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Inactive Exercise & Unequal Protection: Espinoza & Carson Under the Equal Protection Clause

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INACTIVE EXERCISE & UNEQUAL PROTECTION: *ESPINOZA* & *CARSON* UNDER THE EQUAL PROTECTION CLAUSE

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I. INTRODUCTION

A pop quiz: when a state law treats similarly situated persons differently based only on who they are, which provision of the United States Constitution will subject that law to judicial scrutiny? Prior to 2017, the answer to this question was easy: the Fourteenth Amendment's Equal Protection Clause.[1] However, in a trilogy of Free Exercise decisions handed down between 2017 and 2022—*Trinity Lutheran Church of Columbia, Inc. v. Comer*,[2] *Espinoza v. Montana Department of Revenue*,[3] and *Carson v. Makin*[4]—the Supreme Court offered a different answer to this once simple question: a resounding, lawyerly, "It depends."

Long before *Trinity Lutheran*, the Court had begun to incorporate Equal Protection principles into its Free Exercise jurisprudence.[5] But Chief Justice Roberts's majority opinion in *Trinity Lutheran* marked the first time that the Court had struck down a policy purely because it "impose[d] a penalty on the free exercise of religion" by "discriminat[ing] against otherwise eligible recipients . . . solely because of their religious *character*," as opposed to their religious *conduct*.[6] This laid the groundwork for the Court's subsequent opinions in *Espinoza* and *Carson*, which held that when a state offers tuition assistance payments for use in private schools, the Free Exercise Clause forbids it from excluding religious schools from eligibility.[7] These three decisions, though purportedly "unremarkable,"[8] in fact marked a major break with the

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1. *See* Plyler v. Doe, 457 U.S. 202, 216 (1982) ("The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'" (quoting F.S. Royster Guano v. Virginia, 253 U.S. 412, 415 (1920))); Yick Wo v. Hopkins, 118 U.S. 356, 386 (1886) ("Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."); *see also* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.2(a) (5th ed. 2012), WestLaw CONLAW (database updated May 2022).

2. 582 U.S. 449 (2017).

3. 140 S. Ct. 2246 (2020).

4. 142 S. Ct. 1987 (2022).

5. *See generally* Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. REV. 275 (2006) (examining the interrelated evolution of the Free Exercise and Equal Protection Clauses).

6. *Trinity Lutheran*, 582 U.S. at 462 (emphasis added).

7. *See Espinoza*, 140 S. Ct. at 2256 ("The Montana Constitution discriminates based on religious status just like the Missouri policy in *Trinity Lutheran*, which excluded organizations 'owned or controlled by a church, sect, or other religious entity.'" (citations omitted)); *Carson*, 142 S. Ct. at 1997 ("By 'condition[ing] the availability of benefits' in that manner, Maine's tuition assistance program—like the program in *Trinity Lutheran*—'effectively penalizes the free exercise' of religion." (citations omitted)).

8. *Trinity Lutheran*, 582 U.S. at 450, 462 ("The Department's policy expressly discriminates

Court's twentieth-century cases regarding state funding and religious institutions.[9] Much ink has been spilled over whether and how *Espinoza* and *Carson* withdrew from the states the choice not to fund religious educations. Yet not even Justice Sotomayor, the most vehement dissenter from these decisions, has acknowledged one of the jurisprudential novelties at the decisions' heart: the Free Exercise Clause's newfound power to invalidate laws which do not implicate any religious *exercise*, but merely religious *status*.[10]

The majority's reasoning in both *Carson* and *Espinoza* defies logic by willfully sidestepping the obvious relevance of the Equal Protection Clause to claims based on religious status discrimination. It does so by distending the Free Exercise Clause to encompass inert status in order to reach results easily attainable under Equal Protection.[11] Such jurisprudential contortions are not merely inelegant—they are downright dangerous. This Note argues that future courts can preserve the outcomes of *Carson* and *Espinoza* while reinterpreting them as built upon an Equal Protection, rather than a Free Exercise, framework. It does so in four primary parts, of which this Introduction is Section I. Section II tracks the shifting understanding of the Free Exercise Clause in the years before *Trinity Lutheran*, taking special pains to note how the cases dealt with religious *activity* (i.e., exercise), rather than religious *status* distinctions. It then addresses how the Court did and did not depart from prior understandings of the Clause in *Trinity Lutheran*, *Espinoza*, and *Carson*. Section III offers an analytic framework of Free Exercise that prioritizes

against otherwise eligible recipients . . . solely because of their religious character. . . . [S]uch a policy imposes a penalty on the free exercise of religion[.] . . . This conclusion is unremarkable in light of our prior decisions." (internal citations omitted)); *Espinoza*, 140 S. Ct. at 2260 ("As *Trinity Lutheran* explained, the rule is 'unremarkable in light of our prior decisions.'"); *Carson*, 142 S. Ct. at 1997 ("The 'unremarkable' principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case.").

9. *See Trinity Lutheran*, 582 U.S. at 2027 (Sotomayor, J., dissenting) ("This case is about nothing less than the relationship between religious institutions and the civil government—that is, between church and state. The Court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slights both our precedents and our history, and its reasoning weakens this country's longstanding commitment to a separation of church and state beneficial to both.").

10. Justice Sotomayor focused her dissents on the Court's demand that funds flow from the public fisc to religious institutions, thereby forcing states to subsidize religious teaching. *See Trinity Lutheran*, 582 U.S. at 471–72 (Sotomayor, J., dissenting); *Espinoza*, 140 S. Ct. at 2297 (Sotomayor, J., dissenting); *Carson*, 142 S. Ct. at 2012 (Sotomayor, J., dissenting).

11. I take as a given, for the purposes of this Note, that the ultimate results of *Espinoza* and *Carson* either cannot or should not be overruled. This is not to say that these cases were rightly decided, nor that I believe a state's "antiestablishment interests" are less than compelling, nor even that I believe these cases fall outside the ambit of the Establishment Clause. Rather, this Note strives to lay a foundation upon which courts and advocates—ones more qualified than myself—might build arguments for future cases. This Note seeks to ensure the integrity of the Equal Protection Clause and to jurisprudentially link discrimination against religious persons with other types of discrimination, without contradicting the result—or the spirit—of *Espinoza* or *Carson*.

active religious conduct and speech over status, applies this framework to disentangle the interwoven threads of nondiscrimination and "unconstitutional conditions" principles in these cases, and illustrates how the Equal Protection Clause would better address cases like *Espinoza* and *Carson*, which fall on the "status" side of the line. Finally, Section IV discusses the implications of such a seemingly academic distinction, and what is at stake if the Court stays its current course and elevates the Free Exercise Clause to a self-contained equal-protection-of-religion clause.

II. BACKGROUND

The Free Exercise Clause has always been a challenge for the judiciary to enforce.[12] At the broadest level, the intent of the Free Exercise Clause is relatively clear: to prevent the federal government "from intermeddling with religious institutions, their doctrines, discipline, or exercises,"[13] or, by negative implication, from secularizing the citizenry.[14] In application, Free Exercise claims have generally taken two forms: (1) claims seeking religious exercise exemptions from generally applicable laws, and (2) claims seeking to invalidate some policy, regulation, or statute as punishing religious observance.[15] And though the proportion and the relative success rate of these two types of claims have fluctuated, both species of claim have, at their core, concerned religious conduct. Thus, the pre-*Trinity* Free Exercise cases discussed in this Section address religious practices,[16] religious speech,[17] and religious governance or

12. *See* 1 WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 10:3 (3d ed. 2011), WestLaw MODCONLAW (database updated Dec. 2021) ("From the beginning, the Supreme Court had a difficult time resolving questions about the extent to which the Free Exercise Clause should be relied upon to limit government action.").

13. Letter from Thomas Jefferson to Samuel Miller (Jan. 23, 1808) (on file with the Library of Congress, Manuscript Division), https://www.loc.gov/item/mtjbib018142/.

14. *See* ERWIN CHEMERINSKY & HOWARD GILLMAN, THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE 39 (2020) (ebook).

15. *Cf.* Thomas C. Berg & Douglas Laycock, Espinoza, *Government Funding, and Religious Choice*, 35 J. L. & RELIGION 361, 373–78 (2020). In their article, Professors Berg and Laycock categorize major areas of the Religion Clauses jurisprudence, through sub-headings, into cases involving "Funding Programs," "Regulatory Exemptions," and "Government-Sponsored Religious Speech." The first of these overlaps substantially with what this Note describes as religious discrimination cases. The second clearly maps to the religious exemption cases. The third describes a line of cases decided almost exclusively under the Establishment Clause, and are therefore not directly relevant to this Note.

16. *See, e.g.*, Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (invalidating a ban on animal sacrifice); Sherbert v. Verner, 374 U.S. 398 (1963) (requiring the state to exempt plaintiff from a law that would deny her unemployment benefits because of her Saturday sabbath observance).

17. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (holding that a ban on student publications based on religious viewpoints violated the First Amendment's Free Speech clause); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (holding that a refusal to screen a film based on its religious viewpoint to be unconstitutional, even in a nonpublic forum); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (forbidding public schools from

leadership.[18] Parts A and B track this fact through the Court's lines of religious exemption and religious discrimination cases, respectively. Finally, Part C situates the Court's recent decisions in *Trinity Lutheran*, *Espinoza*, and *Carson* in this same context.

A. The Religious Exemption Cases

Constitutional claims for exemptions from general laws date to at least 1878—when the Supreme Court decided its first case under the Religion Clauses, *Reynolds v. United States*.[19] Mr. Reynolds was a twice-married Mormon man seeking an exemption from a law prohibiting polygamy.[20] He claimed his faith compelled his plural nuptials.[21] But, like most such claimants seeking religious exemptions between 1878 and 1963, Mr. Reynolds' claims did not prevail in the Supreme Court.[22] During this period, the Court accepted as self-evident that "Congress was deprived [by the First Amendment] of all legislative power" over an individual's religious *beliefs*, but retained some authority to legislate against actions "in violation of social duties or subversive of good order."[23]

Sherbert v. Verner, in 1963, heralded a departure from this mentality.[24] *Sherbert*, concerned a petitioner who had been denied unemployment benefits because she had refused to work during her Saturday sabbath.[25] The Court held that, to deny a petitioner her benefits unless she transgressed her faith, the State would have to show that it did so pursuant to a "compelling state interest."[26] But, in the eighteen years following *Sherbert*, the Supreme Court and the lower courts struggled to apply this

compelling speech, in this case the pledge of allegiance, from those who disagree); Niemotko v. Maryland, 340 U.S. 268 (1951) (declaring unconstitutional a licensing scheme that prevented religious groups from speaking in a public park because of distaste for their beliefs).

18. *See, e.g.*, McDaniel v. Paty, 435 U.S. 618 (1978) (plurality opinion) (holding that a minister could not be excluded from holding office only because he was a member of the clergy); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012) (holding that the Free Exercise and Establishment Clauses protect a church's right to select its ministers as it sees fit).

19. 98 U.S. 146 (1878).

20. *Id.* at 161–62.

21. *Id.*

22. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944); Braunfeld v. Brown, 366 U.S. 599 (1961).

23. *Reynolds*, 98 U.S. at 164; *see also* Torasco v. Watkins, 367 U.S. 488, 495 (1961) ("[N]either a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.'" (quoting Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947))).

24. 374 U.S. 398 (1963).

25. *Id.* at 399–401.

26. *Id.* at 403–05; *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that a state could not compel an Amish family to compromise their religious beliefs by sending their fourteen- and fifteen-year-old children to secondary school, unless the state could show a compelling interest in the additional years of education, which it could not).

new compelling interest test rigorously outside of the unemployment benefits context, permitting numerous laws to stand where religious exceptions were plainly possible (if inconvenient).[27] Out of these frustrations came *Employment Division v. Smith*, which held that a "valid and neutral law of general applicability"—even one that clearly stymies certain believers' religious exercise—need *not* be supported by a "compelling interest."[28] *Smith* did not overrule *Sherbert*, but opted instead to cabin its reach to cases where religious exercise is intertwined with another right, where a state makes individualized determinations in administering benefits, or where a state meant to target religious conduct specifically.[29]

But no matter which standard the Court applied or which claims prevailed, the Court viewed all these religious exemption claims as presenting Free Exercise questions.[30] And in every case the facts revolved around a petitioner's religious conduct or activity. Many religious exemption-seekers claimed their faith compelled them to do something the law forbade, as in *Reynolds*, or punished, as in *Sherbert*.[31] Others, however, sought permission *not* to do something that the law required.[32] These claims, too, concerned conduct.

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27. *Compare* Gillette v. United States, 401 U.S. 437 (1971) (upholding penalties for draft dodging under the Selective Service Act as applied to petitioner with religious objections to the Vietnam War specifically, because the Act only excused those with religious objections to "war in any form"), *and* United States v. Lee, 455 U.S. 252 (1982) (mandating payment of social security taxes by a member of the Old Amish Order despite religious objection), *with* Thomas v. Review Bd., 450 U.S. 707 (1981) (striking down denial of unemployment benefits based on religious conduct). *See also* Employment Div. v. Smith, 494 U.S. 872, 889 (1990) (collecting cases); *cf.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (suggesting that the government need not show a compelling purpose when developing its own land, even if doing so would eviscerate the rituals of a Native American tribe).

28. *Smith*, 494 U.S. at 878–79 (quoting *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring in judgment)).

29. *Smith*, 494 U.S. at 877, 882, 884.

30. *See, e.g., Yoder*, 406 U.S. at 219 (holding "that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of [the Amish] respondents' religious beliefs"); *Gillette*, 401 U.S. at 462 (holding that, although "the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience," the "incidental burdens" felt by drafted soldiers with religious objections specifically to the Vietnam War were outweighed by the Government's interests); *Lee*, 455 U.S. at 255 (holding that "compulsory participation in the social security system interferes with [the Amish respondents'] free exercise rights," but that the respondents were not entitled to a constitutional exemption, "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order"); *Thomas*, 450 U.S. at 718 (holding that a failure to accommodate Jehovah's Witness employee would impose an "infringement upon free exercise" that was "substantial").

31. *See, e.g.*, *Yoder*, 406 U.S. 205 (law punished Amish for withdrawing their children from school in accordance with their religion); *Lyng*, 485 U.S. 439 (government purchase of land would eviscerate religious rituals); *Smith*, 494 U.S. 872 (law prohibited consumption of peyote necessary for religious services).

32. *See, e.g.*, *Gillette*, 401 U.S. 437 (defendant sought exemption from the draft); *Lee*, 455 U.S. 252 (defendant sought exemption from payment of social security tax); *Thomas*, 450 U.S. 707 (law conditioned receipt of unemployment benefits on employee staying in a religiously objectionable job).

The case of *United States v. Lee* provides a good example of such a claim. The criminal defendant in *Lee* had refused to pay his social security taxes, asserting that the Social Security system ran counter to his Amish beliefs.[33] Though the Court denied the defendant's request for an exemption, it did so only after determining that the Free Exercise Clause applied to his claim and putting the government to the burden of strict scrutiny.[34] Mr. Lee's *refusal to contribute*—i.e., his choice to willfully and conscientiously abstain—was itself an exercise of his religion.[35]

After *Smith*, constitutional "religious exemption" cases waned.[36] Some morphed into statutory claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA),[37] the federal Religious Freedom Restoration Act (RFRA),[38] or any of the numerous state-law RFRAs.[39] Other exemption claims that might previously have been brought under the Free Exercise Clause were brought under alternative constitutional provisions, such as the Free Speech Clause.[40] And still others sidestepped the "exemption" issue by claiming that the challenged regulations were the products of religious animus, or else that they discriminated against religious conduct by failing to offer a religious exemption despite offering a comparable secular one.[41] Such concerns about discrimination against

33. *Lee*, 455 U.S. at 254–55.

34. *Id.* at 257–60.

35. *Id.* at 257 ("We therefore accept appellee's contention that both payment and receipt of social security benefits is forbidden by the Amish faith. Because the payment of the taxes or receipt of benefits violates Amish religious beliefs, *compulsory participation* in the social security system interferes with their free exercise rights.") (emphasis added).

36. Arguably, religious exemption claims experienced a renaissance during the COVID-19 pandemic, in a series of memorandum orders and per curiam opinions from the Court's emergency, or "shadow," docket. *See* Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & LIBERTY 699 (2022). However, the Court claims to have decided these COVID cases based not on a theory that religious conduct required an exemption from a neutral scheme, but that the lockdown regulations were *not neutral* because they treated "comparable secular activity more favorably than religious exercise." Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–68 (2020) *(*per curiam)). Such claims of religious discrimination will be addressed. *See infra* Part II.B.

37. Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc to 2000cc-5).

38. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4); *see also, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (reading a religious exemption into the Affordable Care Act's contraceptive mandate under RFRA)

39. *See* 1 WILLIAM W. BASSETT ET AL., RELIGIOUS ORGANIZATIONS & THE LAW §§ 3.26-.30, Westlaw RELORGS (database updated Nov. 2021).

40. *See, e.g.*, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (framing a public accommodations law, which did not provide an exception for a web-designer to discriminate on the basis of sexuality, as compelling her to speak a message with which she does not agree).

41. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018) (holding that the state violated equal protections in penalizing a baker for refusing to comply with public accommodations law, because those applying the law had exhibited anti-religious animus); Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (holding that the City of Baltimore was required to exempt a Catholic foster agency from the city's requirement that agencies approve gay and lesbian foster parents,

religious exercise have been the Court's predominate concern over the last three decades of Free Exercise jurisprudence.

B. The Religious Discrimination Cases

Even in the early twentieth century, the Court's cases suggested that the Religion Clauses had something to say about anti-religious discrimination. *Cantwell v. Connecticut*, the case in which the Court announced the incorporation of the Free Exercise Clause into the Fourteenth Amendment, was animated by such concerns.[42] In *Cantwell*, the Court invalidated the conviction of a Jehovah's Witness for religious solicitation without a license, holding that Connecticut's licensing provision worked an unconstitutional prior restraint on religious exercise.[43] *Cantwell* inaugurated a spate of cases in the 1940s and 50s that limited the power of a state to stimy religious speech through licensing regimes, including *Niemotko v. Maryland*[44] and *Fowler v. Rhode Island*.[45]

All three of these cases dealt with religious action—either solicitation or public congregation—and all three relied, at least in part, on the First Amendment.[46] But to the extent that these cases represented the singling out of one group for differential treatment, the Court of the 1950s suggested they also implicated the Equal Protection Clause. In fact, the central holding in *Niemotko* included a declaration that "the completely arbitrary and discriminatory refusal to grant the permits was a denial of *equal protection*."[47] And, although the majority's terse opinion in *Fowler* located the protections relevant to the religious license applicants' claims

because the city had granted comparable exemptions for other reasons); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422–23 (2022) (holding that a public high school could not prohibit a football coach from praying in a conspicuous place on the football field after games); *see also* Kermit V. Lipez, *Reflections on the Church/State Puzzle*, 20 J. APP. PRAC. & PROCESS 7, 12–13 (2019).

42. 310 U.S. 296, 303 (1940).

43. *Id.* at 306.

44. 340 U.S. 268 (1951) (holding in favor of a Jehovah's Witness prosecuted for organizing a gathering in a public park without a granted license, after his application to hold the gathering was denied by the town).

45. 345 U.S. 67 (1953) (striking down a licensing provision that would allow some religious services in a public park, but not the Jehovah's Witnesses' services).

46. *See Cantwell*, 310 U.S. at 304 ("The appellants urge that to require them to obtain a certificate as a condition" of soliciting support for their views amounts to a prior restraint on the exercise of their' religion within the meaning of the Constitution."); *Fowler*, 340 U.S. at 273 ("[T]he lack of standards in the license-issuing 'practice'" used to bar Jehovah's Witnesses from congregating in a park "render[ed] that 'practice' a prior restraint in contravention of the Fourteenth Amendment," which applied the First Amendment to the states.); *Fowler*, 345 U.S. at 70 ("[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment. . . . To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.").

47. 340 U.S. at 273 (emphasis added).

within the First Amendment,[48] Justice Frankfurter's separate opinion suggested that the case could and should have been resolved under the Equal Protection Clause with the same result.[49]

In general, religious discrimination comes in two forms: discrimination *among* religions, and discrimination *against* religion writ large. Discrimination of the former sort offends the Establishment Clause because it amounts to governmental support for some faiths or sects over others.[50] The nondiscrimination principle found in the Establishment Clause, however, has a unique character, embodying as it does a broader fear of government overreach and entanglement in religious affairs.[51] And, to the end of keeping free each person's individual conscience, the Establishment Clause also prohibits the deliberate advancement of religion in general over nonreligion.[52]

But the Establishment Clause has little, if anything, to say about the deliberate *disfavoring* of religion as against nonreligion.[53] The modern Court has instead tackled legislation singling out religion for negative treatment under the Free Exercise Clause.[54] The touchstones in this area,

48. *Fowler*, 345 U.S. at 69–70.

49. *Id.* at 70 (Frankfurter, J., concurring).

50. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."); Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

51. *See generally Everson*, 330 U.S. at 8–16.

52. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 216 (1963) ("this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another"); Bd. of Educ. v. Grumet, 512 U.S. 687, 696 (1994) ("'A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion,' favoring neither one religion over others nor religious adherents collectively over nonadherents." (citation omitted) (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792–93 (1973)); *see also* Agostini v. Felton, 521 U.S. 203, 233 (1997).

53. *Cf.* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we . . . for the most part have addressed governmental efforts to benefit religion or particular religions[.] . . . [Here,] Petitioners allege an attempt to disfavor their religion because of the religious ceremonies it commands, and the Free Exercise Clause is dispositive in our analysis.").

54. Here, I must acknowledge the roiling debate regarding so-called "Blaine Amendments," and the history of no-aid-to-religion clauses in state constitutions. Whether these amendments and constitutional provisions reflect a noble tradition of church-state separation or a reprehensible legacy of anti-Catholic bigotry has taken center-stage in recent Supreme Court opinions. The positions on either side are personified in the persons of Justices Sotomayor and Alito. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 479–86 (2017) (Sotomayor, J., dissenting); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2267–75 (2020) (Alito, J., concurring). I, however, am not a historian, and do not wish to tread down that well-trod road. Nor is it necessary to do so—as indicated in *supra* note 11, this Note accepts the outcomes of both *Espinoza* and *Carson*. This means that it must accept that discrimination against religion generally must be justified by some "compelling interest," and that antiestablishment interests, like those suggested by Missouri in *Trinity Lutheran* and by Montana in *Espinoza*, cannot qualify unless they align directly with the dictates and boundaries of the Establishment Clause. The question, of course, will be *what bars* such discrimination, properly understood?

especially for the majorities in *Trinity Lutheran*, *Espinoza*, and *Carson*, are the 1978 plurality opinion in *McDaniel v. Paty*,[55] and Justice Kennedy's 1993 opinion for the Court in *Church of Lukumi Babalu Aye v. City of Hialeah*.[56] The remainder of this Part explains how these cases, despite their sweeping language, suggested two relatively unexceptional propositions: (1) that the Free Exercise Clause prevents a state from denying a benefit because of an individual's religious speech or their role within a church, and (2) that the Free Exercise Clause will not abide the singling out of an individual religious practice for prohibition or punishment.

The plaintiff in *McDaniel* was a Baptist minister who wanted to be a delegate to Tennessee's constitutional convention and received the votes to make it so.[57] But Tennessee's constitution contained a provision prohibiting ministers from serving as legislators, and Tennessee's statutes mandated that convention delegates meet the qualifications for state legislators.[58] When Tennessee's highest court ruled that Mr. McDaniel could not serve in the post to which he had been elected, the Supreme Court noted probable jurisdiction and took his case.[59]

The Court, employing language from the majority opinion in *Sherbert v. Verner*, asserted that Tennessee had not deprived Mr. McDaniel "of a civil right solely because of [his] religious beliefs," but "because of his *status* as a 'minister' or 'priest.'"[60] However, "status" in this context referred to more than Mr. McDaniel's identity as a believer. The "Tennessee disqualification is directed primarily at *status, acts, and conduct*," as opposed to one based on pure belief.[61] The state barred Mr. McDaniel from office because of his ministerial duties, his pastoral performances, and his religious speech.[62] Accordingly, the plurality defined "the right to the free exercise of religion [as] unquestionably

55. 435 U.S. 618 (1978) (plurality opinion). *Trinity Lutheran* cited the *McDaniel* plurality directly appear throughout these opinions. *Trinity Lutheran*, 582 U.S. at 457–59 (citing *McDaniel*, 435 U.S. at 627, 634 (plurality opinion)); *id.* at 462 (citing *McDaniel*, 435 U.S. at 626 (plurality opinion)). Both *Espinoza* and *Carson*, in turn, relied on the parts of *Trinity Lutheran* that quoted *McDaniel*. *See Espinoza*, 140 S. Ct. at 2256 (citing *Trinity Lutheran*, 582 U.S. at 460–62); Carson v. Makin, 142 S. Ct. 1987, 1996 (2022) (quoting *Trinity Lutheran*, 582 U.S. at 462); *see also Espinoza*, 140 S. Ct. at 2276 (Alito, J., concurring) (citing *McDaniel*, 435 U.S. at 620–22 (plurality opinion)).

56. 508 U.S. 520 (1993).

57. *McDaniel*, 435 U.S. at 621.

58. *Id.* at 620–21.

59. *Id.* at 621–22.

60. *Id.* at 626–27 (emphasis added).

61. *Id.* at 627 (emphasis added).

62. *See id.* at 627 n.6; *see also* Berg & Laycock, *supra* note 15, at 365 ("The plurality held that the state had placed an unconstitutional disability on McDaniel—ineligibility for office—because of his 'status as a "minister."' But it immediately noted that Tennessee defined ministerial status 'in terms of conduct and activity.'" (quoting *McDaniel*, 435 U.S. at 627)).

encompass[ing] the right to preach, proselyte, and perform other similar religious functions, or, in other words, to be a minister of the type McDaniel was found to be."[63] The Free Exercise Clause applied to Mr. McDaniel's case because Tennessee had conditioned his ability to participate in civic life as a convention delegate on a surrender of his First Amendment right to act as a minister.[64]

This antidiscrimination strain in Free Exercise jurisprudence commanded a majority of the Court in *Church of Lukumi Babalu Aye v. City of Hialeah*.[65] "At a minimum," Justice Kennedy wrote for the majority, "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[66] The cases Justice Kennedy cited to support this assertion were not so broad. Neither case held that discrimination against "all religious beliefs" fell within the Free Exercise Clause's protections; nor did they clearly distinguish their antidiscrimination holdings as falling within the Free Exercise, rather than the Establishment Clause.[67]

Although the Court in *Lukumi Babalu Aye* proceeded upon this broad canvas, the picture it painted was fairly confined—holding that a "law burdening religious *practice* that is not neutral or not of general application must undergo the most rigorous of scrutiny."[68] In fact, the law at issue prohibited the slaughter of animals for the purpose of sacrifice—a clear and pointed nod to the sort of ritual sacrifice undertaken by the community of Santeria practitioners who lived in Hialeah.[69] This regulation clearly affected religious conduct.

The opinion becomes blurry in its treatment of the relationship between the nature of the state's discrimination and the anti-Santeria animus that had motivated that discrimination.[70] The confusion stems from the

63. *McDaniel*, 435 U.S. at 626.

64. *See id.* at 627; Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 459 (2017) ("McDaniel could not seek to participate in the convention while also maintaining his role as a minister; to pursue the one, he would have to give up the other.").

65. 508 U.S. 520 (1993).

66. *Id.* at 532.

67. The portion of *Braunfeld v. Brown* cited by Justice Kennedy dictates that heightened scrutiny will apply under the First Amendment, when a state "impede[s] the *observance* of one or all religions," (presumably the Free Exercise Clause) or when the state "*discriminate[s]* invidiously between religions," (presumably the Establishment Clause). Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (plurality opinion) (emphasis added). And Justice Kennedy's citation to Fowler v. Rhode Island leads only to language condemning government preference for "one religion over another," or attempts to "to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings." Fowler v. Rhode Island, 345 U.S. 67, 70 (1953). Such "a discrimination," the *Fowler* Court held, was "barred by the First and Fourteenth Amendments." *Id.* at 69.

68. *Lukumi Babalu Aye*, 508 U.S. at 546.

69. *Id.* at 542.

70. *Id.* at 545–46.

strictures of *Employment Division v. Smith*. Under *Smith*, a law is subject to strict scrutiny when it (1) is not neutral toward religion and generally applicable to all, and (2) places a burden upon the exercise of religion.[71] Hialeah's law had criminalized the church's religious conduct, but this only triggered constitutional scrutiny if the law was not "neutral and of general applicability."[72] To demonstrate the law's non-neutrality, Justice Kennedy not only explained how the regulations operated to "target Santeria sacrifice,"[73] but also narrated their origins in animus against local Santeria practitioners as a class.[74] This showing of animus, intent, and non-neutrality would have meant nothing, however, had the law not first burdened the plaintiffs' exercise of their religion.

These two cases—*Lukumi* and *McDaniel*—represent the two broad instances in which discrimination is prohibited by the First Amendment's Free Exercise Clause: (1) where the government singles out religious conduct or expression for prohibition or disfavor, as in *Lukumi*, and (2) where the government excludes individuals from its opportunities because of their religious conduct or role, as in *McDaniel*.[75] Despite Justice Kennedy's broad language in *Lukumi*, neither sort of unconstitutional discrimination attacked persons, only behaviors.[76]

Apart from the specific generally-available-funding cases (*Trinity Lutheran*, *Espinoza*, and *Carson*) the Court's religious discrimination cases have continued to concern discriminatory restrictions on activity, rather than on pure status. In the controversial COVID-19 church cases, for example, the Court struck down state-imposed emergency restrictions on religious gatherings because they "treat[ed] . . . comparable secular activity more favorably than religious exercise."[77] This approach, described by some commentators as the "most favored nation" theory of Free Exercise, began in separate writings attached to emergency orders,[78]

71. *See* Employment Div. v. Smith, 494 U.S. 872, 878–79 (1990); *Lukumi Bablu Aye*, 508 U.S. at 532–33.

72. *Id.* at 531.

73. *Id.* at 535. *See generally id.* at 533–40

74. *Id.* at 540–42.

75. I exclude from this list a third type of case—in which the government targets *beliefs*, perhaps by punishing one who will not swear an oath that violates one's conscience. *Cf.* Torasco v. Watkins, 367 U.S. 488 (1961) (holding religious tests for state office unconstitutional under the Establishment Clause); McDaniel v. Paty, 435 U.S. 618, 626 (1978) (plurality opinion) (reframing *Torasco* as creating a per se rule under Free Exercise). Such cases are incredibly uncommon and may belong as much to the Establishment as to the Free Exercise Clause.

76. See *infra* Part III.A for possible explanations for this peculiar possibility—that the First Amendment might care about discrimination against religious *conduct* but not religious *persons*.

77. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) (quoting Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–68 (2020) (per curiam)); *see also* Vladeck, *supra* note 36.

78. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.); Agudath Israel of Am. v. Cuomo, 141 S. Ct. 889 (2020) (mem.); S. Bay Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (mem.).

before migrating to precedential opinions by the end of the lockdowns.[79] This striking new spin on *Smith* and the Free Exercise Clause was polarizing.[80] Nevertheless, in *Fulton v. City of Philadelphia* the Court made clear that this most-favored-nation principle applied beyond the pandemic context.[81] In *Fulton*, the Court held that that the City of Philadelphia could not compel a Catholic foster agency to approve same-sex foster families, because the City permitted exemptions from similar requirements for other, nonreligious agencies.[82] But, whatever changes these decisions wrought in methodology, these decisions maintained a focus on activity—whether that activity was operating of a foster care ministry or worshipping in the midst of a global pandemic.

C. Trinity Lutheran, Espinoza, & Carson

In 2017, the Court handed down *Trinity Lutheran Church of Columbia, Inc. v. Comer*, a decision it described as an "unremarkable" application of the principles embodied in cases like *McDaniel* and *Lukumi*.[83] The Missouri Department of Natural Resources had offered grants for childcare facilities to upgrade their playground with safe, ADA-friendly rubber surfaces made from recycled tires.[84] Trinity Lutheran Church, which operated a daycare and preschool complete with playground, applied for one of these grants.[85] Though otherwise eligible, the Department rejected Trinity Lutheran Church's application because Trinity Lutheran was a church.[86] The Court held that the policy which had compelled the Department to reject Trinity's application had effectively conditioned the receipt of an otherwise available public benefit upon the surrender of Trinity Lutheran's status as a church.[87]

79. *Roman Cath. Diocese*, 141 S. Ct. 63 (2020) (per curiam); *Tandon*, 141 S. Ct. 1294 (2021) (per curiam).

80. *Compare* Leah M. Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1 (2022), *and* David Simson, *Most Favored Racial Hierarchy: The Ever-Evolving Ways of the Supreme Court's Superordination of Whiteness*, 120 MICH. L. REV. 1629, 1640–44 (2022), *and* Vladeck, *supra* note 36, *with* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49–51 (1990) (suggesting a most-favored nation reading of *Smith* at the time it was decided), *and* Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise under* Smith *and after* Smith, 2020 CATO SUP. CT. REV. 33 (2020–2021) (suggesting expansion of *Fulton*'s principles beyond the non-neutral context).

81. 141 S. Ct. 1868 (2021).

82. *Id.* at 1882.

83. 582 U.S. 449, 462 (2017) (describing the Court's holding as "unremarkable in light of our prior decisions").

84. *Id.* at 454–55.

85. *Id.*

86. *Id.* at 456.

87. *Id.* at 465.

Chief Justice Roberts, writing for the majority, took his cues from Justice Kennedy in *Lukumi*, soaking his opinion in similar language depicting animus against religion.[88] He did so, in part, by repeatedly invoking the plurality opinion in *McDaniel*, while at the same time laboring to emphasize that his *Trinity Lutheran* opinion was *only* talking about religious status discrimination.[89] Chief Justice Roberts appeared to feel he was on firmer ground when it came to purely status-based discrimination, including a footnote suggesting that burdens on the *use* of funds for religious activities might present different questions.[90] was the only fragment of the Chief Justice's otherwise six-Justice majority opinion that failed to garner even a bare majority.[91] Chief Justice Roberts felt, it seems, that he was on firmer Free Exercise ground in dealing with plain status discrimination.

But the Court did not long limit itself to playground surfacing grants. Three years later, the seemingly innocuous and "unremarkable" reasoning of *Trinity Lutheran* provided the cornerstone for the Court's decision in *Espinoza v. Montana Department of Revenue*.[92] Montana had provided tax deductions for donations to "scholarship organizations," which, in turn, awarded scholarship grants for students to use at any accredited private school.[93] The Montana Department of Revenue, however, promulgated a rule that said that such scholarships could not be used to pay for private religious education, pursuant to the Montana constitution's prohibition on public aid to "sectarian schools."[94] Several parents of children attending or hoping to attend Christian schools sued, alleging, among other things, that the Department's "[r]ule discriminated on the basis of their religious views and the religious nature of the school they had chosen for their children."[95]

Quoting heavily from his own broad language in *Trinity Lutheran*, Chief Justice Roberts again asserted that the "Free Exercise Clause . . . 'protects religious observers against unequal treatment' and against 'laws

88. *See, e.g.*, *id.* at 462 ("The Department's policy expressly discriminates against otherwise eligible recipients . . . solely because of their religious character."); *id.* at 463 ("The express discrimination against religious exercise here is . . . the refusal to allow the Church . . . to compete with secular organizations for a grant."); *id.* at 466 ("[O]nly a state interest 'of the highest order' can justify the Department's discriminatory policy." (citation omitted)).

89. *See, e.g.*, *id.* at 458 ("[D]enying a generally available benefit *solely on account of religious identity* imposes a penalty on the free exercise of religion . . . ." (emphasis added)); *see also id.* at 465 n.3 (Roberts, C.J.) (note supported only by a plurality).

90. *Id.*

91. *Id*.

92. 140 S. Ct. 2246 (2020).

93. *Id.* at 2251.

94. *Id.* at 2252.

95. *Id.*

that impose special disabilities on the basis of religious status.'"[96] For the Chief Justice, this case, like *Trinity Lutheran*, was plainly about discrimination.[97] Notably, however, the Chief never claimed that Montana's rule distinguished between religious parents and nonreligious parents, or even parents who wished to send their children to a religious school and those who did not. Rather, the law discriminated against certain religious parents, he said, "solely because of the religious character of the school" they wished to send their children to.[98] He alternately described Montana's scholarship program as benefitting the families and the schools,[99] and seemed to view *both* the families and the schools as victims of discrimination.[100] In the end, one thing was clear to Chief Justice Roberts: separating out persons or organizations for differential treatment based on their religious status was impermissible, unless justified by a state interest of extraordinary magnitude and accomplished with surgical tailoring.[101] Montana had no such hyper-compelling interest for its rule, and thus the rule could not stand.[102]

Two years later, *Carson v. Makin* met with a similar reception from the Court.[103] There, Maine provided tuition funding for students who lived in parts of the state without access to local public schools—funds which they

96. *Id.* at 2254 (quoting *Trinity Lutheran*, 582 U.S. at 458).

97. *Id.* at 2256 ("The Montana Constitution discriminates based on religious status just like the Missouri policy in *Trinity Lutheran*, which excluded organizations 'owned or controlled by a church, sect, or other religious entity.'" (quoting *Trinity Lutheran*, 582 U.S. at 455)).

98. *Espinoza*, 140 S. Ct. at 2255.

99. *Compare id.* at 2256 ("To be eligible for government aid under the Montana Constitution, a *school* must divorce itself from any religious control or affiliation." (emphasis added)), *and id.* at 2262 ("The final step in this line of reasoning eliminated the program, to the detriment of religious and nonreligious *schools* alike." (emphasis added)), *with id.* at 2261 ("[T]he no-aid provision penalizes that decision by *cutting families off* from otherwise available benefits if they choose a religious private school rather than a secular one, and for no other reason." (emphasis added)), *and id.* at 2262–63 ("[The Constitution] condemns discrimination against religious schools *and the families whose children attend them*[,] . . . and their exclusion from the scholarship program here is odious to our Constitution and cannot stand." (internal quotation marks and citations omitted) (emphasis added)).

100. *Id.* at 2255 ("Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school.").

101. *See id.* at 2260 ("Because the Montana Supreme Court applied the no-aid provision to discriminate against schools and parents based on the religious character of the school, the 'strictest scrutiny' is required. [*Trinity Lutheran*, 582 U.S. at 458]. That 'stringent standard,' [*id.* at 459], is not 'watered down but really means what it says,' [Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993)]. To satisfy it, government action 'must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests.' [*Id.*]").

102. *Espinoza*, 140 S. Ct. at 2261 ("Montana's interest in public education cannot justify a no-aid provision that requires only religious private schools to 'bear [its] weight.'" (quoting *Lukumi*, 508 U.S. at 546)).

103. 142 S. Ct. 1987 (2022).

might use at any public school or private institution.[104] As in Montana, however, this tuition aid could not be used at religious schools.[105] And, as in Montana, the Court subjected Maine's law to the strictest of scrutiny and struck it down.[106]

The Chief Justice, completing this trilogy of opinions by writing for the majority in *Carson*, again proved noncommittal as to who exactly Maine's benefit was *for*, and who had suffered discrimination at the hands of Maine's program.[107] One thing did distinguish this case from the two previous, however: where both *Trinity Lutheran* and *Espinoza* had avoided answering whether a prohibition on religious *uses* of state benefits would be presumptively unconstitutional, *Carson* could not.[108] The First Circuit forced the Court's hand by asserting that Maine's constraint on funding was a permissible "use" restriction.[109] The Supreme Court rejected this argument, opining that such a status-use distinction "lack[ed] a meaningful application not only in theory, but in practice as well."[110] The decision to prohibit the religious use of a government benefit was not part of the "play in the joints" between the Religion Clause described in the Court's prior cases, but class-based distinctions in disguise.[111]

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104. *Id.* at 1993–94.

105. *Id.* at 1997. However, according to Maine, mere religious affiliation was not dispositive—rather, the state's inquiry focused on whether the curriculum involved religion. *Id.* at 1994. The Court rejected this distinction. *Id.* at 1997, 2001–02.

106. *Id.* at 1997 ("While the wording of the Montana and Maine provisions is different, their effect is the same: 'to disqualify some private schools' from funding 'solely because they are religious.' A law that operates in that manner, we held in *Espinoza*, must be subjected to 'the strictest scrutiny.'" (quoting *Espinoza*, 140 S. Ct. at 2261)).

107. *Compare Carson*, 142 S. Ct. at 1997. ("Maine offers *its citizens* a benefit: tuition assistance payments for any family whose school district does not provide a public secondary school." (emphasis added)), *and id.* (describing Maine's program as a "a neutral benefit program in which public funds flow to religious organizations through the independent choices of *private benefit recipients* does not offend the Establishment Clause." (emphasis added)), *and id.* at 1998 ("The State pays tuition *for certain students* at private schools—so long as the schools are not religious. That is discrimination against religion." (emphasis added)), *with id.* at 1997 ("And like the daycare center in *Trinity Lutheran*, *BCS and Temple Academy* are disqualified from this generally available benefit 'solely because of their religious character.'" (emphasis added)), *and id.* at 2002 ("[T]he program operates to identify and exclude *otherwise eligible schools* on the basis of their religious exercise." (emphasis added)).

108. *Compare id.* at 2001 ("In short, the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination."), *with Trinity Lutheran*, 582 U.S. at 465 n.3 ("This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."), *and Espinoza*, 140 S. Ct. at 2256 ("This case also turns expressly on religious status and not religious use.").

109. *Carson*, 142 S. Ct. at 2000.

110. *Id.* at 2000–01.

111. *Id.* at 2001–02; *see also* Locke v. Davey, 540 U.S. 712, 718–19 (2004) (setting out the theory that, between the Free Exercise and Establishment Clauses there exists some "play in the joints" for state actions toward religion that are neither compelled by the former clause, nor prohibited by the latter).

III. DISCUSSION

In *Carson*, as in *Espinoza* before it, the Court found (1) that the state had offered a generally available tuition voucher to parents or schools,[112] (2) that the only accredited schools at which that voucher could not be used were religious schools,[113] (3) that such a restriction discriminated against either the schools or the families on the basis of their religious status,[114] (4) that the Free Exercise Clause of the First Amendment generally prohibited such discrimination, rendering the state's policy presumptively unconstitutional,[115] and (5) that the state had not overcome that presumption, because it had not shown that its law was narrowly tailored to serve the most compelling sort of state interest.[116] But proposition (3)—that the states discriminated against the schools or the families—does not and cannot lead inexorably to proposition (4)—that the states violated the Free Exercise Clause—except by way of a legal fiction. Below, Part III.A begins with a discussion of what constitutes "exercise," and distinguishes between claims of religious discrimination based on religious conduct and those based on religious status. Part III.B then takes another look at the reasoning of *Trinity Lutheran*, this time through this conduct-status lens, and seeks to explain the case under the doctrine of unconstitutional conditions. Finally, Parts III.C and III.D explains that *Carson* and *Espinoza* cannot be justified either as restrictions on religious "exercise" nor as unconstitutional conditions, and propose the Equal Protection Clause as a superior, alternative route.

A. Two Types of Protections: Religious Status v. Religious Conduct

At oral arguments, Justices of (and advocates before) the Supreme Court have drawn parallels between discrimination based on race and discrimination based on religion.[117] Such parallels are appealing—the framers of the First Amendment clearly feared a national government that would use its power to quash religious heterodoxy, just as the framers of the Reconstruction amendments feared that state governments would use their power to continue to oppress and violate the dignity of the recently-

112. *Carson*, 142 S. Ct. at 1997; *see also* cases cited *supra* note 107.

113. *Carson*, 142 S. Ct. at 1998.

114. *Id.*

115. *Id.* at 1997.

116. *Id.* at 1997–98.

117. *See, e.g.*, Transcript of Oral Argument at 4, 49, 55, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020) (No. 18-1195); Transcript of Oral Argument at 118–19, Carson v. Makin, 142 S. Ct. 1987 (2022) (No. 20-1088).

enslaved Black Americans.[118] But religion is analytically different from those classes to which the Court has traditionally extended heightened protections under the Fourteenth Amendment's Equal Protection Clause. Religion, by its nature, connotes both a status demarcation *and* a particular pattern of conduct. One can be discriminated against because of a religious identity, as one can be discriminated against on the basis race or sex. But one does not really "exercise" one's race or sex in the way one "exercises" one's religion.[119] Religious discrimination, then, can take two forms: (a) discrimination against a religious class, and (b) discrimination against religious conduct.

It is this latter sort of conduct discrimination that the text of the First Amendment prohibits.[120] The First Amendment begins by stating that

118. This is not to suggest that, in reality, religious discrimination—even religious discrimination based upon pure religious status—is akin to racial discrimination. I mean only to suggest that discriminatory government action was a concern in the fashioning and text of both amendments.

119. The argument could be raised that sexuality has a similar dual aspect to it. One could be discriminated against because one *is* a person of a particular sexual orientation, or one may be discriminated against because one *engages* in conduct or relationships pursuant to that orientation. I take no position, in this Note, as to whether one's sexuality and the intimate conduct which flows from it can be analytically distinguished in any meaningful way. I do note, however, that the Court's cases may already consider status and conduct separately when it comes to sexuality. For example, a Colorado constitutional provision, which prohibited the passage of any law protecting gay, lesbian, or bisexual citizens was struck down primarily as unconstitutional status discrimination under the Equal Protection Clause. Romer v. Evans, 517 U.S. 620 (1996). By contrast, a law criminalizing same-sex intimacy was struck down as transgressing an unenumerated substantive right to engage in consensual, intimate conduct without government intrusion, which was protected by the Due Process Clause of the Fourteenth Amendment. Lawrence v. Texas, 539 U.S. 558 (2003). And similarly, when the Court struck down same-sex marriage bans, it relied upon the fundamental right to marry rather than any status distinction—perhaps because it considered marriage to be active conduct. Obergefell v. Hodges, 576 U.S. 644 (2015).

120. Though it will dabble in period dictionaries, the analysis in this Section is candidly based on a plain meaning, and not an original-public-meaning analysis. This is for two reasons.

First, I take the view that the interpretation of the Religion Clauses through a true originalist lens would yield absurd and disastrous results. Take the anti-Catholic biases of both the founding generation and the generation who ratified the Fourteenth Amendment. As Professor Laycock has noted, "If [the ratifiers] had written their anti-Catholicism into the text [of the First Amendment], we would be . . . stuck" unless we could pass an Amendment to excise it. Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 683, 693 (1990). Fortunately, the founding generation's bigotries (in this instance) are extra-textual, and we can permit the text to carry us. "Rejection of the founders' anti-Catholicism is possible only because their intent *is subordinate to the text*." *Id.* For an easy example, and since the cases here deal with state policies, let us look to the meaning of the Clause in 1868, when the Fourteenth Amendment was ratified. *Cf.* N.Y. State Rifle & Pistol Assoc. v. Bruen, 142 S. Ct. 2111, 2137–38 (2022) ("We also acknowledge that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)."). In 1868, a large portion of the country did not understand Free Exercise as mandating neutrality with respect to all religions or religious exercises. *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2271 (2020) (Alito, J., concurring) (describing the rampant anti-Catholic animus driving the no-aid amendments of the second half of the nineteenth century). On Justice Alito's reading of the historical record, an originalist understanding of the First Amendment, as of the time of incorporation, must either accept this anti-Catholicism as permissible under the First Amendment, or else gerrymander or redefine the ratifiers' notions of religious liberty. Otherwise, express bans on funds going

"Congress shall make no law respecting an establishment of religion, or prohibiting the free *exercise* thereof."[121] The single word, "exercise," near the heart of so much twentieth-century constitutional litigation, has been extended far beyond its plain meaning by legal interpreters of all stripes.[122] But the modern lay reader has no delusion; "exercise" refers to activity, whether of one's body (as on the treadmill), of one's mind (as when learning a new language), or of one's rights.[123] This understanding is far from new. Samuel Johnson's classic 1755 dictionary defined "exercise" exclusively in active terms, whether as a "labour of the body" or a "practice [or] outward performance."[124] Even Johnson's purely religious definition of "exercise" refers to an "[a]ct of divine worship whether publick [sic] or private."[125] Likewise, Noah Webster's 1828 *American Dictionary of the English Language* offered a series of definitions for "exercise," each beginning with words like "use," "practice," "exertion," or "act."[126] Like Johnson, Webster incorporated expressly religious definitions of "exercise"—both active—explaining that an "exercise" may be a "[p]ractice; performance; as the *exercise* of religion," or an "[a]ct of divine worship."[127]

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to Catholic schools would be per se constitutional, even if Methodists or Unitarians had not been excluded. More than thirty state constitutions had such no-aid provisions—several of these under the mandate of the Federal Congress. *Id.* at 2258 (Roberts, C.J.). Such overwhelming assent for what Justice Alito characterizes as thinly veiled anti-Catholic animus, roughly contemporaneous with ratification, certainly suggests that protections for Catholics were *not* part of the First (or Fourteenth) Amendment's public meaning at the time of its incorporation. Without further belaboring this discussion of the history of religious intolerance in America, I will confess that I reject, at least in this context, an interpretive method which must either incorporate into "Free Exercise" the popular bigotry of the ratifying public, or else lose its primary purported virtue—objectivity. "It is modern Americans, and not the founders, who must draw the lessons from past persecutions and apply those lessons to current conditions." Laycock, *Text, Intent, and the Religion Clauses*, *supra*, at 693.

Second, a satisfactory resolution of the original public meaning of the Free Exercise Clause in the lead-up to 1791 is almost uniquely elusive, as the founding history is rife with wildly polarized views on the matter. Eventually, the opposing sides settled for a provision of sufficient breadth and ambiguity to satisfy most. Today, there remains division over how to read these historical disagreements. *Compare* ELLIS M. WEST, THE FREE EXERCISE OF RELIGION IN AMERICA: ITS ORIGINAL CONSTITUTIONAL MEANING (2019), *with* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1989). Such historical debates, while interesting, border on intractable, and make for a poor interpretive touchstone.

121. U.S. CONST. amend. I.

122. *Compare supra* Part II.A, *and supra* Part II.B, *with supra* Part II.C.

123. *See Exercise*, NEW OXFORD AMERICAN DICTIONARY (Angus Stevenson & Christine A. Lindberg eds., 2010) (defining "exercise" as, inter alia, "activity requiring physical effort, carried out especially to sustain or improve health and fitness," "a process or activity carried out for a specific purpose," and "the use or application of a faculty, right, or process").

124. SAMUEL JOHNSON, *Exercise*, A DICTIONARY OF THE ENGLISH LANGUAGE (1755), https://johnsonsdictionaryonline.com/1755/exercise_ns [https://perma.cc/F39J-G2KD].

125. *Id.*

126. NOAH WEBSTER, *Exercise*, *in* AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), https://webstersdictionary1828.com/Dictionary/exercise [https://perma.cc/4Z2Q-26RW].

127. *Id.*

By its own terms, the Free Exercise Clause protects religious conduct, speech, and practice.[128] Though the language of the cases has swept more broadly, their facts and holdings (before *Trinity Lutheran*) universally concerned religious activity—whether that activity was speech,[129] worship,[130] ministry,[131] or sabbath observance.[132] Active conduct has been the issue both in those cases concerning exemptions from general regulations[133] and in those challenging laws alleged to discriminate against religious practice.[134]. Simply *being* religious, absent any religious conduct, has fallen outside the plain text of the Free Exercise Clause's protections.

B. Unconstitutional Conditions & the Problem with Trinity Lutheran

A state need not criminalize religious exercise to offend the Free Exercise Clause. "Governmental imposition of . . . a choice" between a government benefit and exercising one's faith "puts the same kind of

128. Professor Laycock (joined in some more recent writings by Professor Berg) has argued for over thirty years that the text of the First Amendment extends to religious conduct. *See* Berg & Laycock, *supra* note 15, at 365 ("The 'exercise of religion' covers not just having a religious identity, but also living out that religious identity[.]"); Laycock, *Text, Intent, and the Religion Clauses*, *supra* note 120, at 687 ("[T]he word 'exercise' is powerful textual evidence that the protection extends beyond mere belief and reaches religious conduct"). Admittedly, my analysis departs from that of Professors Laycock and Berg on two points: (1) Professor Laycock has consistently assumed that, even so, religious status distinctions are still best cognized under the First Amendment, and (2) Professors Laycock and Berg describe a restriction on the schools in which a parent may apply a scholarship grant as equivalent to a prohibition on the parents' religious activity, rather than an unconstitutional condition. Berg & Laycock, *supra* note 15, at 365. This Note takes a different view on these questions, as discussed *infra*. *See also* Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 469–71 (2017) (Gorsuch, J., concurring in part).

129. *See, e.g.*, cases cited *supra* note 17.

130. *See, e.g.*, Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

131. *See, e.g.*, McDaniel v. Paty, 435 U.S. 618 (1978) (plurality opinion).

132. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).

133. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990) (considering exemption religious use of peyote under rubric of Free Exercise); United States v. Lee, 455 U.S. 252 (1982) (considering exemption from military conscription under Free Exercise); Wisconsin v. Yoder, 406 U.S. 205 (1972) (considering exemption from compulsory education laws under Free Exercise); Reynolds v. United States, 98 U.S. 146 (1878) (considering exemption from bigamy prohibitions under Free Exercise).

134. *See, e.g.*, Torasco v. Watkins, 367 U.S. 488 (1961) (holding a religious test for public office to be unconstitutional under both the Free Exercise and Establishment clauses); Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993); McDaniel v. Paty, 435 U.S. 618 (1978). Non-funding cases after *Trinity Lutheran* have often continued in this vein. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (considering discriminatory prohibition on public prayer by coach under Free Exercise); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (deeming proceedings against baker who refused, on religious grounds, to bake cakes for LGBTQIA+ weddings to have discriminated against his Free Exercise, because the proceedings were filled with anti-religious animus).

burden upon the free exercise of religion as would a fine."[135] Such a choice imposes what is often called an "unconstitutional condition" on the benefit.[136] In general, the doctrine of unconstitutional conditions prohibits the government from conditioning the receipt of an entitlement upon the relinquishing of a constitutional right.[137] But not every restriction placed on government funds will impose an unconstitutional condition. The government may generally define the scope of a benefit it offers, and may restrict the ways that benefit can be used in ways that would ordinarily constitute content or viewpoint discrimination.[138] As Chief Justice Rehnquist noted in *Rust v. Sullivan*, a condition on government funding becomes unconstitutional when "the [g]overnment has placed a condition on the *recipient* of the subsidy rather than on a particular program, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program."[139]

The doctrine of unconstitutional conditions has long applied in the Free Exercise context, as evidenced by *Sherbert v. Verner* and *Thomas v. Review Board of the Indiana Employment Security Division.*[140] In both cases, the government conditioned eligibility for a benefit—unemployment compensation—on a believer's willingness either to engage in conduct their religion prohibited, or to desist from conduct their

135. *Sherbert*, 374 U.S. at 405

136. *See* Rust v. Sullivan, 500 U.S. 173, 197 (1991) ("[O]ur 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy . . . effectively prohibiting the recipient from engaging in . . . protected conduct outside the scope of the federally funded program."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) ("The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.").

137. Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("[E]ven though a person has no 'right' to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest."); *see also Rust*, 500 U.S. at 196.

138. *See Rust*, 500 U.S. at 193 ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."); Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc. (*AOSI*), 570 U.S. 205, 214 (2013) (Roberts, C.J.) ("As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights."); *see also* Regan v. Taxation with Representation, 461 U.S. 540, 545–46 (1983).

139. *Rust*, 500 U.S. at 197.

140. Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Rev. Bd., 450 U.S. 707 (1981); *see also* McDaniel v. Paty, 435 U.S. 618, 633 (1978) (Brennan, J., concurring in judgment) ("The . . . proposition—that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment—is . . . squarely rejected by precedent.").

religion compelled.[141] In both cases, the government "force[d] [the plaintiff] to choose between . . . forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand."[142] In both cases, the plaintiffs refused to violate the tenets of their faith, even though the government threatened ineligibility for unemployment benefits.[143] And in both cases, the states' conditions on unemployment compensation functioned to regulate, through the back door, conduct which the Constitution would never permit them to regulate through the front.[144]

So, in the Free Exercise context, the Court will strike down a statute as imposing an unconstitutional condition on a government benefit when it finds that (a) the government grant is contingent upon the grantee engaging in or foregoing some religious conduct or speech which would normally be constitutionally protected,[145] (b) the government could not have compelled the grantee to engage in or forego such conduct by direct command,[146] and (c) the condition placed on the granted benefit extends beyond how the benefit may be used.[147] This means that neither a state nor the federal government may condition a benefit on a grantee's promise not to engage in his normal religious worship or otherwise act contrary to his faith, except where that religious conduct goes directly to how the grant is used.

This straightforward understanding is complicated by the legal fiction of religious status conditions posited in *Trinity Lutheran*. Ordinarily, the doctrine of unconstitutional conditions falls neatly on the "conduct" side

141. *Thomas*, 450 U.S. at 718 ("[W]e see that Mrs. Sherbert was dismissed because she refused to work on Saturdays[.] . . . In both [that case and this one], the termination flowed from the fact that the employment, once acceptable, became religiously objectionable because of changed conditions.").

142. *Sherbert*, 374 U.S. at 404.

143. *Id.*; *Thomas*, 450 U.S. at 717.

144. *See Sherbert*, 374 U.S. at 403 ("Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on" Free Exercise satisfies Strict Scrutiny.); *Thomas*, 450 U.S. at 717 ("In a variety of ways we have said that '[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.'" (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972))); *cf.* Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.'" (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958))).

145. *See, e.g.*, *Sherbert*, 374 U.S. at 404 ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

146. *See supra* note 144.

147. *See supra* note 138.

of the status-conduct line drawn in Part III.A. When the government grants a benefit with a condition attached, that condition usually requires that a grantee *do* or *not do* something. A condition on a fundamental aspect of oneself would make little sense under the Court's doctrine. Though an individual may adopt some government-desired behavior or speak some government-espoused message to meet the prerequisites of some government funding program, she cannot become what she fundamentally is not. In *Trinity Lutheran*, however, the Court distended this doctrine to the point of legal fiction, in an effort to place religious *status* discrimination within its reach.[148] So the Court declared that Missouri's playground resurfacing grant program "put[] Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution."[149] But this would be an unusual "condition"—one of existential proportions, and virtually certain not to occur. To suggest that Trinity Lutheran Church could cease to be a religious institution is not only unrealistic—it would require that Trinity Lutheran Church change *all three words in its name*. Such a "condition" is no condition at all; it is a straightforward, status-based exclusion.

Stated plainly, differential treatment of religious entities vis-à-vis nonreligious entities has little to do with the right to exercise one's religion. However, by framing such differential treatment as just another sort of unconstitutional condition on Free Exercise rights, the Court dragged these claims under the umbrella of the First Amendment. But such claims simply do not fit within the kind of conditions which were deemed unconstitutional as applied to Ms. Sherbert and Mr. Thomas. To say that a person or church chooses between a government benefit and their core religious identity is fanciful. Though one may choose to convert to a religion, one does not, ordinarily, wake up each day and choose anew a religious identity. One could, however, wake up each day and choose anew what religious conduct to engage in. And such a choice *could* reasonably be influenced by the looming risk of disqualification from a government entitlement. Thus, a State's refusal to grant a benefit so long as the putative recipient engages in some religious conduct clearly works an unconstitutional condition upon her Free Exercise right. A denial of a benefit based purely on one's religious status, however, is more precisely considered an exclusion than a condition.

148. Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 463 (2017). ("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. Trinity Lutheran is a member of the community too, and the State's decision to exclude it for purposes of this public program must withstand the strictest scrutiny." (citations omitted)).

149. *Id.* at 460–64.

C. The Equal Protection Alternative

This legal fiction of unconstitutional-status-conditions is not only unnecessary; it affirmatively reads redundancy into the Constitution. A law that treated differently a religious entity and a nonreligious entity, regardless of their conduct, would logically the Equal Protection Clause of the Fourteenth Amendment. In its famous fourth footnote to its decision in *United States v. Carolene Products*, the Court suggested that "prejudice against discrete and insular minorities" as embodied in "statutes directed at particular religious . . . or racial minorities" could justify a Court in subjecting a law to heightened scrutiny.[150] Here, the Court grouped the heightened review of religious status classifications *not* with its discussion of "the first ten amendments" in the first paragraph of the footnote, but with its discussion of "prejudice against . . . minorities," a clear allusion to the Fourteenth Amendment's guarantee of Equal Protection.[151] And Footnote Four is not an island; the Court has frequently suggested that religious classifications would be suspect under the Equal Protection Clause.[152] Indeed, such discrimination on the basis of religious status fits neatly with other types of discrimination traditionally associated with equal protection, such as those based on race, sex, and sexuality.

Three things, then, are true: (1) the Free Exercise Clause, by its plain text and as-applied pre-*Trinity*, is concerned with discriminatory treatment of religious conduct, practice, or speech;[153] (2) discrimination based purely upon religious *status* fits within the Free Exercise Clause only by virtue of a legal fiction;[154] and (3) the Equal Protection Clause, on its face, can apply to class distinctions based upon religion.[155] But this is not to say that *every* sort of religious discrimination should be evaluated under Equal Protection. Classifications based only upon religious status, like more traditional suspect classifications based upon race, sex, etc., under the Equal Protection Clause, are not based on things people *do*, but things people *are*.[156] There is no jurisprudence regarding the equal

150. United States v. Carolene Products, 304 U.S. 144, 152–53 n.4 (1938); *see also* Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 919 (2013) ("The clear implication of Footnote Four [of *Carolene Products*] is that religion gets Fourteenth Amendment protection in addition to and above and beyond any First Amendment protections that religion gets under the Establishment and Free Exercise Clauses.").

151. *Carolene Products*, 304 U.S. at 152–53 n.4.

152. *See* Calabresi & Salander, *supra* note 150, at 919 n.49 (collecting cases which list religion as a protected class for Equal Protection analysis).

153. *See supra* Part III.A.

154. *See supra* Part III.B.

155. *See supra* notes 150.

156. *See* Plyler v. Doe, 457 U.S. 202, 216 (1982) ("The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'" (quoting F.S. Royster Guano v. Virginia, 253

protection of one's ability to engage in conduct associated with a single race, nor to do things traditionally associated with one sex, except to the extent that such policies were enacted with a purpose to discriminate against a protected class.[157] In fact, the sex discrimination cases emphasize that the classification cannot be justified by "overbroad generalizations about the different talents, capacities, or preferences of males and females."[158]

Because there are two distinct natures to religious discrimination, religious individuals can receive two distinct species of protection. First, they can receive protection from laws which inhibit their religious conduct, speech, and practice. Such laws are covered by the plain text of the Free Exercise Clause. This type of protection would also cover policies like the one at issue in *Sherbert*—in which religious individuals are made to choose between engaging in specific religious conduct, speech, or practices or receiving an unrelated government benefit—because such policies impose true unconstitutional conditions with respect to religious exercise.[159] Second, religious believers warrant protection from unjustified discriminatory treatment because of their religious status. As shown, this second sort of protection should be and is provided under the Equal Protection Clause.

U.S. 412, 415 (1920))); 3 ROTUNDA & NOWAK, *supra* note 1, § 18.2(a) ("Equal protection is the guarantee that similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same."). *But see supra* note 119.

157. *See, e.g.*, Arnold v. Barbers Hill Indep. Sch. Dist., 479 F. Supp. 3d 511, 519–28 (S.D. Tex. 2020) (finding plaintiff likely to succeed on merits of Equal Protections claims (1) because the school's hairstyle policy treated sexes differently on its face, and (2) because the policy against dreadlocks was enacted with a discriminatory *purpose*, based on factors in *Vill. Of Arlington Heights v. Met. Housing Dev. Corp.*, 429 U.S. 252 (1977)); *id.* at 528-30 (determining that student's right to wear his hair in dreadlocks was protected was, in itself, protected under the First Amendment, not under Equal Protection); *cf.* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1032–33 (11th Cir. 2016) (noting that, as far as the Eleventh Circuit could tell, under Title VII, "every court to have considered the issue has rejected the argument that Title VII protects hairstyles culturally associated with race," and collecting cases). *But see* Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1142 (2004) (arguing that "there is an urgent need to redefine Title VII's definition of race and ethnicity to include both biological, visible racial/ethnic features and performed features associated with racial and ethnic identity").

158. United States v. Virginia, 518 U.S. 515, 533 (1996); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (noting, in the Title VII context, that it does not "require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex, and not her interpersonal skills, that has drawn the criticism.").

159. *See supra* Part III.B.

D. A Better Route to Espinoza *&* Carson[160]

The framework developed so far suggests three ways in which the government might seek to discriminate against religion generally: (a) by subjecting religious conduct or speech to direct discriminatory treatment, (b) by inhibiting religious exercise by conditioning a benefit on an individual's decision to desist from some religious conduct or speech, and (c) by treating persons or entities differently based solely on their religious status or identity. As discussed, the first two buckets fit easily within the Free Exercise Clause, while the last fits more comfortably under the Equal Protection Clause. *Espinoza* and *Carson*, then, would have to fit within one of the first two buckets to feel at home under Free Exercise. Because neither Montana nor Maine enacted a bald command penalizing some religious speech or exercise akin to that in *Lukumi Babalu Aye*, neither *Espinoza* nor *Carson* fall into bucket (a).[161] The question, therefore, is whether a restriction on the use of state tuition assistance at religious schools imposes (b) an unconstitutional condition on religious exercise, or (c) denies equal protection on the basis of religious status.

At first glance, religious tuition assistance cases, like *Espinoza* and *Carson*, have an unconstitutional conditions flavor that *Trinity Lutheran* lacked. As discussed, the program at issue in *Trinity Lutheran* can only

160. This Section often elides the Court's opinions in Carson v. Makin, 142 S. Ct. 1987 (2022), and Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020)—referring to the facts of one here and of the other there, though always identifying from which case a specific fact arises. The facts in the two cases do differ in notable respects, but not in any way that would alter the broad contours of the legal theory set forth in this Note. Except where this Section indicates to the contrary, it accepts the factual and logical congruence of the two decisions, as described by Chief Justice Roberts in his opinion for the majority in *Carson*:

> [In *Espinoza*], as here, we considered a state benefit program under which public funds flowed to support tuition payments at private schools. And there, as here, that program specifically carved out private religious schools from those eligible to receive such funds. While the wording of the Montana and Maine provisions is different, their effect is the same: to "disqualify some private schools" from funding "solely because they are religious."

Carson, 142 S. Ct. at 1997 (quoting *Espinoza*, 140 S. Ct. at 2261).

161. *Compare* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 527 (1993) (striking down city ordinances that made it a crime to "kill[], slaughter[], or sacrifice[] animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed"), *with Espinoza*, 140 S. Ct. at 2255 *(*"We acknowledged [in *Trinity Lutheran*] that the State had not 'criminalized' the way in which the Church worshipped . . . . But the State's discriminatory policy was 'odious to our Constitution all the same.' Here too Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools." (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 462, 467 (2017))), *and Carson*, 132 S. Ct. at 1996 ("The Free Exercise Clause of the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988))), *and id.* at 1998 ("The State pays tuition for certain students at private schools—so long as the schools are not religious.").

be described as imposing an unconstitutional condition by dint of a legal fiction, which imagines that Trinity Lutheran Church might cease to be a church to earn a playground surfacing grant. By contrast, *Espinoza* and *Carson* directly implicated conduct—the sending of children to religious schools to receive a religious education.[162] And, in *Espinoza* and *Carson*, it was absolutely conceivable that parents might reasonably have foregone religious schooling in order to receive the tuition assistance, even if that religious schooling had substantial significance to their faith.

A closer examination, however, reveals a substantial analytical problem in reading *Espinoza* and *Carson* this way. True—the Court employed the language of unconstitutional conditions in describing the Maine and Montana programs' impact on First Amendment rights.[163] But if one takes this unconstitutional condition argument seriously, and if one strives to avoid letting Equal Protection arguments bleed in, problems arise from the start.

A state creates an unconstitutional condition when it "place[s] a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting [the recipient] from engaging in the protected conduct outside the scope of the . . . program."[164] Such a condition "puts [the recipient] to a choice: . . . participate in an otherwise available benefit program or" exercise their constitutional rights.[165] But tuition assistance programs, like those at issue in *Espinoza* and *Carson*, make it difficult to identify who the "recipient of the subsidy" is. Who is put to the choice in *Espinoza*, for example? In such programs, the scheme is triangular: grant money flows from the public fisc to parents in the form of tuition assistance, and then from the parents to the school.[166] The student and his family benefit from the grant

162. *See Espinoza*, 140 S. Ct. at 2252 ("This suit was brought by three mothers whose children attend Stillwater Christian School in northwestern Montana. . . . Rule 1 blocked petitioners from using scholarship funds for tuition at Stillwater."); *Carson*, 142 S. Ct. at 1995 ("Absent the 'nonsectarian' requirement, the [Petitioner-Parents] would have asked [the State] to pay the tuition to send their children to [their preferred religious schools].").

163. *See, e.g.*, *Espinoza*, 140 S. Ct. at 2261 ("[T]he no-aid provision penalizes that decision by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one, and for no other reason."); *id.* at 2256 ("So applied, the provision imposes special disabilities on the basis of religious status and conditions the availability of benefits upon a recipient's willingness to surrender its religiously impelled status." (internal quotation marks and alterations omitted) (quoting *Trinity Lutheran*, 582 U.S. at 461–62)); *Carson*, 142 S. Ct. at 1997 ("By conditioning the availability of benefits in that manner, Maine's tuition assistance program . . . effectively penalizes the free exercise of religion." (internal quotation marks and alterations omitted) (quoting *Trinity Lutheran*, 582 U.S. at 462)).

164. Rust v. Sullivan, 500 U.S. 173, 197 (1991).

165. *Trinity Lutheran*, 582 U.S. at 460–64.

166. *See, e.g.*, *Espinoza*, 140 S. Ct. at 2254 (noting that "the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools"); *Carson*, 142 S. Ct. at 1991 (describing Maine's program as a "neutral benefit program in which

funding, presumably, but it is the school's bank account that ultimately swells. Which of these parties is the recipient of the benefit? Unlike in *Trinity Lutheran*, the caption "*Espinoza v. Montana Dep't of Revenue*" contained not the name of an institution, but that of a parent as petitioner. However, just because a parent has standing to sue does not *necessarily* mean that parent was the intended recipient of the benefit. As discussed above, Chief Justice Roberts vacillates on this issue in both the *Espinoza* and *Carson* decisions, describing the benefit as offered to the school one moment, and the family the next.[167] This Section looks at each possibility in turn.

The school cannot be the grantee under either the Montana or Maine programs for two reasons. First, nearly twenty years before *Espinoza*, the Court held in *Zelman v. Simmons-Harris* that when private citizens "direct government aid to religious schools wholly as a result of their own genuine and independent private choice[s]," the link between government funds and the religious schools is severed.[168] In that case, the Court held that a private school voucher program that included religious schools did not violate the Establishment Clause.[169] In fact, the Chief Justice cited *Zelman* to dispose of Montana's Establishment Clause arguments.[170] If such indirect aid to a religious school is not a government benefit for that school in the Establishment Clause context, it cannot logically be deemed a benefit in the Free Exercise context. A state cannot impose a "condition"—constitutional or otherwise—on funds it has no authority to give.[171]

Second, even if the private-choice rationale did not apply in the Free Exercise context, the "condition" on the school in *Espinoza* is as improbable as that imposed upon the church in *Trinity Lutheran*. Religious schools have existed for centuries, and for the three decades between *Lemon v. Kurtzman*[172] and *Zelman*, they continued to teach without government aid to subsidize tuition.[173] To suppose that they

public funds flow to religious organizations through the independent choices of private benefit recipients").

167. *See supra* notes 99 (citing conflicting passages in *Espinoza*), 107 (citing similar conflicting passages in *Carson*).

168. 536 U.S. 639, 652 (2002).

169. *Id.* at 653.

170. *Espinoza*, 140 S. Ct. at 2254 ("Any Establishment Clause objection to the scholarship program here is particularly unavailing because the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools." (citing *Zelman*, 536 U.S. at 649–53)).

171. *Zelman*, 536 U.S. at 652.

172. 403 U.S. 602 (1971).

173. *Zelman*, 536 U.S. at 726 (Breyer, J., dissenting) ("I concede that the Establishment Clause currently permits States to channel various forms of assistance to religious schools, for example, transportation costs for students, computers, and secular texts. . . . School voucher programs differ,

would give up their religious character for the sake of government tuition waivers strains credulity. It is conceivable that such schools might close for lack of funds, but that is not an unconstitutional condition—it is the result of an express disadvantage imposed on the basis of the institution's religious status. Their closing would not be a result of any "choice" which the schools had made to comply or not comply with a government requirement; it would be the consequence of alleged discrimination and governmental exclusion.

The logical result: as in *Trinity Lutheran*, any "condition" placed upon these schools functions, in fact, as a status-based exclusion. At a minimum, this lens—which views Montana's program as excluding religious schools from the rolls of voucher-eligible institutions—depicts the problem in a simpler and more honest light than the alternative—which views the program as holding hostage a religious school's eligibility to maybe, indirectly receive government funds, unless the religious school consents not to be religious anymore. Put simply, it makes as little sense to read the Montana and Maine policies as conditioning a benefit on the schools' surrender of their religion as it did to when the Chief Justice read such a "condition" into the policy at issue in *Trinity Lutheran*.[174]

Are the students, then, the intended recipients of the Maine and Montana benefits? This seems the more logical answer. The funds in both *Espinoza* and *Carson* flowed to the families without third-party intervention and enabled the students to attend schools they could not otherwise afford. And the "conditions" that accompanied the Maine and Montana grants restricted the students' choices much more directly than they restricted the schools'. These tuition assistance payments were available to students, if and only if they used them at a nonreligious school.[175]

But it does not necessarily follow that the condition imposed upon the Maine and Montana students' school choice is an *unconstitutional* condition. The doctrine of unconstitutional conditions "involve[s] situations in which the [g]overnment has placed a condition on the *recipient* of the subsidy rather than on a particular program or service."[176] The government can still define the scope of how its largesse may be used, however.[177] Thus, a state or the federal government can, compliant with

however, in both kind and degree from aid programs upheld in the past. They differ in kind because they direct financing to a core function of the church: the teaching of religious truths to young children.").

174. *See supra* Part III.B.

175. *See Carson*, 142 S. Ct. at 1998 ("The State pays tuition for certain students at private schools—so long as the schools are not religious.").

176. Rust v. Sullivan, 500 U.S. 173, 197 (1991).

177. *See id.* at 193 ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time

the Constitution, prohibit the use of grant funding to advocate for particular points of view or engage in constitutionally protected activities it does not wish to support.[178] What the government cannot do is withhold that grant funding until the grantee agrees not to exercise their rights outside of the grant program.[179]

The restrictions on the tuition assistance payments at issue in *Carson* and *Espinoza* clearly fell within the former, permissible camp. The requirements that the scholarship funds be used only at secular schools would not have prevented a single dime from flowing to religious families who chose to exercise their constitutional rights extrinsic to their use of the grant funds.[180] Montana and Maine neither demanded that the families receiving these benefits renounce their faith *ex ante*, nor did they threaten to revoke that assistance if the families continued to exercise their faith *ex post*.[181] The policies of Montana and Maine restricted how the benefits those states provided might be used—not, as in *Sherbert* or *McDaniel*, who was eligible to receive them.[182] The students and their families were entitled to the same benefits as everyone else—those benefits just did not include their preferred choice of (religious) schools. Such restrictions may well be problematic, but not because they impose any unconstitutional condition.

Rust v. Sullivan represents the canonical formulation of the unconstitutional-conditions-on-government-funding doctrine, but

funding an alternative program which seeks to deal with the problem in another way.").

178. *Cf. AOSI*, 570 U.S. 205, 214–15 (2013) ("[T]he relevant distinction . . . is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.").

179. *See id.* at 217–18 (holding that a government funding grant could not be conditioned on the grantee's explicit opposition to prostitution and sex trafficking, but the government could prohibit use of grant funds for promoting prostitution and sex trafficking).

180. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2289 (2020) (Breyer, J., dissenting) ("Montana's law does not punish religious exercise. It does not deny anyone, because of their faith, the right to participate in political affairs of the community. And it does not require students to choose between their religious beliefs and receiving secular government aid such as unemployment benefits. The State has simply chosen not to fund programs that, in significant part, typically involve the teaching and practice of religious devotion. And 'a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.'" (internal citations omitted) (quoting Regan v. Taxation with Representation of Wash., 461 U.S. 540, 549 (1983))).

181. *Id.*

182. *Compare id.* at 2252 (Roberts, C.J.) ("That administrative rule prohibited families from using scholarships at religious schools."), *and Carson*, 142 S. Ct. at 1998 ("The State pays tuition for certain students at private schools—so long as the schools are not religious."), *with* Sherbert v. Verner, 374 U.S. 398, 404 (1963) ("[N]ot only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable."), *and* McDaniel v. Paty, 435 U.S. 618, 621 (1978) (plurality opinion) (addressing "whether a Tennessee statute barring [ministers] from serving as delegates to the State's limited constitutional convention deprived appellant McDaniel, an ordained minister, of the right to the free exercise of religion guaranteed by the First Amendment").

subsequent cases have grappled with when a supposed condition on the *use* of government funding in fact functions as a restriction on the *user*.[183] *Carson*, the only one of the *Trinity-Espinoza-Carson* trilogy to address the *Rust* line of cases directly, suggested that Maine's program had crossed that line.[184] In his opinion for the Court, the Chief Justice quoted from *Agency for International Development v. Alliance for Open Society International, Inc.* ("*AOSI*")—a case explicitly applying *Rust* and its unconstitutional conditions rule:

> Saying that Maine offers a benefit limited to private secular education is just another way of saying that Maine does not extend tuition assistance payments to parents who choose to educate their children at religious schools. But "the definition of a particular program can always be manipulated to subsume the challenged condition," and to allow States to "recast a condition on funding" in this manner would be to see "the First Amendment . . . reduced to a simple semantic exercise."[185]

But *AOSI*'s concern with expansive definitions of what constitutes a condition on the use of funds bears scant relation to the restrictions on parents in *Espinoza* and *Carson*.[186] *AOSI* involved a government program that conditioned grants to organizations fighting the AIDs epidemic on those organizations' adopting policies opposed to prostitution.[187] Though this condition bore some nexus to the aims of the program at issue—at least according to the government—the Court struck it down as "demanding that funding recipients adopt . . . the [g]overnment's view on an issue of public concern," and thereby "affecting 'protected conduct *outside the scope of the federally funded program*.'"[188] The Montana and Maine programs plainly restricted student choice—but they plainly did so within the scope of the funded programs.

Further, the fact that the Chief Justice skirts around *Rust* and its progeny is not terribly surprising—if *Carson* correctly applied the unconstitutional conditions doctrine laid out in *Rust*, then *Rust* itself was wrongly decided. In *Rust*, grantees under Title X of the Public Health Services Act received funds to offer family planning services but were forbidden from advising any Title X patient about the possibility of terminating a pregnancy.[189] Though this restriction implicated both the

183. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001); *AOSI*, 570 U.S. 205.

184. *See Carson*, 142 S. Ct. at 1999.

185. *Carson*, 142 S. Ct. at 1999 (quoting *AOSI*, 570 U.S. at 215).

186. Admittedly, *AOSI*'s concerns about defining the program to exclude a class of organizations from receiving funding *would* be relevant, if Montana or Maine's programs provided a benefit for the *schools*, but for reasons discussed *supra*, such a reading is problematic for other reasons.

187. *AOSI*, 570 U.S. at 209–10.

188. *Id.* at 218 (Roberts, C.J.) (quoting Rust v. Sullivan, 500 U.S. 173, 197 (1991)) (emphasis added).

189. *Rust*, 500 U.S. at 178–80.

Free Speech Clause and the then-recognized constitutional right to abortion, the *Rust* Court held that "the limitation [on the grantees' ability to exercise their constitutional rights] is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority."[190] Yet, to plug the facts of *Rust* into Chief Justice Roberts's reasoning in *Carson*, "[s]aying that [Title X] offers a benefit limited to [*preventive* family planning counseling] is just another way of saying that [Title X] does not extend [employment] to [doctors] who choose to [express their views on abortion to patients]."[191] Nothing in the Court's opinions in *Trinity Lutheran*, *Espinoza*, or *Carson*, however, suggests the Court intended to overrule *Rust*. Something else is at work.

The inconsistency between the *Rust* and *Trinity Lutheran* lines of cases stems from reading Equal Protection ideas into the doctrine of unconstitutional conditions. As shown, a restriction on the use of state-provided tuition assistance at religious schools, even if discriminatory, cannot fit neatly into the doctrine of unconstitutional conditions—for the schools, such a rule would not properly be a "condition," and, for the students, any condition would not be "unconstitutional." The doctrine set forth in *Rust* and *AOSI* was never meant to alleviate unfairness and discrimination, but to protect against government coercion. And, for all their rhetoric about Free Exercise and about citizens "put to the choice" between First Amendment rights and government benefits, neither *Espinoza* nor *Carson*—nor even *Trinity Lutheran*—involved the government *compelling* anyone not to exercise their religion.[192]

Carson and *Espinoza* were always about "discrimination on the basis of religious status."[193] The religious students who received tuition

190. *Id.* at 199.

191. Carson v. Makin, 142 S. Ct. 1987, 1999 (2022).

192. For an example of a proper application of a *Rust*-style rule in the Free Exercise context, look no further than Sherbert v. Verner, 374 U.S. 398 (1963) (discussed in *supra* Part II.A). There, the government threatened to withhold unemployment benefits from a woman fired for missing work to observe a Saturday sabbath. By this restriction on access to unemployment benefits, the government hoped individuals would stop demanding accommodations for their sabbath observance—a clearly unconstitutional condition on a general government program.

193. *Carson*, 142 S. Ct. at 2001; *see also id.* at 1998 ("[T]here is nothing neutral about Maine's program."); *id.* at 1997 ("BCS and Temple Academy are disqualified from this generally available benefit 'solely because of their religious character.'"); Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 462 (2017) ("The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."); *id.* at 467 ("[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 all the same, and cannot stand."); *id.* at 458 ("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.'" (citing Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533, 542 (1993))); Espinoza v. Mont.

assistance from Maine and Montana, however, were not "discriminated against," because they received the same benefit as every other student, subject to the same conditions. At bottom, the Chief Justice's problem with the policies in *Carson* and *Espinoza* is that both single out a class of schools, namely *religious* schools, for differential treatment under the law. He, and the justices who joined his opinions, felt that this distinction reflected an invidious and discriminatory will toward religious groups, and that the states lacked a sufficient justification for treating these otherwise similarly situated schools so differently from their secular counterparts.[194]

To rectify such an unequal protection of the laws, the Court need have looked no further than the Equal Protection Clause. As suggested in Part III.C, Equal Protection would have afforded the Chief Justice a cleaner route to reach the same conclusions. Instead, Chief Justice Roberts chose to read a prohibition on such status-based discrimination directly into a Clause which, on its face, has little to do with *status* and everything to do with *exercise*.[195] To accomplish this, the majorities in *Carson*, *Espinoza*, and *Trinity* disregarded the plain meaning of "exercise," preferring to rely on dicta and an understanding of unconstitutional conditions that strained the doctrine past its limits. Their reason for ignoring the Equal Protection path is not clear, and any answer must be speculation. However, three likely objections to shifting these claims to the Equal Protection Clause warrant address: (1) that the Equal Protection Clause might not subject religious status discrimination to strict scrutiny, (2) that the Court should not fragment religious protections by locating half in the First and half in the Fourteenth Amendments, and (3) that religious status discrimination warrants unique and self-contained protections that are jurisprudentially separate from other status-based discrimination under the Equal Protection Clause.

This first worry is easily assuaged—given the concern expressed by the drafters of the Bill of Rights for protecting religion, it is difficult to imagine that the level of scrutiny for religious status discriminations would be anything but strict. And, indeed, Footnote Four of the Court's

Dep't of Revenue, 140 S. Ct. at 2256 ("The Montana Constitution discriminates based on religious status . . . .").

194. *Id.* at 2260 ("Because the Montana Supreme Court applied the no-aid provision to discriminate against schools and parents based on the religious character of the school, the 'strictest scrutiny' is required."); *id.* at 2261 ("Montana's interest in public education cannot justify a no-aid provision that requires only religious private schools to 'bear [its] weight.'" (quoting *Lukumi*, 508 U.S. at 547)); *Carson*, 142 S. Ct. at 1987 ("Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise.").

195. *See, e.g.*, *Carson*, 142 S. Ct. at 2001 ("the prohibition on *status-based* discrimination under the Free *Exercise* Clause is not a permission to engage in use-based discrimination." (emphasis added)).

Carolene Products opinion suggested as much.[196] The ends-means standard and analysis need not change. In *Espinoza* and *Carson*, the defendants claimed a compelling interest in fostering greater church-state separation than the Establishment Clause mandated.[197] The Court found this interest inadequate.[198] Nothing about this reasoning—whether the reader believes it to be right or wrong—changes if protections against religious status discrimination are located within the Equal Protection Clause.

The second concern regarding the fragmentation of religious liberties is understandable. But keeping status-based cases under the Free Exercise clause muddies more than it clarifies. The jumbled language of early cases, some of which seemed to evoke the Free Exercise, Establishment, and Equal Protection Clauses in the same breath, attests to the inherent confusion.[199] And the gradual (and sometimes not so gradual) importation of Equal Protection concepts into Free Exercise jurisprudence has led to confusion and doctrinal malleability.[200] Further, given the relationship between ethnicity, race, and religion in some instances, some discriminatory laws could be addressed under either clause—and potentially yield differing outcomes as a result.[201]

The third objection—that, because religion is specified in the First Amendment, it deserves especial protection above and apart from the Equal Protection Clause—was partially addressed at the end of Part III.C. If religious status discrimination were to fall within the Equal Protection Clause, the Free Exercise Clause would not be without application. The latter clause stands as a clear barrier to laws which would restrict religious activity—a sort of protection not generally accorded to other protected classes that lack the dual nature of religion.[202] The dual nature and dual source of these protections would ensure that religious status discriminations are handled like other status discriminations, and that religious exercise, the distinctive feature of religion, receives independent protections. To demand any further protection for religious *status*, however, would imply that other invidious status-based discriminations—such as discriminations based on race, over which this nation fought a civil war, and concerning which three constitutional amendments were

196. 304 U.S. 144, 152–53 n.4 (1937).

197. *Espinoza*, 140 S. Ct. at 2260; *Carson*, 142 S. Ct. at 1997–98.

198. *Espinoza*, 140 S. Ct. at 2260–61; *Carson*, 142 S. Ct. at 1998.

199. *See, e.g.*, Fowler v. Rhode Island, 345 U.S. 67, 67–70 (1953).

200. *Cf.* Meyler, *supra* note 5, at 278–80; Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 6–9 (2016).

201. *See* Calabresi & Salander, *supra* note 150, at 961–65.

202. *See* discussion in *supra* Part III.A. *But see supra* note 119.

ratified—warrant less constitutional scrutiny than those based upon religious status.

IV. CONCLUSION

When the Court decided *Trinity Lutheran*, it knew it could not brook differential treatment based purely upon religious status. At that point, the Court could and should have resolved the case on Equal Protection grounds. It did not. And because it did not, the subsequent decisions in *Espinoza* and *Carson* likewise swerved around the Equal Protection question to careen straight into the realm of Free Exercise. But status is not exercise, and exclusions are not conditions. The long history of Free Exercise cases, along with the established law regarding what sort of conditions the government may place on the entitlements it disburses, militate against a reading of the Free Exercise Clause which would concern itself with identity rather than conduct. If the policies in *Espinoza* and *Carson* offended the Constitution, it was because they drew a line between religious and non-religious organizations and treated them differently, not because they pressured any believer or institution to abandon their profound sense of religious identity in favor of scholarship funds.

Future judges and litigants have an opportunity to clarify the jurisprudence. Although *Trinity Lutheran*, *Espinoza*, and *Carson* all purport to reach their conclusions based on the Free Exercise Clause, nothing about the application of strict scrutiny, nor their findings of unconstitutionality necessitate that path. By framing future citations to these cases and challenges to exclusionary benefit programs in terms of the Equal Protection Clause rather than the Free Exercise Clause, bench and bar may gently correct the Court's course, while honestly ensuring that the holdings in all three cases are repeatable and maintained. And these practitioners can offer a pedigree for addressing religious discrimination in this manner—one dating at least to the 1950s in *Niemotko v. Maryland*[203] and Justice Frankfurter's concurrence in *Fowler v. Rhode Island*,[204] if not back to 1937 and *United States v. Carolene Products*.[205]

The impact could be more than academic. As several scholars have observed, discrimination complaints based on religion have fared better with the Court in recent years than those based on race.[206] When the Court

203. 340 U.S. 268, 273 (1951).

204. 345 U.S. 67, 70 (1953) (Frankfurter, J., concurring).

205. 304 U.S. 144, 152–53 n.4 (1937).

206. *See* Litman, *supra* note 80; Simson, *supra* note 80. *Compare, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2338–40 (2021) (interpreting § 2 of the Voting Rights Act), *with* Fulton v.

removes some discrimination claims from the Equal Protection Clause, it risks the chasm growing wider. Unbound by the restrictions it has placed upon the Equal Protection Clause, the Court could decide that status discrimination claims brought under the Free Exercise Clause need not satisfy the same barriers racial status discrimination claims must.

Suppose a facially neutral law was passed, one which had the effect of enriching secular persons substantially more than religious persons. Suppose, too, that nothing in the history or context of that law suggested that it was passed for the purpose of causing that differential effect. Would the law be struck down as unconstitutionally discriminatory? Under Equal Protection the answer has long been that it would not,[207] but no clear precedent similarly constrains the Free Exercise Clause.

The modern Court has imposed a highly formal and analytical framework on the Equal Protection Clause, analyzing affirmative action programs under the same standard as Jim Crow laws,[208] and assessing the rights of men to drink low-alcohol beer with the same test used to bar women from attending elite schools.[209] In other words, under the Court's view, it is the classification itself which is at issue in these cases, not the results. The Court has long since rejected, in cases concerning racial classifications, a "political process theory" of Equal Protection review like that articulated by John Hart Ely, which would demand more exacting scrutiny for classifications that disadvantage groups with little political pull.[210] But, as Professor Litman has recently pointed out, echoes of Ely's theory have started rumbling through the Free Exercise jurisprudence and in the religious corners of the Free Speech caselaw.[211] If the Court wishes to reinvigorate political process theory, it should not do so in a piecemeal

City of Philadelphia, 141 S. Ct. 1868, 1878–79 (2021).

207. *See* Washington v. Davis, 426 U.S. 229, 245 (1976) ("[W]e have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory, and denies 'any person . . . equal protection of the laws,' simply because a greater proportion of [Black applicants] fail to qualify than members of other racial or ethnic groups.").

208. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 242–45 (1995) (Stevens, J., dissenting); Students for Fair Admissions, Inc. v. President of Harvard Coll., 600 U.S. 181, 206 (2023) ("Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies 'without regard to any differences of race, of color, or of nationality.'" (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)); *id.* at 214 ("Because '[r]acial discrimination [is] invidious in all contexts,' we have required that universities operate their race-based admissions programs in a manner that is 'sufficiently measurable to permit judicial [review]' under the rubric of strict scrutiny." (citations omitted)).

209. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); United States v. Virginia, 518 U.S. 515 (1996).

210. *See* Litman, *supra* note 80, at 12–14; *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

211. *See* Litman, *supra* note 80, at 20–21 ("In the religion context, the Court has adopted a theory of discrimination that discounts the relevance of intent and focuses more on the relative burdens of a law . . . faced by religious organizations" and "nonreligious organizations."); *id.* at 58 ("Intriguingly, some of Justice Thomas's writings have signaled some attention to economic and social facts about the world in the context of First Amendment speech claims related to service providers.").

fashion by scattering various discrimination claims among different amendments.

Whatever the Equal Protection Clause was in 1868, it now stands as a bar to facial discrimination based on suspect classifications. If the Court believes the rigidity of modern Equal Protection analysis cannot sufficiently protect against religious status discrimination, then it should explain why the same analysis can properly protect against race or sex discrimination. Fortunately, *Espinoza* and *Carson* have not yet expanded the scope of Free Exercise beyond the limits of Equal Protection. The Equal Protection Clause can plausibly be read to subject programs like those in *Trinity Lutheran*, *Espinoza*, and *Carson* (i.e., programs that treat religious institutions different from nonreligious institutions) to strict scrutiny.[212] Transposing this trilogy into an Equal Protection key would require little in the way of doctrinal change and demand no express overrulings. If left in their current state, however, *Trinity Lutheran*, *Espinoza*, and *Carson* provide a foundation for a new antidiscrimination jurisprudence and may leave the Court free to discriminate among what sorts of discrimination it thinks most pernicious. All the Court would need to do is point out that one does not equal fourteen.

212. *See supra* Part III.D.