court in *Harris* similarly minimized the state's decision not to fund abortion: "The Hyde Amendment . . . places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy."[182] *Locke* never cited to *Harris*, but legal scholars on both sides of the ideological spectrum agree that Chief Justice Rehnquist evoked reasoning from the abortion funding cases in *Locke*.[183]

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177 *See supra* Section II.B (summarizing the facts in *Espinoza*).

178 *See Harris*, 448 U.S. at 325 ("Congress has established incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid.").

179 *See supra* Section III.A (comparing *Harris* and *Espinoza*).

180 *See* Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 989–91 (1991) (explaining that supporters of abortion funding, who often also argue that religious schools should not be funded, and proponents of funding religious schools, who often also argue that abortion should not be funded, hold inconsistent views).

181 Locke v. Davey, 540 U.S. 712, 721 (2004).

182 *Harris*, 448 U.S. at 315.

183 *See* Tebbe, *Excluding Religion*, *supra* note 88, at 1283 ("Chief Justice Rehnquist in *Davey* apparently saw an analogy even to the abortion funding cases. . . . [H]is implicit references to them were difficult to miss."); Douglas Laycock, Comment, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 175–76 (2004) ("Invoking this body of law [abortion funding] without citation or elaboration, the Court [in *Locke*] denied that Washington had pressured Davey to abandon his theology major.").

Some may argue that in *Trinity Lutheran Church* and *Espinoza*, however, the Court has recognized a powerful equality principle embedded within the Free Exercise Clause that requires selective funding of religious education and that this principle is not present in the abortion right.[184] According to Professor Douglas Laycock, any analogy between abortion funding cases and religious funding cases is unsound because it disregards that the "right to religious liberty is a right to government neutrality."[185] He notes that the right to abortion, on the other hand, was a right to be free of undue burdens.[186] Equality also was at play in the abortion rights context, however. Reproductive freedom discourse and jurisprudence makes clear that access to abortion is inextricably linked to the equality of women and of persons capable of becoming pregnant.[187] In 1994, Black feminists coined the term "reproductive justice" as part of a movement to clarify that reproductive freedom is a human rights issue implicating the dignity and equality of all humans capable of reproduction.[188]

Although the Court originally based the abortion right in the right to privacy in the Due Process Clause,[189] equality arguments also appeared in the Court's abortion rights jurisprudence.[190] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court reaf-

184 *See supra* Sections II.A & B (summarizing *Trinity Lutheran Church* and *Espinoza*).

185 *See* Laycock, *supra* note 183, at 177.

186 *See id.* ("[W]hat [the state] cannot do is impose undue burdens on the right to choose abortion.").

187 *See, e.g.*, Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 263 (1992) ("Restricting women's access to abortion implicates constitutional values of equality as well as privacy . . . ."); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1300 (1991) (implicating the law in perpetuating sex inequality and arguing that "[i]n the area[] of . . . reproductive control specifically, these legal concepts have been designed and applied from the point of view of the . . . outsider/impregnator . . . in the absence of the point of view of the . . . pregnant woman"); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 383 (1985) ("The conflict [in abortion jurisprudence] . . . is not simply one between a fetus' interests and a woman's interest, narrowly conceived . . . . Also in the balance is a woman's autonomous charge of her full life's course . . . her . . . [status as an] equal citizen.").

188 *See Reproductive Justice*, SISTERSONG, https://www.sistersong.net/reproductive-justice [https://perma.cc/3MMS-MRH6] (describing the history of reproductive justice). For a comprehensive description of the field of reproductive justice, see LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION (2017).

189 *See* Roe v. Wade, 410 U.S. 113, 153–54 (1973) (explaining that "the right of personal privacy," which is "founded in the Fourteenth Amendment's concept of personal liberty" includes the right to have an abortion).

190 Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISCOURSE 160, 164 (2013) (explaining that the "modern Court, in unpacking the meaning of the Due Process Clauses in the area[] of . . . abortion rights, has continuously appealed to equality values").

firmed the right to abortion and reasoned that a woman's "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."[191] The Court recognized that "[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society."[192] The Court further argued that it could not overrule *Roe* because "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[193] This language on equality was not dicta. The equality reasoning in *Casey* was central to the Court's decision to strike down the Pennsylvania law that required spousal notification before abortion.[194] In striking down this law, the Court reasoned: "A State may not give to a man the kind of dominion over his wife that parents exercise over their children."[195] *Casey* thus made the Due Process Clause equality imperative clear in abortion rights jurisprudence.

Even though the Court eradicated the right to an abortion in *Dobbs*,[196] this logical inconsistency in the Court's conception of equality persists. The Court's use of equality values to interpret substantive Due Process Clause rights is not limited to the abortion context. This reasoning is present in LGBTQ rights cases, too. In *Lawrence v. Texas*, the Court struck down a Texas law which criminalized sodomy between two people of the same gender as a violation of the Fourteenth Amendment Due Process Clause.[197] It recognized that this law was designed to criminalize sexual practices common to queer relationships and reasoned that "[t]he State cannot demean [these individuals'] existence or control their destiny by making their private sexual conduct a crime."[198] *Lawrence* then made the connection between equality and due process rights explicit: "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important

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191 505 U.S. 833, 852 (1992).

192 *Id.*

193 *Id.* at 856.

194 *See* Siegel & Siegel, *supra* note 190, at 165 ("The equality reasoning . . . is not mere surplusage. Equality values help to identify the kinds of restrictions on abortion that are unconstitutional under *Casey*[] . . . .").

195 *Casey*, 505 U.S. at 898.

196 Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 5 (U.S. June 24, 2022) ("*Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . .").

197 539 U.S. 558, 578–79 (2003) (reversing the lower court decision which upheld the Texas law).

198 *Id.* at 578.

respects, and a decision on the latter point advances both interests."[199] The Court expounded on this connection between the Due Process Clause and equality in *Obergefell v. Hodges*, holding that same-sex couples are guaranteed the right to marry.[200] Although *Obergefell* involved both an Equal Protection Clause and Due Process Clause claim,[201] the Court reasoned that "in some instances each [right] may be instructive as to the meaning and reach of the other."[202]

As *Lawrence* and *Obergefell* demonstrate, an equality principle animates Due Process Clause jurisprudence even outside of the abortion context. A number of constitutional law scholars have acknowledged the interplay between liberty and equality claims.[203] Indeed, Professor Kenji Yoshino argues that the connection between equality and liberty is so strong that advocates and courts should recognize something called a "dignity" claim in order to capture the full scope of equality-based liberty rights.[204] The clear and enduring connection between equality and liberty in Due Process Clause decisions lays bare that the Court's conception of subsidized equality rights in *Espinoza* is unique to the religion clauses context. But the Court has failed to explain why this is the case as a matter of constitutional law.

Some may also argue that the Court in *Harris v. McRae* declined to find an infringement on the right to an abortion because it would entail acknowledgement of a positive right, which is counter to the U.S. constitutional system.[205] The Court's decision in *DeShaney v.*

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199 *Id.* at 575.

200 576 U.S. 644 (2015).

201 *See id.* at 672 ("The Due Process Clause and the Equal Protection Clause . . . set forth independent principles.").

202 *Id.*

203 *See e.g.*, Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1312 (2017) ("In *Obergefell*, the Court has more definitively made the link between equal protection and due process that commentators have observed for decades."); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748–50 (2011) (noting that a weak Equal Protection Clause doctrine has resulted in litigants and courts using the "Due Process Clauses to further equality concerns"); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 99 (2007) (writing that the promise of equal citizenship has "found notable expression in substantive liberties protected by the Due Process Clause"); Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) ("[D]ue process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix. It is a single, unfolding tale of equal liberty and increasingly universal dignity."); Rebecca L. Brown, *Liberty, The New Equality*, 77 N.Y.U. L. REV. 1491, 1541 (2002) ("Equality and liberty are not as different as their histories in the case law have made them out to appear.").

204 *See* Yoshino, *supra* note 203, at 749.

205 *See* Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 331 (1985)

Winnebago County contains one of the Supreme Court's strongest statements against positive rights.[206] In this case, the plaintiff alleged that Winnebago County deprived the plaintiff's young child of his Fourteenth Amendment due process liberty rights when it failed to intervene to protect the child from his severely abusive father.[207] In rejecting the plaintiff's claim, the Court turned to the Constitution's text to rebuke the theory that the Constitution imposed affirmative obligations on the State. Chief Justice Rehnquist, writing for the majority, reasoned that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. . . . [I]ts language cannot fairly be extended to impose an affirmative obligation on the State . . . ."[208] In support, the Chief Justice cited a number of Supreme Court cases, all of which failed to impose an affirmative obligation on the government to provide a benefit, including *Harris v. McRae*.[209]

In addition to referencing case law, arguments that the U.S. Constitution guarantees only negative liberties often point to the Nation's founding era.[210] There is evidence that the framers intended the Bill of Rights to be a "charter of negative rather than positive liberties."[211] Further, the Bill of Rights is phrased in negative terms: "Congress shall make no law respecting an establishment of religion";[212] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

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([D]espite [the] blurry edges [between affirmative and negative rights], the lines marked by . . . negativity have continuing intuitive content and indisputable constitutional significance.").

206 DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

207 *See id.* at 192–93 (describing the claims).

208 *Id.* at 195.

209 *See id.* at 196.

210 *See id.* ("[The Due Process Clause's] purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes."); Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) ("The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much . . . . The Fourteenth Amendment . . . sought to protect Americans from oppression by state government, not to secure them . . . services."), *cert. denied*, 465 U.S. 1049 (1984).

211 *See Jackson*, 715 F.2d at 1203; *see also* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 865 (1986) ("The ratification debates and the preamble to the resolution proposing the Bill of Rights contain repeated references confirming Madison's explanation that the Bill of Rights was designed to protect against 'abuse of the powers of the General Government,' and in particular to limit the powers of Congress." (quoting 1 ANNALS OF CONG. 432 (1789) (Joseph Gales ed., 1834) (remarks of James Madison))).

212 U.S. CONST. amend. I.

seizures, shall not be violated";[213] and "Excessive bail shall not be required . . . ."[214] All of these elements are used to support the theory that the U.S. Constitution guarantees only negative liberties.

However, none of this explains why the Court would recognize a positive right in the context of religious liberty, but not in the Fourteenth Amendment context. Nothing in the text of the Constitution indicates that the Free Exercise Clause has the potential to produce a positive right, but that substantive due process rights do not. Both the First Amendment and the Fourteenth Amendment—the provision in which the right to an abortion was based—are negatively phrased.[215] In fact, as Justice Sotomayor explained in her *Espinoza* dissent: "'[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.' Put another way, the Constitution does not compel Montana to create or maintain a tax subsidy."[216] Further, the fact that free exercise rights are enumerated did not factor into the Court's rationale in *Espinoza*. Instead, the Court's analysis relied on the status-use distinction,[217] which has no basis in the text of the Constitution.[218]

Given the similarities between *Harris* and *Espinoza*, it is difficult, if not impossible, to argue with logical consistency that the decision in *Espinoza* does not also smack of positive rights.[219] Further, despite the fact that the positive and negative rights distinction has "indisputable constitutional significance,"[220] the Constitution is not purely a document of negative rights. A number of constitutional law scholars have argued that the Constitution contains language which imposes affirmative obligations on the state.[221] Some examples include the

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213 U.S. CONST. amend. IV.

214 U.S. CONST. amend. VIII.

215 *Compare* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."), *with* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

216 Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2293 (2020) (Sotomayor, J., dissenting) (citations omitted).

217 *See id.* at 2256 (majority opinion) ("This case . . . turns expressly on religious status and not religious use.").

218 *See* Brief for Petitioner at 1, No. 20-1088 (U.S. June 21, 2022) (arguing that "there is no basis for" the status-use distinction).

219 *See infra* Section III.A (arguing that the Court created an entitlement in *Espinoza* very similar to the one it disavowed in *Harris*).

220 Tribe, *supra* note 205, at 331.

221 *See, e.g.*, Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimum Entitlements*, 44 MERCER L. REV. 525, 534 (1993) ("First, it is important to emphasize that it is inaccurate to depict the Constitution as solely a charter of negative liberties. Many parts of the Constitution create affirmative duties."); Susan Bandes, *The*

rights enumerated by the Sixth Amendment, which guarantees that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defense."[222] Another example includes the text of Article IV, Section 4, which requires the United States to "guarantee to every State in this Union a Republican Form of Government, and . . . protect each of them against Invasion . . . ."[223]

In addition to the positive language in some of the constitutional text, the Supreme Court also has recognized the positive nature of some rights. In *Gideon v. Wainwright*, the Court construed the assistance of counsel provision in the Sixth Amendment to require the state to provide counsel to indigent defendants in federal cases.[224] This is plainly an affirmative obligation on the state.[225] Voting rights have also been described as a positive right, both in the sense that the Supreme Court has affirmatively recognized that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens"[226] and because "[w]ithout positive state action, there is no *voting*."[227] Finally, a number of scholars have argued that the Supreme Court has recognized a positive right to marry, in that the right "imposes positive obligations on the state to act" to recognize marriage[228] and that it includes "a claim to the legal power to create obligations for our relationships."[229]

Negative Constitution: A Critique, 88 MICH. L. REV. 2271, 2282 (1990) ("Even those constitutional duties which are most clearly phrased in the negative may be enforceable only through affirmative governmental exertions."); Currie, *supra* note 211, at 873–74 ("[T]he 'right' to assistance of counsel is not so negatively phrased."); Tribe, *supra* note 205, at 331–32 ("Even within our largely . . . negative constitutional scheme, however, there are exceptional rights that the constitutional text itself expresses in affirmative form.").

222 U.S. CONST. amend. VI.

223 U.S. CONST. art. IV, § 4.

224 372 U.S. 335, 339–40 (1963) ("We have construed [the assistance of counsel provision] to mean that in federal courts counsel must be provided for defendants unable to employ counsel . . . .").

225 *See* CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 156 (2004) (describing *Gideon* as "a small but unmistakable step toward recognizing social and economic rights").

226 Dunn v. Blumstein, 405 U.S. 330, 336 (1972).

227 Joseph Fishkin, *Voting as a Positive Right: A Reply to Flanders*, 28 ALASKA L. REV. 29, 34 (2011) (emphasis added). Fishkin also argues that "because the right to vote is linked with other rights in ways that courts cannot help but recognize, the positive character of the right to vote puts pressure on the Court's unwillingness to read the federal Constitution as a charter of *positive rights* in other spheres." *Id.* at 35 (emphasis added).

228 Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of* Lawrence v. Texas, 88 MINN. L. REV. 1184, 1205 (2004) (discussing *Loving v. Virginia* and other cases).

229 Gregg Strauss, *The Positive Right to Marry*, 102 VA. L. REV. 1691, 1765 (2016). Strauss cites *Obergefell* to conclude that the positive right to marry does not include a

Efforts to expand the theory that the U.S. Constitution guarantees positive rights have mostly failed.[230] At the state level, however, efforts to create positive rights under state constitutions have fared much better. Professor Emily Zackin details how three political movements—the "campaign for education rights, . . . the movement for positive labor rights . . . and the push to add environmental bills of rights to state constitutions"—helped yield state constitutions that guarantee positive rights.[231] Examples of positive rights in state constitutions include: the state's duty to "establish and support institutions . . . as the public good may require" in Idaho;[232] the state's duty to "pass suitable laws for the protection and promotion of the public health" in Michigan;[233] and the state's promise to provide a pension to resident citizens "who [have] attained the age of sixty years or more" in Colorado.[234] As Zackin argues, provisions such as these create a rich tradition of positive constitutional rights in the United States.[235]

The existence of some affirmative rights language in the U.S. Constitution, the Supreme Court's acknowledgment of a limited number of positive rights, and the rich tradition of positive constitutional rights at the state level support a plausible rebuttal to the argument that the U.S. constitutional system is one of negative rights only. Indeed, despite the Court's refusal to establish positive constitutional rights in cases such as *Harris v. McRae* and *San Antonio Independent School District v. Rodriguez*,[236] those cases were hotly contested and narrowly decided.[237] That the Court recognized an equality-based pos-

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"claim to public benefits to support our relationships," but that instead the right to marry is positive in that it "requires legal regulation" which must be "capable of rendering intimate authority consistent with equal liberty." *Id.*

230 *See* Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 886–93 (1989) (describing failed attempts to create constitutional positive rights using the Equal Protection and Due Process Clauses).

231 *See* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 3 (2013).

232 IDAHO CONST. art. X, § 1.

233 MICH. CONST. art. IV, § 51.

234 COLO. CONST. art. XXIV, § 3.

235 *See* ZACKIN, *supra* note 231, at 1–3 (noting that scholars who focus exclusively on the federal Constitution overstate the tradition of negative constitutional rights in the United States).

236 411 U.S. 1, 24 (1973) (concluding that a Texas education finance program, which funded school districts based on the property tax base, was constitutional because, "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages").

237 *See* Neuborne, *supra* note 230, at 896 n.91 (noting that despite the difficulty of making positive rights arguments, the Court only decided not to recognize them in *Harris* and *Rodriguez* by 5–4 votes).

itive right to religious liberty in *Espinoza* should re-ignite efforts to expand this theory to other constitutional rights.

The similarities between abortion and other substantive due process cases and the free exercise right are striking. By recognizing a refusal to subsidize free exercise rights when the government funds similar secular activity as a violation of the Free Exercise Clause, the Court in *Espinoza* acknowledged that, in certain circumstances, free exercise equality is a subsidized right requiring the Court to "level up" and demand that States affirmatively provide to religious individuals benefits provided to non-religious individuals. Given the Court's current prioritization of religious rights,[238] it is not realistic to expect the Court to adjust its free exercise jurisprudence to match its abortion case law—in other words, the Court is unlikely to "level down" when adjudicating free exercise equality claims. In the face of this political reality, this Note argues that the Court, in adjudicating substantive due process rights, should—similar to free exercise law—recognize an energized equality principle when dealing with equality-tinged claims.[239] Due to the similarities between the free exercise rights and other equality rights, this theory of subsidized equality rights should be applied outside the free exercise context. To the extent that the Court cabins its theory of positive rights to the Free Exercise Clause, however, it privileges religious liberty above other constitutional rights. This is a political choice.[240]

CONCLUSION

Since the 1990s, the Court's decisions have diminished the Establishment Clause and energized the Free Exercise Clause equality principle. The case law highlighted in Part I made the Court's reasoning in *Trinity Lutheran*, *Espinoza*, and *Carson* possible. These cases established firsts for the Court in that all three *required* the government to make funds available to religious institutions. This requirement created a theory of subsidized equality rights, embedded in the

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238 *See* PLATT ET AL., *supra* note 6, at 4 ("The Supreme Court's new approach provides religious activity with a level of constitutional protection greater than nearly any other fundamental right . . . .").

239 For an argument that this approach may be normatively preferred, see Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2438–51 (2021).

240 *See* Nelson Tebbe & Micah Schwartzman, Opinion, *Barrett Favors Religious Expression over Other Speech. The Constitution Doesn't*, WASH. POST (Oct. 13, 2020, 12:43 PM), https://www.washingtonpost.com/outlook/2020/10/13/barrett-first-amendment-religion-expression [https://perma.cc/Z96J-X83T] (arguing that Justice Barrett could be the deciding vote on a number of cases that elevate religious liberty above other rights as, "[t]he four most conservative Justices have already signaled that they would replace the existing rule with one that strongly favors religious exemptions").

Free Exercise Clause energized equality principle. Although at odds with how the Court has characterized what the government must provide to secure other fundamental liberties, this new right should not be cabined within the religion clauses. To the extent that other rights are similar to free exercise rights, this positive rights principle should be applied outside the free exercise context.