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Can First Amendment "History and Tradition" Protect Both Sides in Polarized America?

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In recent years, religious-freedom issues have become caught up in the nation's cycle of political and social polarization.[1] Today's religious-freedom controversies have reached new levels of intensity,[2] reflecting—and probably contributing to—our bitter political, social, and cultural divides.[3] A key question is whether it's possible to reduce the bitterness and division over religious-freedom issues, whether by crafting legislative compromises or by refining judicial doctrines.[4] My own work claims that strong protection of religious freedom can help reduce the intractability and bitterness of these disputes—but also that the commitment to religious freedom can only help if it also "treats all faiths evenhandedly, and remains mindful of other interests."[5] I have argued, on my own and in concert with others, that the only way forward is to protect key interests of both conflicting sides in our major religious-freedom disputes: both Muslim and evangelical Christians, both LGBTQ people and religious conservatives.[6]

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[1] Just a few works on the nature, causes, harms, and possible cures of polarization include EZRA KLEIN, WHY WE'RE POLARIZED (Avid Books 2020); LILIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY (U. Chicago Press 2018); MARC HETHERINGTON AND JONATHAN WEILER, PRIUS OR PICKUP? HOW THE ANSWERS TO FOUR SIMPLE QUESTIONS EXPLAIN AMERICA'S GREAT DIVIDE (Houghton Mifflin 2018); JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION (Pantheon 2012); Jonathan Rauch, *Rethinking Polarization*, NAT'L AFFAIRS, Fall 2019, https://www.nationalaffairs.com/publications/detail/rethinking-polarization.

[2] See, e.g., Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 155 (2014) ("In public discussion and in the scholarly community, the very notion of religious liberty—its terms and its value—has become an increasingly contested subject.").

[3] See, e.g., THOMAS C. BERG, RELIGIOUS LIBERTY IN A POLARIZED AGE chs. 1–2 (2023) (hereinafter "POLARIZED AGE"); ASMA T. UDDIN, THE POLITICS OF VULNERABILITY: HOW TO HEAL MUSLIM-CHRISTIAN RELATIONS IN A POST-CHRISTIAN AMERICA XX–XX (2021) (describing, among other things, how Muslim rights have been caught in the left-right conflict)

[4] See, e.g., Douglas Laycock et al., *The Respect for Marriage Act: Living Together Despite Our Deepest Difference*, 2024 U. ILL. L. REV. 511; Jonathan Rauch, *Meeting in the middle on religious and LGBT rights*, DESERET NEWS, May 4, 2021, https://www.deseret.com/2021/5/4/22417652/meeting-in-the-middle-religious-freedom-lgbtq-rights-fairness-for-all-equality-act/; Robin Fretwell Wilson, *Bargaining for Civil Rights: Lessons from Mrs. Murphy for Same-Sex Marriage and LGBT Rights*, 95 B.U. L. REV. 951 (2015); Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417 (2012).

[5] POLARIZED AGE, *supra* note 3, at 343.

[6] *Id.* at 229–39 (re Muslims and evangelicals); Laycock et al., supra note 4; Douglas Laycock and Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV. ONLINE 1 (2013).

In past years the Supreme Court has taken important steps protecting both sides in the culture wars. On the side of sexual freedom, it declared the constitutional right to same-sex marriage;[7] then it extended Title VII's prohibition on sex discrimination to cover many forms of discrimination against gay, lesbian, and transgender people or conduct.[8] On the religious-rights side, the Court has protected traditionalist objectors in several ways from burdens imposed by progressive laws. It has read the Free Exercise Clause's ban on anti-religious discrimination or hostility broadly;[9] it has held that applying nondiscrimination rules to providers of expressive services unconstitutionally compels them to speak;[10] and it has read the Religious Freedom Restoration Act[11] to protect entities that objected to mandatory employer coverage of contraception under the Affordable Care Act.[12]

However, at the same time as bipartisan approaches to religious-freedom conflicts have arguably become imperative, the Court has also begun reworking significant parts of its jurisprudence about religion, government, and other issues concerning cultural conflict. The current Court continues to recognize strong free exercise protection for both institutions and individuals.[13] But in Establishment Clause cases it has taken a new direction, focused predominantly on whether "history and tradition" support a government practice or category of practices.[14] The turn to history and tradition parallels the turn in other areas such as the Second Amendment and substantive due process rights.[15] As to the Establishment Clause, it indicates that various practices once at risk of invalidation are now likely to be upheld.

The danger is that key elements of bipartisan protection will be reversed under the auspices of the "history and tradition" approach. The new decisions have already approved some measures exposing nonbelievers and members of minority faiths to majoritarian official religious expression and even some kinds of official coercion.[16] Those decisions, however, might have limited effects. The purpose of the Article is to discuss those limits and explain why the Court should not go further. It should not extend its approval of official religious expression into the public-school classroom—the issue posed by Louisiana's recent law requiring the posting of the Ten

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[7] Obergefell v. Hodges, 576 U.S. 644 (2015).
[8] Bostock v. Clayton County, Ga., 590 U.S. 644 (2020).
[9] Fulton v. City of Philadelphia, 593 U.S. 22 (2021); Masterpiece Cakeshop, LLC v. Colorado Civil Rights Comm., 584 U.S. 617 (2018).
[10] 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).
[11] 42 U.S.C. §§ 2000bb *et seq.*
[12] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); Zubik v. Burwell, 578 U.S. 403 (2016).
[13] See *infra* part II-A.
[14] Kennedy v. Bremerton School Dist., 597 U.S. 507, 535 (2022); American Legion v. American Humanist Assn., 588 U.S. 29 (2019); Town of Greece v. Galloway, 572 U.S. 565 (2014).
[15] For a summary of decisions across various areas, see Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEG. ISS. 9, 13–25 (2024).
[16] See *infra* notes XX–XX and accompanying text (discussing *American Legion*, 588 U.S. 29; and *Kennedy*, 597 U.S. 507).

Commandments in all classrooms.[17] Its approach to unenumerated constitutional rights would probably would not have generated the same-sex marriage decision, and that approach will not likely change; but the Court should not overturn the decision.[18] And overall, in applying "history and tradition" under the Religion Clauses, the court should read history and traditions with sufficient flexibility and generality to achieve the clauses' key purposes, which include protecting people from suffering for living according to their deepest commitments and preventing the cycles of fear, resentment, and conflict that such suffering brings on. Some such flexibility in analyzing history and tradition provides the best account of the Court's doctrine strongly protecting free exercise.[19] Similar flexibility should apply in the doctrine protecting against establishments.

I. PROTECTING CONFLICTING SIDES IN POLARIZED TIMES

This section briefly summarizes the argument of my book *Religious Liberty in a Polarized Age*.[20] Strong protection of religious liberty has the potential to mitigate polarized cultural-political conflict—not to eliminate it, but to mitigate it by reducing one contributing factor. This is not the only purpose of religious-liberty protection. But it is an important one.

Strong religious liberty protects people from suffering for a key set of deep, pervasive commitments. That is its most fundamental purpose: to allow people to pursue religious commitment and live according to it without suffering coercion or penalties for doing so. The by-product of protection against suffering and coercion is the mitigation of conflict. When people face such penalties or suffering for their deep commitments, they are likely to be fearful and resentful; they may well attempt to penalize or disfavor their opponents, either preemptively or in retaliation.[21] A cycle of recrimination and attacks develops and potentially spirals.

Such a spiral occurred in the Reformation and early modern period between Catholics and Protestants and among Protestants.[22] In England, whose history directly influenced the American founders, the back-and-forth lurches in the Tudor years between official Catholicism and official Protestantism produced hundreds of martyrs on each side. Elizabeth and later monarchs systematically repressed Catholics, based partly on the fear that some were planning violence against the government. That repression produced retaliations like the 1605 Gunpowder Plot, whose leader, Robert Catesby, asserted that "the nature of the disease [persecution of Catholics] required so sharp a remedy."[23] The foiled plot of course triggered new repression.[24] Suppression

[17] See *infra* part III-B-4.
[18] See *infra* part III-C.
[19] See *infra* part III-A.
[20] *Supra* note 3.
[21] POLARIZED AGE, *supra* note 3, at 6, 120–22.
[22] This paragraph very briefly summarizes the description in *id.* at 119–33.
[23] Confession of Thomas Wintour, quoted in ANTONIA FRASER, FAITH AND TREASON: THE STORY OF THE GUNPOWDER PLOT 97–98 (Doubleday 1996).
[24] *Id.* at 63–65, 85–89.

of dissenters also took hold in colonial America. But over time, toleration increased and matured into a broader principled commitment to religious freedom—even if that commitment of course remained imperfect.

Religious liberty can mitigate the conflict by protecting people from penalties for their religious commitments and therefore heading off the fear of penalties. Reducing fear in turn reduces resentment and the desire to retaliate or act preemptively against the opposing side. As James Madison put it in the *Memorial and Remonstrance Against Religious Assessments*, "[t]orrents of blood had[d] been split in the Old World" by government's attempts to suppress religious differences or disfavored religious practices.[25] The "true remedy" was "equal and compleat liberty" in matters of religion: "Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease." Strong and equal liberty "does not wholly eradicate it [conflict over religion]," but it "sufficiently destroys its malignant influence on the health and prosperity of the State."[26]

Today's polarization shares features of the Reformation-era conflict that pushed us toward religious freedom. Traditionalists and progressives see each other as threats to individuals and to the nation.[27] They attack each other in a self-perpetuating cycle.[28] Often they use government as the weapon, which makes the attacks potentially more severe—given government's power to coerce—and makes the targets resent the government, weakening their civic allegiance. People on each side act from a sense of moral imperative, but also from an existential fear that the other side will attack them or those with whom they sympathize.

As sympathetic critics of evangelicalism observed, legal and social challenges in the Obama years, "particularly regarding human sexuality," put white evangelicals into "a state of panic";[29] fear became "a dominant theme of [evangelicals'] political life," especially the fear that "[r]eligious institutions are under legal attack from progressives."[30] Unfortunately, with respect to the freedom of religious organizations, conservative fears had a basis. Liberal groups increasingly called evangelicals' opposition to LGBTQ relationships and conduct "bigotry," likening it to racist

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[25] James Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶11 (1785), at FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-08-02-0163.
[26] *Id.*
[27] In a 2021 poll, "[e]ighty percent of those who'd voted for Joe Biden [in 2020], and 84 percent of those who'd voted for Donald Trump, at least 'somewhat agreed' that elected officials from the other party presented 'a clear and present danger to American democracy.' Fifty-one percent of Biden voters and 57 percent of Trump voters 'strongly agreed' with those fears." *Id.* at 5 (citing *New Initiative Explores Deep, Persistent Divides between Biden and Trump Voters*, U. OF VA. CTR. FOR POLITICS, https://centerforpolitics.org/news/new-initiative-explores-deep-persistent-divides-between-biden-and-trump-voters/.
[28] The next three paragraphs summarize the description in POLARIZED AGE, *supra* note 3, at 138–47.
[29] JOHN FEA, BELIEVE ME: THE EVANGELICAL ROAD TO DONALD TRUMP 7 (Eerdmans 2018).
[30] David French, *Evangelicals Are Supporting Trump out of Fear, Not Faith*, TIME, June 27, 2019, https://time.com/5615617/why-evangelicals-support-trump/.

resistance against desegregation in the South. The analogy suggested consequences affecting far more people than a few stubborn wedding vendors. It suggested there would be penalties on key traditionalist religious institutions like colleges, elementary schools, and social-service agencies. Catholic and Protestant."[31] A couple of examples, among many others, attracted widespread attention and stoked evangelical fears in the run-up to the 2016 elections: the California legislature proceeded far with a bill to withdraw state scholarships from needy students attending private colleges with policies disfavoring LGBTQ conduct, and the U.S. Solicitor General told the Supreme Court that potential withdrawal of tax exemptions from LGBTQ-disfavoring schools was "certainly going to be an issue."[32]

At the same time, intolerance among many conservatives intensified and found its way into government action, at the expense of religious freedom and other rights. Donald Trump issued his travel ban, rooted in anti-Muslim hostility, with widespread support from evangelicals and, in the Supreme Court, from conservative organizations that advocate religious freedom in other contexts.[33] States passed so-called anti-sharia laws; local groups used zoning laws, as well as angry protests, to block the construction of mosques.[34] Asma Uddin connects the anti-Muslim strain among many evangelicalism to their sense of insecurity and loss of control concerning other issues, especially LGBTQ rights.[35] Most conservatives opposed enactment of LGBTQ nondiscrimination laws. They could point out, of course, that many such laws lacked any meaningful protections for religious organizations.[36] Progressives took that opposition as confirmation that no exemptions should be given.

The result is a "polarization spiral," as Jonathan Haidt and Greg Lukianoff call it.[37] Because polarization involves religiously significant issues and leads to government penalties on religious status or behavior, religious liberty can be part of the solution, as it has been in the past.

Protection of religious liberty can mitigate destructive conflict, I argue, if—but only if—it has three features.[38] First, it must be strong: sufficiently strong that it serves the purposes of

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[31] POLARIZED AGE, *supra* note 3, at 145.
[32] See Thomas Berg, *Does This New Bill Threaten California Colleges' Religious Freedom?*, CHR. TODAY, July 5, 2016, https://www.christianitytoday.com/ct/2016/july-web-only/california-sb-1146-religious-freedom.html; Transcript of Oral Argument, 38, in Obergefell v. Hodges, 576 U.S. 644 (2015), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/14-556q1_l5gm.pdf. See generally POLARIZED AGE, *supra* note 3, at 62–64.
[33] See *id.* at 2–3.
[34] See *id.* at 56–61.
[35] UDDIN, *supra* note XX, at 29–30, 103–33.
[36] See, e.g., POLARIZED AGE, *supra* note 3, at 69 (discussing the Equality Act and Do No Harm Act, which not only lack exemptions but remove existing protections under the Religious Freedom Restoration Act).
[37] Jonathan Haidt and Greg Lukianoff, *The Polarization Spiral: How the Right's Monomania and the Left's Great Awokening Feed Each Other*, PERSUASION, Oct. 29, 2021, https://www.persuasion.community/p/haidt-and-lukianoff-the-polarization.
[38] POLARIZED AGE, *supra* note 3, at 6–8.

preventing suffering and people's reasonable fear that they will suffer for living according to their beliefs. Protection that government can easily evade will not serve that purpose. This implies, among other things, that people should have meaningful protection against laws that substantially restrict their religious exercise, and that religious communities and institutions should have substantial room to define their beliefs and operate consistently with them.[39]

Second, religious liberty must extend to all religious views; it can't support only the groups with which you sympathize, whether that's conservative Christians or the classic religious minorities with whom progressives tend to sympathize. Selectivity in supporting religious freedom is a key feature of polarization, and it threatens religious freedom by making it look simply like a tool for advancing one's underlying policy views.[40] Conversely, strong religious freedom principles that protect one religious group also protect other groups however different their beliefs and practices.[41] Religious freedom can thus be "a cross-cutting issue" reducing division and increasing trust.[42]

Finally, and perhaps most important here, religious liberty must take account of other important, potential conflicting interests. That in turn requires both boundaries on religious freedom and the recognition of other constitutional rights. If religious freedom becomes a trump on all other interests, it will inflame conflict rather than soothe it. The same will happen if we protect only religious freedom and not other important rights. The combination of the first and third points—religious liberty should be strong but also must have boundaries—means that, to a significant extent, the devil is in the details. But I argue that with careful analysis, decisionmakers can optimize protection for the most important interests of the conflicting sides.

But protecting other interests must not undermine strong protection of free exercise. We must remember that preventing people from living according to their religious commitment causes suffering and in turn fear, resentment, and resistance or retaliation.

Giving significant protection to both sides in cultural-social conflicts holds out the best hope of mitigating polarization. This is the wager of American religious liberty tradition, as articulated by Madison in the *Memorial and Remonstrance* and by others.[43] Strong and equal religious liberty would not "wholly eradicate" conflict over religion, Madison said, but it would "assuage the

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[39] *Id.* at 187–204.
[40] *Id.* at 69–72, 84.
[41] See, e.g., UDDIN, *supra* note XX, at 192–99 (discussing religious freedom as a "superordinate goal" that Muslims and conservative Christians can share); LUKE T. GOODRICH, FREE TO BELIEVE: THE BATTLE OVER RELIGIOUS LIBERTY IN AMERICA 145–60 (Multnomah 2019) (discussing conservative Christians' principled and pragmatic interest in supporting Muslim rights); POLARIZED AGE, *supra* note 3, at 229–34 (discussing parallels in the two groups' religious-freedom challenges).
[42] UDDIN, *supra* note XX, at 194.
[43] See *supra* notes XX–XX and accompanying text.

disease," "sufficiently destroy[ing] its malignant influence on the health and prosperity of the State."[44]

It does not automatically follow, of course, that primary responsibility for protecting the conflicting sides should rest with the courts. Legislatures have an important role to play. But today's polarization has features that impede legislative solutions. Polarization is not merely issue- or ideology-based but is "affective" and cultural: people have sorted into "mega-identities" that combine political and social/cultural views, breaking "the cross-cutting ties that once allowed for partisan compromise."[45] Thus the contending parties "see each other not just as political adversaries, but as enemies who seek to harm the nation."[46] And partisanship is increasingly "negative," focused less on advancing a positive program and more on stopping the other side. "[T]o win and maintain power," politicians need not "inspire voters around a cohesive and forward-looking vision"; they "need only incite fear and anger toward the opposing party."[47] Or as political analysts sometimes put it, "It's better to have an issue than a bill."[48]

Under such "extreme partisanship," the American system of checks and balances invites gridlock: "opposing factions can block decision-making,"[49] especially compromise decision-making that addresses the interest and needs of both sides. Thus blue-state legislatures or enact LGBTQ-rights laws with minimal religious exemptions, or seek to eliminate existing exemptions; red states pass religious-liberty bills when they don't even have, and won't consider having, statewide LGBTQ-nondiscrimination laws in the first place. Democrats in Congress coalesce around the Equality Act, which includes no exemptions and indeed eliminates existing protections provided by the Religious Freedom Restoration Act.[50] Republicans have pushed the First Amendment Defense Act, which provides overbroad religious exemptions while doing nothing for LGBTQ people.[51] Neither bill had a chance to pass.

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[44] Madison, *supra* note 14, at ¶11.
[45] MASON, *supra* note 1, at 6 (U. Chicago Press 2018). See POLARIZED AGE, *supra* note 3, at 25–35, 45 (detailing such features, citing, among others, sources from note 1 supra).
[46] Alan Abramowitz and Steven Webster, *"Negative Partisanship" Explains Everything*, POLITICO, Sept./Oct. 2017.
[47] *Id.*
[48] THOMAS R. MANN AND NORMAN J. ORNSTEIN, IT'S WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 51 (Basic Books 2012).
[49] Thomas Byrne Edsall, *Book Review*, WASH. POST, Feb. 3, 2012 (reviewing FIORINA, *supra* note 1, and ABRAMOWITZ, *supra* note 1).
[50] H.R. 15, 118th Cong., 1st Sess., sec. 9, § 1106 (introduced June 21, 2023), https://www.congress.gov/bill/118th-congress/house-bill/15/text ("The Religious Freedom Restoration Act of 1993 shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title."). "[C]overed title[s]" include all the major titles of the Civil Rights Act (titles II, III, IV, VI, VII, and IX). *Id.*, sec. 9, § 1101(a).
[51] H.R. 2802, 114th Cong., 1st Sess. (introduced June 17, 2015), https://www.congress.gov/bill/114th-congress/house-bill/2802.

Courts are far from perfect, but they have some comparative advantages over legislatures in a time of political polarization. Judges have to hear cases brought to them, even from small or unpopular groups; they have to issue decisions with reasoned explanations.[52] Legislatures are better equipped to draw specific lines, but they also strike their balances in the shadow of constitutional rules. The prospect that a court will step into legislative void with its own ruling can drive a legislature to try to address the issue itself. So courts should play a role,

One thing that courts cannot do, for the most part, is to declare nondiscrimination rights against private conduct. That requires legislation, since most constitutional rights run only against state action. Currently, according to the Human Rights Campaign, 35 to 40 percent of the states have no statewide laws preventing discrimination based on sexual orientation or gender identity in employment, housing, or public accommodations.[53] Those states are politically conservative to one degree or another. The only hope for enacting nondiscrimination laws in them—or in a closely divided Congress—is to protect the rights of religious objectors at the same time.

Protecting both sides is necessary. Without such protection, or with one-sided protection, the cycle of fear, resentment, and retaliation continues.

And protecting both sides is possible, even if not easy. As noted above, the Court's existing rulings have already protected both sides in meaningful ways. So have a couple of notable pieces of legislation. In 2015, Utah, a deep-red state,[54] enacted statewide LGBT-rights legislation as to employment and housing, combined with substantial exemptions for religious organizations.[55] The former protection surely would not have passed without the latter. Critics argued at the time that Utah's law should be "no model" for the rest of the nation because its protections for religious objectors were broader than those in other states.[56] But with no state since Utah pursuing the

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[52] Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1176 (2007) ("Litigants may invoke the judicial process as of right; unlike legislators, judges cannot simply ignore questions presented to them.") (reviewing MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (Cambridge U. Press 2005)).

[53] Human Rights Campaign, *Resources: State Maps*, https://www.hrc.org/resources/state-maps (showing 17 states with no nondiscrimination laws concerning employment, 19 with none concerning housing, and 22 with none concerning public accommodations).

[54] The Cook Partisan Voting Index ranks Utah as the 12th most Republican state, with an average Republican advantage of +13 in the last two presidential elections. *Most Republican States 2024*, WORLD POPULATION REVIEW, https://worldpopulationreview.com/state-rankings/most-republican-states.

[55] See S.B. 296, Antidiscrimination and Religious Freedom Amendment, 2015 Gen. Sess., State of Utah, https://le.utah.gov/~2015/bills/static/sb0296.html.

[56] Nelson Tebbe, Richard C. Schragger, and Micah Schwartzman, *Utah "Compromise" to Protect LGBT Citizens from Discrimination is No Model for the Nation*, SLATE, Mar. 18, 2015, https://slate.com/human-interest/2015/03/gay-rights-the-utah-compromise-is-no-model-for-the-nation.html.

bipartisan approach, no new statewide LGBTQ-nondiscrimination law has passed since 2015.[57] Perhaps the idea of Utah as a model deserves another chance.

The Respect for Marriage Act of 2022[58] exemplifies how protecting both sides can reduce the intensity of conflict. The Act requires states to accept same-sex marriages entered into in other states; it also secures and endorses protections for objecting religious organizations.[59] On the one side, there were fears after the Court's overruling of abortion rights[60] that it might do the same to same-sex-marriage rights.[61] The Act significantly reduces the practical consequences of those fears.[62] On the other side, the Act contains several provisions that directly accommodate religious organizations or—perhaps even more importantly—ensure that it does not "diminish or abrogate" current religious-liberty protections or deny or alter any benefit, status, or right of an otherwise eligible entity or person."[63] These provisions block any argument "that because Congress has now recognized same-sex marriages, it has also recognized a compelling interest in overriding religious objections to assisting with or participating in such marriages."[64] These protections are potentially important in future litigation, and they "have immediate effect; they protect religious organizations whether or not *Obergefell* is ever overruled."[65]

II. THE COURT'S TURN TO TEXT/HISTORY/TRADITION

By now it's clear that the Court is turning, at least in its stated theories of interpretation, toward "history and tradition," as well as, where appropriate, to the text.

A. The Use of History/Tradition

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[57] Laycock et al., *supra* note XX, at 548–49 (noting that Utah "was a bipartisan outlier between 2014 and 2022" and that its approach "did not gain traction elsewhere").
[58] Pub. L. No. 117-228, 136 Stat. 2305 (signed into law Dec. 13, 2022) (hereinafter "RMA").
[59] For discussion of the Act's provisions, background, and likely effects, see Laycock et al., *supra* note XX.
[60] See Dobbs v. Jackson Women's Health Center, 597 U.S. 215 (2022) (overruling Roe. Wade, 413 U.S. 110 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992)).
[61] See, e.g., *Dobbs* , 597 U.S. at 363 (Breyer, Kagan, and Sotomayor, JJ., dissenting).
[62] Under the Act, states need not recognize same-sex marriages as an initial matter; they must only recognize those contracted validly in other states. RMA, *supra* note XX, § 4. If *Obergefell* were overturned, many states would continue to recognize such marriages themselves, and couples could go to those states to be married and then return home. Laycock et al., *supra* note XX, at 534. That is not perfect protection; but Congress probably had to act under its power to require full faith and credit for other states' recognition of marriage because courts would have held that it lacked the power to require state recognition directly. See Laycock et al., *supra* note XX, at 533–34 (describing "substantial constitutional impediments" to requiring state recognition directly).
[63] RMA, *supra* note XX, §§ 6(a), 7(a).
[64] Laycock et al., *supra* note XX, at 537 (discussing § 6(a)); accord *id.* at 543 (discussing § 7(a)). See *id.* at 516–18, 537–42 (discussing other religious-liberty protections in §§ 2(2) and 6(b)).
[65] *Id.* at 536.

The use of tradition has been a longstanding in separation-of-powers cases, where in the words of Justice Frankfurter, the way that the branches interacted in practice put a "gloss" on general terms like "the 'executive' power."[66] Some commentators have argued that tradition should play a smaller, or perhaps more flexible, role as to individual rights, which are designed to stand against majoritarian practices.[67] But the Court has turned toward tradition (and history) in Bill of Rights and Fourteenth Amendment cases as well.

Start with the Establishment Clause, which according to several recent decisions, "must be interpreted 'by reference to historical practices and understandings.'"[68] That approach has driven decisions that have upheld legislative prayers, state and local;[69] the display of a Latin Cross, erected in 1921, as a war memorial;[70] and postgame prayers by high school football coach Joseph Kennedy.[71] "Any test the Court adopts," the majority has said, "must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."[72] That formulation begs questions about precisely how particular practices relate to general principles, and about how lengthy and continuous a practice must be to have Establishment Clause weight. But history and tradition have become important.

They have become dominant in other areas as well. In Second Amendment cases, the Court says that "[w]hen the [A]mendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[73] Means-end scrutiny does not apply at that stage of justification; the question is whether there is "a historical regulation" that serves as "a proper analogue for a distinctly modern firearm regulation."[74] To be permitted, a regulation need not be "identical to ones that could be

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[66] Youngstown Sheet & Tube v. Sawyer, 343 U.S. 479, 610–11 (1952) (Frankfurter, J., concurring); see also NLRB v. Noel Canning, 573 U.S. 513, 524 (2014) ("'[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President.") (quotation omitted).

[67] See, e.g., Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 416 (2012) ("Relying on past practice [concerning separation of powers] does not typically raise concerns about the oppression of minorities or other disadvantaged groups the way that it does in some individual rights areas."). For a summary of such arguments, and counterarguments, see, e.g., William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 49–50 (2019).

[68] Kennedy v. Bremerton School Dist., 597 U.S. 707, 572 U.S. at 576–77 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576–77 (2014)).

[69] *Greece*, 572 U.S. 565; Marsh v. Chambers, 463 U.S. 783 (1983).

[70] American Legion v. American Humanist Assn., 588 U.S. 29 (2019).

[71] *Kennedy*, 597 U.S. 507.

[72] *Greece*, 572 U.S. at 576–77.

[73] New York State Pistol & Rifle Assn. v. Bruen, 597 U.S. 1, 24 (2022).

[74] *Id.* at 28–29.

found in 1791"; it need merely be "relevantly similar," or "consistent with the principles that underpin our regulatory tradition."[75]

The other area is substantive due process, where a strict and demanding version of the tradition-based approach appears dominant after *Dobbs v. Jackson Women's Health Org*.[76] Before that, the approach of *Washington v. Glucksberg*, requiring a specific tradition that is longstanding and widespread,[77] had co-existed with an autonomy-based approach supporting abortion rights[78] and with mixtures of autonomy and tradition supporting rights to consensual private sex and to same-sex marriage.[79] But *Dobbs*, in overruling abortion rights, declared that the general standard is "whether the right is 'deeply rooted in [our] history and tradition'" and that this requires "a careful analysis of the history of the right at issue."[80] The narrow, demanding version of tradition applies because the majority is worried about "recogniz[ing] rights not mentioned in the Constitution" and worried that "the term 'liberty' alone provides little guidance."[81] *Dobbs* follows *Glucksberg* in saying that "'we must exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.'"[82]

[TRANSITION TBP HERE] Tradition has not entirely displaced tiers of means-end scrutiny. Members of the conservative majority have varying positions. In free speech cases, the Court continues to apply tiers of scrutiny, with no apparent misgiving.[83] The same is true, to date, in most free exercise cases. Even Justice Kavanaugh, who has broadly criticized virtually any kind of means-end scrutiny as "policy by another name," said he was "not suggesting that the Court overrule cases where the Court has applied those heightened-scrutiny tests."[84] Thus, tradition has

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[75] United States v. Rahimi, 602 U.S. 680, 692 (2024). See *id.* ("[W]hen a challenged regulation does not precisely match its historical precursors, 'it still may be analogous enough to pass constitutional muster.' The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'") (quoting *Bruen*, 597 U.S. at 30).

[76] 597 U.S. 215 (2022).

[77] 521 U.S. 702, 720–21 (1997) ("First, … the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.' … Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.").

[78] Roe. Wade, 413 U.S. 110 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[79] Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015).

[80] *Dobbs*, 597 U.S. at 237–38 (quoting, among others, *Glucksberg*, 521 U.S. at 721).

[81] *Id.* at 239.

[82] *Id.* at 240 (quoting *Glucksberg*, 521 U.S. at 720) (cleaned up). See *id.* at 239 ("In interpreting what is meant by the Fourteenth Amendment's reference to "liberty," we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy.").

[83] Tik-Tok Inc. v. Garland, 604 U.S. __, 2025 WL 222571 at *6 (Jan. 17, 2025) (per curiam) ("[W]e cannot accept [Tik-Tok's] call for strict scrutiny…. [And a]s applied to petitioners, the Act satisfies intermediate scrutiny.").

[84] *Rahimi*, 602 U.S. at 731, 732 (Kavanaugh, J., concurring).

been able to occupy the field in the Second Amendment partly because the Court just begun to develop case law for that individual right; no precedents for tiers of scrutiny stood in the way.[85]

This Article is not about theories of constitutional interpretation, and so I won't discuss, let alone try to resolve, many of the complications in the overall approach of "history and tradition." They include whether the Constitution's meaning is fixed by the original meaning or whether post-enactment traditions can determine its meaning, and the extent of the post-enactment traditions that can serve as evidence of original meaning.[86] Some of the issues raised here apply to both original meaning and tradition.

B. Issues with the History/Tradition Approach

The emphasis on "history and tradition" presents problems and complications, as has been observed by its critics and even some of its proponents. This short section briefly sets forth two key problems, both of which will be relevant to the use of history and tradition in Religion Clause areas. But this section raises them as they've appeared in the context of the Second Amendment, where tradition-based analysis has been subject to extensive discussion.

1. Anachronisms and new circumstances

First, critics of the history and tradition approach argue that it cannot account for new circumstances. Joseph Blocher and Eric Ruben have identified various aspects of this problem in Second Amendment cases. They also call it the problem of "anachronism": "[R]equir[ing] judges to compare modern and historical gun laws" can be a very tall order "given the extraordinary

[85] See *id.* at 732 (Kavanaugh, J., concurring) ("I am arguing against extending [means-end] tests to new areas, including the Second Amendment.").

[86] See, e.g., Randy E. Barnett and Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 446–55 (2023) (distinguishing use of history and tradition as "evidence of original meaning and purpose," as "modalities of argument" within a pluralist framework for interpretation, as "an independent constitutional theory" of meaning, and as "an implementing doctrine"). In the recent cases, compare, e.g., the Court's uses of tradition in interpretation with Justice Barrett's caveats or qualms about those uses. Cf., e.g., *Bruen*, 597 U.S. at 60–70 (addressing evidence from mid- to late 1800s as part of "history and tradition"); with *id.* at 82–83 (Barrett, J., concurring) ("today's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights"). And cf. Vidal v. Elster, 602 U.S. 286, 301 (2024) (upholding Lanham Act's prohibition on trademark registration of a living person's name without consent, on the ground that "[the] names clause has deep roots in our legal tradition"), with *id.* at 323–24 (Barrett, J., concurring in part) ("The Court does not (and could not) argue that the late-19th and early-20th century names-restriction tradition serves as evidence of the original meaning of the Free Speech Clause…. Instead, it presents tradition itself as the constitutional argument; the late-19th and early-20th century evidence is dispositive of the First Amendment issue. Yet what is the theoretical justification for using tradition that way?").

technological and social changes since the Founding."[87] Changed circumstances can mean that a historical principle or category has a different application. [TRANSITION TBP]

2. Traditions violating fundamental principles

A second challenge to history-tradition-based analysis that Blocher and Ruben identify is the problem of "violations": "[T]he known historical record from which lawyers and judges must analogize is full of practices and laws that would be impermissible today."[88] They give the example of the Alien and Sedition Laws, enacted only seven years after the First Amendment's ratification, but so contrary to the Amendment's core meaning that they cannot receive interpretive weight.[89]

In other words, sometimes historical examples or traditions must give way to principles that are more fundamental. Both traditionalist justices and traditional scholars have said so. All say that the explicit or clear text of a provision controls over contrary traditions.[90] But Professor DeGirolami also concedes that a tradition nevertheless "might be held unconstitutional as running directly contrary to a powerful moral principle."[91] He gives the obvious example of Jim Crow segregation: "the moral principle of racial equality, as an interpretation of the meaning of the Equal Protection Clause, together with other sociological and psychological considerations, were sufficiently compelling to reject that ostensible tradition."[92]

Presumably, if a principle can trump a widespread tradition for purposes of constitutional interpretation, it cannot be just any old "powerful moral principle"; it must be one that flows from the relevant constitutional provision itself. What matters is that racial equality is "compelling … as an interpretation of the meaning of the Equal Protection Clause," not that it is compelling in the abstract. That begs the question from where these more general principles derive. They might come from history too: the from the original understanding of a provision, from its purposes, or from broader and more durable traditions.

3. Raising—and choosing—the level of generality

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[87] Joseph Blocher and Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 150 (2023).
[88] *Id.* at 156, 158.
[89] *Id.* at 158. The Alien and Sedition Acts of course reflect a single episode and thus don't undercut reliance on traditions of longer duration. On the other hand, that episode was close to the founding.
[90] *Noel Canning*, 573 U.S. at 584 (Scalia, J., concurring) ("The historical practice of the political branches is, of course, irrelevant when the Constitution is clear."); *Rahimi*, 602 U.S. at 715–16 (Kavanaugh, J., concurring); Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1168 (2020).
[91] Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1659 n.20 (2020); *id.* at 1671 ("Likewise, there are times where a tradition violates a moral or political principle of great power that defeats it—and rightly so."); DeGirolami, *supra* note [NDLR], at 1169 ("What the Court takes to be a particularly strong moral principle can also overcome the presumption in favor of a tradition.").
[92] DeGirolami, *supra* note XX [WULR], at 1672.

As Blocher and Ruben write, "[t]he most obvious doctrinal solution" to the problems of anachronism and of impermissible traditions "is to adjust the level of generality at which a court conducts the inquiry": that is, to raise the level of generality.[93]

> If questions are pitched too narrowly, courts will run directly into the problems of anachronism …, like searching for historical regulations of guns in subways. So, too, will they fail to account for historical silences, variations, and violations, potentially building federal constitutional doctrine on a set of unrepresentative or even reprehensible traditions. Operating at a higher level of generality is no panacea, but can help minimize these problems.[94]

[TRANSITION TBP]

III. HISTORY/TRADITION AND PROTECTING CONFLICTING SIDES

Given the Court's turn, litigants in constitutional disputes increasingly must frame arguments in terms of history, tradition (and text). With respect to the Religion Clauses, history and tradition have taken a central place in Establishment Clause cases; whether or not they become similarly central under the Free Exercise Clause, they will likely play a greater role there too. So the question arises: Can history and tradition (and text) provide any basis for protecting the conflicting sides in our religion-related legal/cultural conflicts? To what extent can they protect both sides, and how?

The strongest critics of the current Court will say that asking the question is pointless, that the current majority believes in protecting only the conservative side of the culture wars. I criticize the Court in various ways for failing to protect nonbelievers and religious minorities. But my approach is not so bleak—perhaps because I think that the Court's continued protection of free exercise rights, including for conservatives, does vindicate fundamental constitutional purposes. The purpose of this Article is to argue that the premises and methods that have supported strong free exercise protection should also apply to key protections under the Establishment Clause.

Admittedly, it is unclear whether the Court cares much about considering the conflicting interests so as to protect both, or even to ease reception of its decisions in a divided nation. Some justices likely think it is not the Court's job to mitigate polarization, or that they couldn't succeed even if they tried. Justice Alito, for example, was recently quoted as saying, "I wish I knew [how to mitigate polarization]. I don't know.… We have a very defined role, and we need to do what we're supposed to do. But this is a bigger problem. This is way above us."[95] But mitigation of conflict is central, not peripheral, to our religious-freedom tradition. As discussed in Part I,

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[93] Blocher and Ruben, *supra* note XX, at 160.
[94] *Id.* at 162 (footnote omitted).
[95] Quoted in Asma T. Uddin, *Our divided nation needs the Supreme Court to be a unifying force*, DESERET NEWS, June 15, 2024, https://www.deseret.com/opinion/2024/06/15/divided-nation-supreme-court-polarization-alito/.

avoiding the historic cycles of suffering, fear, and conflict motivated Americans to adopt religious-freedom provisions; and this foundational purpose of our religious-freedom tradition remains vital today.

A. Free Exercise

Strong protection of religious practice is an important component of protecting both sides. It can reduce the fear that leads to cycles of resentment and retaliation.[96] And the current Court has protected religious practice strongly.[97] Is strong protection justified by some version of text, history, and tradition—and what version?

I will focus mostly on the key question that has driven debates over free exercise for several decades: does the Free Exercise Clause protect against the burdensome effects of generally applicable laws that do not target religion? The Court said "no" in *Smith*[98] and has not overturned that ruling. But it has largely undercut it by declaring exemptions when the generally applicable law burden a religious organization's "internal government,"[99] and by applying strict scrutiny—presumptively requiring an exemption—when a law that does not target religion nevertheless makes exceptions for even a relatively small number of comparable secular interests.[100] Both of these rules can be squared with *Smith*, but they're also at least in tension with it by ordering exemptions and rejecting its posture of judicial deference to general laws. So, with some oversimplification, one can ask what form of history/tradition supports the Court's protective approach. After discussing exemptions, I turn to another set of decisions strengthening free exercise, this time in the context of government funding.

1. Text

I begin with a short excursion into textual analysis, because several scholars argue that the Free Exercise Clause text cannot support constitutionally based exemptions.[101] I disagree: The textual argument for exemptions is as good as that against them, perhaps better. The text says that Congress (and after incorporation, the states) "shall make no law prohibiting the free exercise [of religion]."[102] A generally applicable law, if it prohibits religious exercise in a given instance, becomes "a law prohibiting" free exercise in that instance. To prevent such a result, either the legislature or the courts should make an exception for that instance. The judicially free exercise

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[96] See *supra* note XX-XX and accompanying text.
[97] See *supra* notes XX–XX and accompanying text.
[98] 494 U.S. at 877.
[99] Our Lady of Guadalupe School v. Morrissey-Berru, 591 U.S. 732, 747 (2020); Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171, 188 (2012).
[100] Tandon v. Newsom, 593 U.S. 61, 62–63 (2021) (per curiam); Roman Catholic Dioc. of Brooklyn v. Cuomo, 592 U.S. 14, 16–18 (2020) (per curiam); Fulton v. City of Philadelphia, 593 U.S. 522, 533–34 (2021).
[101] See James M. Oleske, Jr., *Free Exercise Uncertainty: Original Meaning? History and Tradition? Pragmatic Nuance*, 70 WAYNE L. REV. 137, 151–54 (2024) (collecting sources making the argument).
[102] U.S. Const. amend. I.

exemption is simply "a species of "as-applied adjudication," as Stephanie Barclay and Mark Rienzi have observed.[103] In as-applied adjudication, "the court will order a remedy that protects the exercise of the constitutional right, but otherwise leaves the law in place to apply to other circumstances that may arise."[104] In other words, it will require an exemption. As-applied claims, the Court says, are the "normal" form of constitutional challenge.[105]

Critics of exemptions argue that the Free Exercise Clause covers only laws that target religion, because of the phrasing "Congress shall *make* no law." This supposedly makes the law's enactment the only relevant event: the clause "'prevents the passage of certain kinds of laws,' but does not provide a right to exemptions from laws Congress is 'authorized to pass.'"[106] "There can be no 'as-applied' challenge under the Free Exercise Clause," Nicholas Quinn Rosenkranz says, "because application of the statute occurs long after the alleged constitutional violation is complete."[107] But the phrase "Congress shall make no law" introduces all of the First Amendment's rights: "Congress shall make no law [affecting religion in forbidden ways] or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." If "make no law" forecloses as-applied challenges to laws that the legislature is generally authorized to pass, it would foreclose as-applied challenges based on free speech as well as free exercise. But as-applied challenges are common (the "normal" form of challenge) in speech cases too: as the Court just reaffirmed, the preference to "handle constitutional claims case by case, not en masse [facially]," holds "true even when a facial suit is based on the First Amendment [speech provision]."[108] To take just one example that arises again and again, a state or city can pass laws against disturbing the peace; it simply can't apply them in ways that interfere with protected speech.[109] The logic of that approach is that when the law in question abridges speech in certain instances, it is to that

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[103] Stephanie H. Barclay and Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1611 (2018).
[104] *Id.*
[105] Ayotte v. Planned Parenthood, 546 U.S. 320, 329 (2006) (adding that "[i]t is axiomatic that a 'statute may be invalid as applied to one state of facts and yet valid as applied to another'") (quotation omitted).
[106] Oleske, *supra* note XX, at 152 (quoting ELLIS WEST, THE FREE EXERCISE OF RELIGION IN AMERICA: ITS ORIGINAL CONSTITUTIONAL MEANING 280 (2019)); Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1266 (2010) ("If Congress violates the Free Exercise Clause by making a law prohibiting the free exercise of religion, then it must be that the violation happens when Congress makes such a law."); John Harrison, *The Free Exercise Clause as a Rule About Rules*, 15 HARV. J.L. & PUB. POL'Y 169, 170–71 (1992) ("If the Free Exercise Clause means what it says, it prohibits the enactment [only] of certain kinds of laws.").
[107] Rosenkranz, *supra* note XX, at 1266.
[108] Moody v. NetChoice, LLC, 603 U.S. 707, 723 (2024) (noting that the "high bar" for facial challenges is still "rigorous" in speech cases although "lowered" some).
[109] See, e.g., Cohen v. California, 403 U.S. 15, 19 (1971) (upholding disturbing peace law against facial challenge but invalidating application to defendant's display of profanity on his jacket); Cantwell v, Connecticut, 310 U.S. 296 (1940) (invalidating application of laws against disturbing the peace and solicitation as applied to speech of Jehovah's Witnesses).

extent a law "abridging" speech: the legislature cannot make such a law, so the abridgement must be excised by forbidding that application.[110] So it is for laws "prohibiting [ ] free exercise."

The pro-exemptions reading of "make no law" seems the stronger because it fits the prevalence of as-applied challenges in other First Amendment areas. But it is at least a highly defensible reading. On balance, the text supports strong free exercise through exemptions—and certainly does not foreclose them.

2. History/tradition

Scholars and judges and scholars are divided on whether the original understanding of the Free Exercise Clause supports exemptions. Michael McConnell and Philip Hamburger famously debated the issue;[111] Justices O'Connor and Scalia, respectively, adopted their arguments in concurring opinions in *City of Boerne v. Flores*.[112] Later Justice Alito adopted and expanded McConnell's arguments, while some scholars have continued to reject them.[113]

The originalist debate over exemptions has focused on two key historical features. First, during the founding period every state adopted a constitutional provision guaranteeing freedom of religious exercise or worship subject to certain limits—most often when the religious acts endangered public "peace" or "safety," sometimes also when they constituted "licentiousness" or endangered public "order" or "happiness."[114] The federal Free Exercise Clause does not explicitly adopt that structure, but it's far more likely to reflect it implicitly, given the unanimity in state provisions, than to reject it.[115] The pro-exemptions argument is that the provisos imply some right of exemption from general laws: "the provisos would only have effect if religiously motivated conduct violated the general laws in some way," and "[t]he 'peace and safety' clauses identify a

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[110] It does not refute this point to answer that as-applied free speech challenges sometimes involve laws that explicitly reference speech. (Professor Oleske, in another context, offers that answer to distinguish religion-neutral laws from content-neutral speech laws, saying: "'TPM [time, place, or manner] restrictions do not impose incidental restrictions on speech; they target it, restricting speech as speech.'" Oleske, *supra* note XX, at 174 n.199 (quoting Frederick Mark Gedicks, The Myth of Second-Class Free Exercise). For one thing, frequently the laws in question don't explicitly reference speech. See, e.g., *Cohen*, 403 U.S. at 16 ("maliciously and willfully disturb[ing] the peace … by … offensive conduct") (quotation omitted); Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (intentional infliction of emotional distress). More fundamentally, the point is that laws can reference speech and still be valid in some circumstances; if that is so, then the invalidity does not come at the making of the law. It comes in the law's application to a given set of facts—as with the free-exercise exemption.

[111] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Philip Hamburger, *A Constitutional Right to Religious Exemptions: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992).

[112] 521 U.S. 507, 537–43 (1997) (Scalia, J., concurring in part); *id.* at 549–64 (O'Connor, J., dissenting).

[113] *Fulton*, 593 U.S. at 571–94 (Alito, J., concurring); contrast, e.g., WEST, *supra* note XX; Oleske, *supra* note XX, at 155–62.

[114] McConnell, *supra* note XX, at 1461–62.

[115] *Id.* at 1456 ("it is reasonable to infer that those who drafted and adopted the first amendment assumed the term "free exercise of religion" meant what it had meant in their states").

narrower subcategory of the general laws."[116] The anti-exemptions response is that in eighteenth-century usage, "'every breach of law [was] against the peace'" (*contra pacem*), so "the disturb-the-peace caveats apparently permitted government to deny religious freedom, not merely in the event of violence or force, but, more generally, upon the occurrence of illegal actions."[117] But McConnell anticipated and addressed that point: he noted that there were debates within states over the proviso language, showing that they "cannot be dismissed as boilerplate, synonymous with 'an assertion of interest on the part of the public.'"[118]

McConnell's other key argument was that when American colonial and early state governments faced known conflicts between religious practice and generally accepted laws, they provided exemptions, as in the case of objectors to oaths, to military service, to religious assessments, and to various other laws.[119] These examples, he argued, showed "that exemptions were seen as a natural and legitimate response to the tension between law and religious convictions."[120] Hamburger's counterargument was that these exemptions were statutory, adopted as a matter of legislative grace rather than constitutional right.[121]

My own judgment is that the historical evidence in favor of constitutionally mandated exemptions is stronger on balance than the evidence against them—but not decisive unless one assesses the history in broad terms, aiming to achieve the First Amendment's purposes. What McConnell claimed was that the historical evidence, "on balance, support[s] *Sherbert*'s interpretation of the free exercise clause," even though the evidence "may not be unequivocal (it seldom is)."[122] It proved, he said, that compelled exemptions "were within the contemplation of the framers and ratifiers as a possible interpretation of the free exercise clause," and that—looking at the history in broad terms—"exemptions were consonant with the popular American understanding of the interrelation between the claims of a limited government and a sovereign God."[123] In other words, the argument for mandated exemptions becomes overriding if—but only if—we take a relatively flexible attitude toward the materials, reading them with a somewhat raised level of generality aimed at serving the overall purposes of the First Amendment.

Moreover, the case for exemptions is strengthened by recognition of problems of "anachronism" as discussed above: how statements or practices of a given time can have a different

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[116] *Id.* at 1462.
[117] Hamburger, *supra* note XX, at 918–19 (quoting Queen v. Lane, 6 Mod. 128, 87 Eng. Rep. 884 (Q.B. 1704)).
[118] McConnell, *supra* note XX, at 1462.
[119] *Id.* at 1466–73.
[120] *Id.* at 1466.
[121] Hamburger, *supra* note XX, at 929 ("[T]he issue whether an individual was understood to have a general constitutional right of religious exemption from civil laws is hardly the same issue as whether statutes or, occasionally, constitutions granted exemptions with respect to a few specific matters.").
[122] *Id.* at 1415.
[123] *Id.*

import or different application as circumstances change.[124] Here is a key example. In arguing against mandated exemptions, Professor Hamburger collected quotes from various religious-liberty proponents who professed commitment to the rule of law and denied any right to obtain exemptions.[125] But in context, these writers endorsed laws whose scope was far more limited than many laws today. Eighteenth-century commentators on religious liberty spoke of laws that served serious social interests, arguing for example that magistrates were "obliged to maintain society and punish all those who destroy the foundations, as murderers and robbers do."[126] And religious-freedom pioneer Roger Williams, in the words of a leading modern scholar, emphasized that "civil government was limited to its responsibility for preserving peace and civility"; therefore, Williams did not accept "subjecting the claims of conscience to any generally applicable law so long as it does not deliberately infringe upon religious belief or act. Rather, ... Williams saw conscience subjected to particular laws, and he viewed these laws as within the specific scope of the government's ordained responsibilities."[127] These statements do not support carte blanche for whatever general secular law is on the books, when the number and scope of such laws increase dramatically as they have in modern society. That increase makes some principle of exemptions necessary to keep government's prohibitions on religious practice within the general, historic category of "public peace, safety, and order."

The smaller scope of government regulation in the founding period causes another anachronism: it meant that the founding generation had little or no occasion to focus on the general issue of mandatory exemptions. In the 1780s, "[a] general right to exemptions wasn't a live issue. With much less regulation and much more religious homogeneity, exemption issues could be addressed individually."[128]

Still another problem of anachronism infects Hamburger's argument that the adoption of legislative exemptions provides no evidence for a constitutional mandate of exemptions. To demand, in the historical record, explicit arguments for judicial as opposed to legislative exemptions overlooks that judicial review was only beginning to become established in the founding period. Legislative exemptions "demonstrate[ ] that religion-specific exemptions were familiar and accepted means of accommodating [religious-legal] conflicts."[129] And "it is reasonable to suppose that framers of constitutional free exercise provisions understood that

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[124] See *supra* part II-B-1, notes XX–XX and accompanying text.
[125] Hamburger, *supra* note XX, at 937–46.
[126] Pierre Bayle, *Philosophical Commentary on These Words of Christ: Compel Them To Come In*, in PIERRE BAYLE'S PHILOSOPHICAL COMMENTARY: A MODERN TRANSLATION AND CRITICAL INTERPRETATION 7, 167 (Amie Goodman Tannenbaum trans. 1987).
[127] Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455, 486 (1991).
[128] Brief of Christian Legal Society et al., *Fulton*, 2020 WL 3078340, at 14 (hereinafter "CLS *Fulton* Brief").
[129] McConnell, *supra* note XX, at 1472.

similar applications of the principle would be made by the courts, once courts were entrusted with the responsibility of enforcing the mandates of free exercise."[130]

The best history-related argument for exemptions is that they serve the First Amendment's original purposes. As Douglas Laycock and I have written:

> If the Free Exercise Clause does not apply to neutral and generally applicable laws, it cannot serve its original purposes. Those purposes include protecting individual conscience and preventing human suffering, social conflict, and persecution. In the 18th century, every colony found that free exercise required exempting dissenters from oaths, military service, and other requirements that burdened their religious practices. Those laws, although neutral and generally applicable, overrode conscience, caused psychological suffering and loss of liberty or property, inflamed social conflict, and discouraged people from settling or remaining in the colony.[131]

There was no point in allowing a dissenting group to exist but then turning around and banning its key behavior. "Quakers couldn't live in Massachusetts if they were banned. But neither could they live in Massachusetts if their important religious practices were banned. Requiring oaths or military service would override individual conscience just as banning Quakers overrode conscience."[132] In short, states that allowed dissenting religion "soon enacted exemptions, because free exercise without exemptions didn't solve the problems they were trying to solve."[133]

Moreover, "free-exercise exemptions are still needed today. Generally applicable laws without exemptions coerce individuals and cause them to suffer for their faith. In today's atmosphere of cultural-political polarization, properly defined protections for religious commitments can reduce fear, resentment, and social conflict."[134]

At the same time, of course, free exercise cannot be unlimited. The standard of "public peace, safety, and order" obviously allows laws to restrict religious exercise in a variety of situations. That historical standard can be implemented responsibly through the compelling-interest test—which in religious exemptions cases will set a strong, but inevitably not absolute, standard—or perhaps through some strong form of intermediate scrutiny.[135] *Sherbert* and *Yoder*, the key decisions recognizing exemptions before *Smith*, used a phrase that echoes the founding-era provisions: government must show some "substantial threat to public safety, peace, or order."[136]

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[130] *Id.* at 1473.
[131] Douglas Laycock and Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2020-21 CATO SUP. CT. REV. 33, 38–39. See also CLS *Fulton* Brief, *supra* note XX, at 8–15 (developing the argument at greater length).
[132] CLS *Fulton* Brief at 12.
[133] *Id.*
[134] Laycock and Berg, *supra* note XX, at 39.
[135] *Id.* at 44–45.
[136] *Yoder*, 406 U.S. at 230 (quoting *Sherbert*, 374 U.S. at 403)

Free exercise analysis must gravitate toward judging cases by general standards—levels of justification that government must meet—rather than solely by analogizing current cases to historical situations where the laws exempted or did not exempt religion. Justice Kavanaugh's dismissal of the tiers of scrutiny in favor of concrete traditions[137] cannot work for free exercise. Both of the problems identified above in the gun-rights context—anachronism and new circumstances, on the one hand, and traditions violating fundamental principles, on the other—become acute in the free exercise context.[138]

First, the range of situations where laws conflict with religious exercise is simply too wide—far wider than in the case of laws restricting guns—for historical analogies to cover them all. Professors McConnell, Laycock, Barclay, and Storslee have made this point in a new blog post arguing that the Court should not "*Bruen*-ize" the Free Exercise Clause: that is, it should not rely simply on historical analogues, rather than general standards, to evaluate a law's consistency with the constitutional command.[139] They observe that in many "areas of modern regulation, there may be no relevant historic analogue that government can point to, at least at a low level of generality." Thus, free exercise cases will regularly present the "quandary under *Bruen*" of determining the level of generality at which the court should consider a regulatory tradition.[140] And that poses problems on either end of the generality continuum. "[C]onstruing historical analogues at a low level of generality might mean that any regulation limiting religious exercise would be categorically invalid":

> That approach would overprotect religion as applied to whole swathes of regulation unknown to the founding generation. For example, the legal category of "child abuse" did not exist until well after the Founding. That does not mean that religiously-motivated child abuse, however severe, should now get a free pass.[141]

On the other hand, the courts might "dial up the level of generality to make modern-day regulation more permissible even if it is more loosely analogous." But "that approach means far less protection for religious claimants, and a categorical affirmance of nearly all modern regulations limiting religious exercise."[142] Avoiding both of these extremes requiring using a more general approach that subjects all burdensome regulations to meaningful review; and indeed some such general standard follows (as McConnell et al. note) from the founding-era standard of "public peace or safety" prevalent in state constitutions.[143]

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[137] See *supra* notes XX-XX and accompanying text.
[138] See *supra* part II-B-1, 2.
[139] Eugene Volokh, *The Court Shouldn't* Bruen-*ize the Free Exercise Clause*, REASON, Mar. 8, 2025, https://reason.com/volokh/2025/03/08/the-court-shouldnt-bruen-ize-the-free-exercise-clause/.
[140] *Id.*; see *supra* part II-B-3.
[141] *Id.*
[142] *Id.*
[143] *Id.*

Free exercise also poses the second problem: traditions violating fundamental principles. Some historical practices of regulating religions reflect primarily "bigotry or unreflective inertia." As McConnell et al. warn: "[T]he regulatory historical analogue approach [of *Bruen*] might even open the door to religious persecution. The American history and tradition toward Native religion, Catholicism, and Mormonism was not a model of respect for the rights of others."[144]

> Constitutional rights are aimed at remedying historic abuses. And the defenders of those abuses do not instantly acquiesce or comply as soon as the new amendment is ratified. They often carry on as before, making history and tradition….
>
> Historical regulations that existed contemporaneous with ratification might sometimes provide limited *indirect* evidence about the Constitution's meaning. But determining the value of that evidence requires a serious attempt to discern the positive meaning of a constitutional provision.[145]

Equal liberty for the wide range of religions demands a general standard that will secure the purposes of the provisions. Neither liberty nor equality will be served by giving predominance to traditions of protecting (or not protecting) certain historical religious practices. At the very least, the analogies drawn from history must be drawn in flexible terms to protect newer and unfamiliar faiths. The Jehovah's Witness practice of preaching and distributing tracts in the streets should be analogized to more traditional church sermons; the use of peyote at Native American Church rituals should be analogized to the consumption of wine at Catholic masses.[146]

Historical traditions can still be important in showing how strong the needs of peace, safety, and order tend to be in a particular category of cases, or how Americans over time have balanced them against religious exercise. In *Ramirez v. Collier*,[147] the Court held that Texas lacked a compelling interest, under the Religious Land Use and Institutionalized Persons Act (RLUIPA),[148] in preventing a capital prisoner, being executed by lethal injection, from having his pastor pray aloud and lay hands on him during the execution. In deciding that the state's interest was insufficient, the Court looked first to "the rich history," from pre-founding England to today, "of clerical prayer at the time of a prisoner's execution."[149] Even so, the Court acknowledged that there was a question whether that history, much of which involved clergy praying at the gallows, applied to clergy activity in the small chamber "during the delicate process of lethal injection."[150] Justice

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[144] *Id.*
[145] *Id.*
[146] See Murdock v. Pennsylvania, 319 U.S. 105 (1943) (Jehovah's Witnesses); *Smith*, 494 U.S. at 913 n.6 (Blackmun, J., dissenting) (analogizing peyote to wine). See Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective*, 5 WM. & MARY BILL RTS. J. 153, 165 (1996) (showing the need to draw broad analogies to protect minority practices).
[147] 595 U.S. 411 (2022).
[148] 42 U.S.C. § 2000cc-1.
[149] 595 U.S. at 427.
[150] *Id.* at 429.

Kavanaugh, concurring, also recognized the problem in determining the scope and applicability of the tradition.[151] The Court concluded (persuasively, I think) that the state could prevent distracting noise or intrusive touching during the injection by means less restrictive than total bans on praying aloud or touching the prisoner.[152] But the Court had to do the analysis, and it had to rely in part on empirical assessments of risk.[153]

To say that free exercise law must rely on general standards does mean it can't also be refined into specific categories of cases, with distinctive rules and based on the history relevant to that category. That has happened with cases involving religious organizations' internal governance. In its two decisions embracing the ministerial exception to nondiscrimination laws, the Court has recognized absolute protection for religious entities' choice of their leaders, as a key example of "their autonomy with respect to internal management decisions that are essential to the institution's central mission."[154] The protection of the choice of ministers relies on a very strong historical record, which the Court reviewed. Interference by the Crown in the choice of clergy was a central feature of the English establishment, and American leaders from colonial assemblies through James Madison resisted any effort to give civil authorities such power here.[155] But the strength of the ministerial exception reflects not only historical episodes but also the comparative interests at stake when the government intervenes in a religious organization's choice of leaders. The exception "is absolute partly because of the severity of the burden. Interference with a religious organization's key governance decisions, including who should fill "key roles," tends to affect not just one of its practices but many," "'the members of a religious group put their faith in the hands of their ministers.'"[156] And on the other side, "[d]enying someone a position as minister does not generally deny broad employment opportunities. Ministers can find another congregation, denomination, or other religious entity, or any secular occupation."[157] This comparison of interests

[151] *Id.* at 444 (Kavanaugh, J., concurring) ("the Court acknowledges that some of the history is not precisely on point because many executions historically were outdoor public hangings").
[152] See *id.* at 429.
[153] The analogous point arises in Second Amendment cases. See Blocher and Ruben, *supra* note XX, at 170 ("Despite *Bruen*'s suggestion that its approach is purely historical, its test requires contemporary evidence to play a key role. Quite simply, there is no way to compare the 'why' and 'how' of modern and historical gun laws without evidence.").
[154] *Our Lady*, 591 U.S. at 746; accord *Hosanna-Tabor*, 565 U.S. at 186 ("matters of church government as well as those of faith and doctrine"); *id.* at 190 ("government interference with an internal church decision that affects the faith and mission of the church itself").
[155] *Hosanna-Tabor*, 565 U.S. at 702–04. For historical evidence on further issues concerning the ministerial exception, see, e.g., Nathaniel Fouch et al., *Credentials Not Required: Why an Employee's Significant Religious Functions Should Suffice to Trigger the Ministerial Exception*, 20 FED. SOC. REV. 182, 185–88 (2020) (discussing founding-era objections, by Baptists and others, to laws setting credentials for religious teachers).
[156] Laycock and Berg, *supra* note XX, at 56 (quoting *Hosanna-Tabor*, 565 U.S. at 188).
[157] *Id.*

bolsters the history underlying the freedom to choose ministers—or perhaps the comparison explains why assertion of that freedom has happened so often in history.

3. Tradition violating a principle: the 19th-century "no-aid" cases

There is another situation where the Court recently has strengthened free exercise protection and considered arguments based on history and tradition. A trio of decisions—*Trinity Lutheran*, *Espinoza*, and *Carson*—have ruled it unconstitutional for government to exclude religious entities and individuals for exclusion from otherwise available public benefits, whether the exclusion is because the beneficiaries have a religious identity or because they will make religious uses of the benefit.[158] These rulings complete a seismic shift in the holdings concerning government funding of religious activities. At one time the Court severely limited such funding under the Establishment Clause,[159] but it then held that equal funding was permissible[160] and eventually (in *Trinity* through *Carson*) that it was required.

Avoiding discriminatory exclusion from benefits programs can be important to religious individuals and entities in the modern state. But in striking down these exclusions, the current Court has had to confront an argument from tradition. States defended the exclusions based on the collection of 19th-century state constitutional provisions that excluded religious or "sectarian" K–12 schools from public funding.[161] These provisions, enacted in more than 30 states from the 1840s through the 1890s, assertedly constituted "a tradition against state support for religious schools" that justified states in excluding religious schools and families using them from eligibility for benefits.[162] But in *Espinoza*, the Court refused to give those provisions weight. One reason was that earlier state practice, predating the rise of public K–12 schooling, had sent substantial fundsing to religious schools.[163] The Court said that "evidence may reinforce an early practice but cannot create one" in contradiction of the earlier practice.[164] But the other reason was that the 19th-century no-aid tradition was "checkered": it had a "'shameful pedigree'" arising from "'pervasive hostility to the Catholic Church and to Catholics in general.'"[165] Although the Court acknowledged some complexity in this record—some states had reenacted their no-aid provisions decades later—it concluded that "[t]he no-aid provisions of the 19th century hardly evince a tradition that should

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[158] Trinity Lutheran Church v. Comer, 582 U.S. 449 (2017) (religious identity); Espinoza v. Montana Dept. of Revenue, 591 U.S. 464 (2020) (religious identity); Carson v. Makin, 597 U.S. 767 (2022) (religious use of benefits).
[159] See, e.g., Lemon v. Kurtzman, 403 U.S. 602 (1971); Comm. for Public Education v. Nyquist, 413 U.S. 756 (1973).
[160] Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Mitchell v. Helms, 530 U.S. 793 (2000).
[161] See, e.g., *Espinoza*, 591 U.S. at 482.
[162] *Id.* (emphasis removed).
[163] *Id.* at 480–81 (citations omitted) ("In the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones.").
[164] *Id.* at 482.
[165] *Id.* (quoting *Mitchell*, 530 U.S. at 828–29) (other citations omitted).

inform our understanding of the Free Exercise Clause."[166] Put differently, the no-funding provisions for schools did not reflect a "'historic and substantial' tradition" comparable to the founding-era tradition of barring funding to support clergy.[167]

In other words, *Espinoza* rests significantly on the proposition, discussed earlier, that some traditions deserve no weight because they contradict the fundamental principles or values underlying the relevant constitutional provision.[168] Here the principle is that hostility or rank discrimination toward a particular religious group is forbidden. That principle is indeed fundamental.[169] And I have joined others in documenting that the 19th-century no-aid provisions were infected with disturbing elements of such hostility.[170] So when the Court found the 19th-century no-aid tradition "checkered," it was scrutinizing a tradition for its consistency with fundamental principles that run even deeper in the history, purposes, or logic of the constitutional rule.

It might be argued that the key in *Espinoza* was simply that the tradition against aid to religious schools did not run back to the founding; it grew up only in the 1830s once Catholic immigrants began to arrive in large numbers.[171] That could mean that the no-aid rule was not justified on originalist grounds, or that it was not sufficiently lengthy or continuous to deserve weight as a strong tradition. But those arguments become complicated. The 19th-century no-aid movement was contemporaneous with the enactment of the Fourteenth Amendment, a time period that is arguably relevant to interpretation of at least the incorporated version of the right.[172]

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[166] *Id.* at 482.

[167] *Carson*, 596 U.S. at 788 (quoting *Espinoza*, 591 U.S. at 481) (both distinguishing Locke v. Davey, 540 U.S. 712, 725 (2004)).

[168] See *supra* notes XX–XX and accompanying text.

[169] *Masterpiece Cakeshop*, 584 U.S. at 637–38; *Lukumi*, 508 U.S. at 532–42.

[170] See, e.g., LLOYD JORGENSEN, THE STATE AND THE NON-PUBLIC SCHOOL, 1825–1925 (1987); Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 199–205 (2003); John C. Jeffries, Jr., and James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 297–303 (2001); Richard W. Garnett, *Brown's Promise, Blaine's Legacy*, 17 CONST. COMM. 651, 670–74 (2000) (reviewing JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999)).

For arguments that the state provisions rested on legitimate concerns and were not pervasively tainted with hostility, see, e.g., Steven K. Green, *Blaming Blaine: Understanding the Blaine Amendment and the No-Funding Principle*, 2 FIRST AMEND. L. REV. 107 (2003); Marc D. Stern, *Blaine Amendments, Anti-Catholicism and Catholic Dogma*, 2 FIRST AMEND. L. REV. 153 (2003).

[171] *Espinoza*, 591 U.S. at 482 ("Such a development … cannot by itself establish an early American tradition.").

[172] Cf., e.g., Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1440 (2022).

Moreover, the state provisions lasted a long time, as *Espinoza* acknowledged,[173] and lower courts relied on them well into the 21st century.[174] Yet the Court in *Espinoza* rejected them.

A tradition's length and continuity may increase the likelihood that it fits with the fundamental implications of the relevant constitutional provisions. But it would be complacent to claim that these feature provide a guarantee, or conversely, that the only substantively objectionable traditions will be those that are short-lived.[175] In fact, the timing of the no-aid provisions is relevant mostly because it shows how they arose in response to the perceived threat from the Catholic surge, which bolsters the case that the 19th-century movement was shot through with highly partial Protestant assumptions.[176]

In short, when *Espinoza* dismissed the 19th-century no-aid tradition as not sufficiently "historic or substantial," it was saying in part that the movement violated fundamental substantive norms of religious neutrality, not simply that it didn't come early enough in our history. Those fundamental principles might derive from the provision's original meaning, or its purposes and the central evils it was designed to prevent.[177] Or they might reflect characterizing relevant traditions at a higher level of generality. However one describes it, the Court handled tradition in a flexible way in *Espinoza*, as it has in other free exercise decisions.[178]

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[173] 591 U.S. at 482.

[174] As exemplified in the cases the Supreme Court reviewed, e.g., Carson v. Makin, 979 F.3d 21 (1st Cir. 2020); Espinoza v. Montana Dept. of Revenue, 393 Mont. 446, 435 P.3d 603 (2018); see also, e.g., Taxpayers for Public Education v. Douglas County School Dist., 351 P.3d 461 (Colo. 2015).

[175] For example, it would be comforting to think that the unconstitutionality of Jim Crow was shown simply by the fact that it was a relatively recent innovation when *Plessy* approved it. Cf. DeGirolami, *supra* note XX, [WULQ] at 1672 (noting that "the practice of segregation by race in railroad cars was, in fact, actually relatively recent at the time").

[176] See, e.g., *Espinoza*, 591 U.S. at 497–507 (Alito, J., concurring) (tracing the anti-Catholic influence on the federal Blaine Amendment and its state counterparts, including Montana's); Berg, *supra* note XX, at 199–205 (arguing the anti-Catholic taint appeared in the timing of the movement, in the explicit statements of no-aid proponents, in the overreaction to any colorable concerns about Catholic schools, and in public schools' imposition of non-neutral, coercive Protestant practices such as King James Bible readings without comment).

[177] See *supra* note XX and accompanying text.

[178] The same points about the "no-aid" provisions can be made about another set of 19th-century practices—one that raises complications, under a tradition-based approach, for broad formulations of church autonomy. A number of states in the antebellum period had statutes restricting the amount of property incorporated churches could hold and regulating their governance, for example requiring that boards have a minimum number of trustees and be dominated by laypersons rather than clergy. See, e.g., Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307, 317–35 (2014). Professor Gordon has argued that these statutes reflected partly a general distrust of corporate power, but partly the attitude that religious disestablishment called for "protection of the individual against the power of religious organizations," including through state intervention against the organization. *Id.* at 371 ("Regulation, in the form of property limitations and lay control, both imposed by states, was widely understood as the surest means of protecting individual liberty to believe.").

C. Non-Establishment

As it has in free exercise cases, the Court should be willing to handle tradition in a flexible way in Establishment Clause cases, particularly those involve government's own religious expression in public schools or other settings.

The Establishment Clause plays an important role in protecting conflicting views on religious matters. Thus it likewise helps reduce people's fear of being penalized or marginalized for living according to their views, and their perceived need to attack the other side before it attacks them. In particular, the Establishment Clause protects members of minority faiths as well as nonbelievers from penalties or marginalization that occur when the government adopts a favored religious view or set of views.

In my book on protecting religious liberty in a polarized age, I argued for strong protection of free exercise across many contexts, and then for strong protection against government promotion of a favored religious view or views even when such promotion doesn't coerce others to join in that view.[179] Under this argument, there are problems with official religious endorsements, not just with official coercion. I've been influenced by the arguments of Alan Brownstein, who emphasizes that strong protections under both Religion Clauses "support and reinforce each other in critical ways": "The justifications for the rigorous enforcement of one religion clause often substantially reinforce[ ] the arguments for the rigorous enforcement of the other, and the dilution of one clause may in a corresponding manner undermine the arguments for taking the other clause seriously."[180]

On the other hand, Lael Weinberger has documented that notwithstanding such statutes, church autonomy principles were developing and expanding in the courts in the 19th century, culminating in their adoption by the Supreme Court as national principles of common law in *Watson v. Jones*, 80 U.S. 679 (1872). Lael Weinberger, *The Origins of Church Autonomy: Religious Liberty after Disestablishment*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4933864 (forthcoming) (last revised Feb. 5, 2025). This tradition of church-regulating statutes was of limited duration; Weinberger suggests that they may reflect "the tail end of the establishment tradition." *Id.* at 38. (In particular, they may reflect a transitional reaction against establishments in the immediate wake of their demise.) But in addition, the statutes, like the "no-aid" provisions of the same general era, run up against fundamental principles prohibiting government discrimination among religions or government imposition of one set of doctrines. The statutes' provisions, especially the lay-trusteeship requirements, reflected hostility to the institutional Catholic Church, or at least to any religion that affirmed a hierarchy.

To the extent that state legislation responded to government's past favoritism for hierarchical churches by imposing government favoritism for non-hierarchical, individualistic versions of faith, the legislation did not reflect a stable, lasting tradition, and it violated foundational principles. It reflects a kind of polarized cycle in itself.

[179] POLARIZED AGE, *supra* note 3, at 300–30 (ch. 8).

[180] Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger When Both Clauses Are Taken Seriously*, 32 CARDOZO L. REV. 1701, 1705 (2011) (bracket inserted).

Brownstein and I disagree on several major points—I defend, while he would limit, the equal participation of private religious individuals and entities in general programs of funding[181]—but we generally agree on the arguments for limiting government's own religious expression. He warns that deference to official religious expressions threatens to undercut several features or dynamics that support free exercise rights as well: undercutting the sense of reciprocity or mutuality in the protection of rights, the independence of religious views and actors from government, and the notion that one should look behind simple or formally neutral rules to see their effect on people of differing religious views.[182] I too think that "limiting government's own religious activity reinforces the case for limiting government control over the voluntary religious activity of private individuals and groups," and that "[a]s a matter of consistency and reciprocity, … religious believers who (properly) claim freedom against government interference in their religious practices should also relinquish claims for government intervention to favor their faith."[183]

But the current Court has retreated from giving strong Establishment Clause protection, and the "history and tradition" approach has played a significant role in the retreat. As noted above, *American Legion v. American Humanist Association*[184] upheld the state of Maryland's display of a 32-foot tall cross, a war memorial erected in 1921 to honor casualties of World War I. The Court abandoned its previous use of the *Lemon* test for "longstanding monuments, symbols, and practices" and instead adopted "a strong presumption of constitutionality" for such actions.[185] Before that, *Town of Greece v. Galloway*[186] upheld the practice of prayers opening a town board meeting because fit within the longstanding, continuous tradition of legislative prayer. And *Kennedy v. Bremerton School District*[187] held that the football coach's postgame prayer at midfield was protected free speech and did not violate the Establishment Clause. Because the Establishment Clause must be interpreted "by 'reference to historical practices and understandings,'"[188] the Court said, the question was not whether the coach's visible prayers endorsed religion but only whether they coerced his players to join him—and the record, the Court said, showed they did not.

The Court should not go further in relaxing Establishment Clause rules under the "history and tradition" approach. Certainly it should not do so if it is to have any chance of protecting conflicting sides and thereby serve the Religion Clauses' historic purpose of reducing suffering, fear, alienation, and retaliation. The Court has been flexible enough in using tradition to allow strong protection of free exercise rights; it should do the same in protecting against official speech favoring a religious view.

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[181] See, e.g., Berg, *supra* note XX ["Vouchers and Religious Schools"].
[182] See Brownstein, *supra* note XX, at 1706–08, 1724.
[183] POLARIZED AGE, *supra* note 3, at 303.
[184] 588 U.S. 29 (2019).
[185] *Id.* at 51–52, 57.
[186] 572 U.S. 576 (2014).
[187] 597 U.S. 507 (2022).
[188] *Id.* at 535 (quoting *Greece*, 572 U.S. at 576).

1. Longstanding (noncoercive) symbols

Like other recent decisions, *American Legion v. American Humanist* undercuts protections against people being subtly harmed by government influence in religious matters. It is difficult at best for the cross, the symbol of Christ's sacrifice and Christians' hope beyond death, to designate the sacrifice of soldiers of other faiths and no faith. Thus the Jewish War Veterans of America described the cross as sending the "hurtful" message "that this is a Christian country whose soldiers can be honored with Christian symbols."[189]

While the decision is sad in that sense, the particular use the Court made of tradition poses less threat to Establishment Clause values than other possible uses. The "strong presumption of constitutionality" for "longstanding monuments, symbols, and practices" connects the validity of government action to traditions and historical practices, not because official religious symbols as a broad category have been prevalent in history, but because the particular display being validated has a long history. "[R]etaining established, religiously expressive monuments, symbols, and practices," the Court said, "is quite different from erecting or adopting new ones."[190] Although concurring justices would have approved any noncoercive display, new or old,[191] the majority's holding and reasoning cover only "longstanding" ones.

The majority gave several reasons for presuming longstanding practices to be valid. Some of the reasons involve complications in identifying the meaning of such a practice: its original meaning may be obscure, or a new, more pluralistic or secular meaning may have developed.[192] In addition, or perhaps as a corollary, when the longstanding practice develops such "familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning."[193]

American Legion's focus on whether the specific display or ceremony in question is longstanding logically preserves challenges to many official religious practices. Its converse is that a newly introduced practice should face closer review, for example on whether it discriminates among faiths (and using a cross alone for an official war memorial today would indeed

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[189] Brief of Jewish War Veterans of America as Amicus Curiae, *American Legion v. American Humanist Assn.*, 2019 WL 410763, at *13.
[190] *American Legion*, 588 U.S. at 57.
[191] See *id.* at 73–74 (Thomas, J., concurring in the judgment) (limiting any incorporation of the Establishment Clause to coercive actions); *id.* at 87 (Gorsuch, J., concurring in in the judgment) ("[A] practice consistent with our nation's traditions is just as permissible whether undertaken today or 94 years ago.").
[192] *Id.* at 52; *id.* at 54–55 ("Even if the original purpose of a monument was infused with religion, the passage of time may obscure that sentiment. As our society becomes more and more religiously diverse, a community may preserve such monuments, symbols, and practices for the sake of their historical significance or their place in a common cultural heritage.").
[193] *Id.* at 56.

discriminate). The Court drew that line 20 years ago in two Ten Commandments display cases,[194] and *American Legion* did not disturb it. Indeed, although *American Legion* rejected the tests of *Lemon* and (relatedly) "no endorsements of religion," its rationales involve similar questions of whether government is sending a religiously partial message.[195] Under *American Legion*'s rationales, the Court can still in future take account of the special constitutional sensitivity of religious matters.

Moreover, the last of *American Legion*'s rationales specifically references the underlying goal of avoiding government interventions in religion that foment division. "[T]earing down monuments with religious symbolism and scrubbing away any reference to the divine," the Court said, "will strike many as aggressively hostile to religion. Militantly secular regimes have carried out such projects in the past, and for those with a knowledge of history, the image of monuments being taken down will be evocative, disturbing, and divisive."[196] The majority quoted Justice Breyer's warning that "'[d]isputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation'" could "'create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.'"[197] Similar warnings have come from scholars who can hardly be called weak on the Establishment Clause.[198]

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[194] See, e.g., Van Orden v. Perry, 545 U.S. 677 (2005), where Justice Breyer's decisive vote upholding the Commandments' display on the Texas Capitol grounds said: "[I]n today's world, in a Nation of so many different religious and comparable nonreligious fundamental beliefs, a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that this longstanding, pre-existing monument has not." *Id.* at 703 (Breyer, J., concurring in the judgment). Cf. McCreary v. Am. Civil Liberties Union, 545 U.S. 844 (2005) (striking down new display of the Commandments in Kentucky county courthouse).

[195] See Ira C. Lupu and Robert W. Tuttle, *The Ten Commandments in Louisiana Public Schools: A Study in the Survival of Establishment Clause Norms*, CHI.-KENT L. REV. (forthcoming 2025), at 20 ("Justice Alito's emphasis on these four reasons does not erase either the secular purpose or primary effect requirements. On the contrary, his opinion attempts to explain how and why the display of a Latin Cross as a war memorial has over time become sufficiently secular to pass constitutional muster."); MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 530 (5th ed. 2022) ("Justice Alito could easily have written this opinion, and come to the same conclusion, within the *Lemon* framework.").

[196] *American Legion*, 588 U.S. at 56.

[197] *Id.* at 56–57 (quoting Van Orden, 545 at 704 (opinion of Breyer, J.)).

[198] Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1841 (2009) ("Establishment Clause rules [against religious endorsements or symbols] cannot prevent division and alienation. On the contrary, they have sometimes exacerbated these problems."); William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 376 (1991) (arguing that "serious religious divisiveness now exists—in part because of the types of cases" that challenge a religious symbol or practice because of its offensiveness to some observers). See also Daniel P. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1185 (1988) ("Other things equal, … the Supreme Court does less good and causes more harm when it invalidates traditional, as opposed to nontraditional, government practices that are designed to favor religion.").

In short, although there are generally strong reasons to think that official religious practices harm minorities and promote division, those arguments tend to be weaker with respect to longstanding (noncoercive) practices. Using "history and tradition" to head off challenges to such practices could, in some instances, promote neutrality and avoid greater division. But, importantly, that is only because the Court defined the relevant category of actions so that they don't violate the most fundamental Religion Clause principles. The definition excludes practices that are coercive, as well as new interventions that favor one religious view in today's pluralistic society. And it excludes even longstanding displays if they showed elements of religious hostility or disrespect at their adoption.[199]

2. Greece *and* Kennedy*: bounded tradition*

The Court has upheld prayer at sessions of legislative bodies—Congress, state legislatures, and local councils—by invoking founding-era history and longstanding, continuous tradition. In *Marsh v. Chambers*,[200] it was enough for the Court that legislative prayer had been adopted by the First Congress (within three days of approving the First Amendment) and had continued as an "unbroken practice for two centuries in the National Congress, [and] more than a century in [many] states."[201] *Marsh* did not explain how the legislative-prayer tradition fit with key principles under the Religion Clauses, as Michael McConnell—no strict separationist—complained.[202] He wrote: "So far as one can tell from the Court's opinion, there is simply an exception from the establishment clause for legislative chaplains…. The *Marsh* style of jurisprudence suggests that the Constitution does not embody any set of coherent and consistent principles; in short, it suggests that the Constitution is not 'law' in any recognizable sense."[203]

Town of Greece v. Galloway partially corrected this deficiency. It upheld invocations at town council meetings in reliance on the history of legislative prayer, but it also said that "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation."[204] It went on to assess whether the council's practice violated two key principles of the Religion Clauses: nondiscrimination among religions (were its prayers or pattern impermissibly "sectarian"?) and noncoercion (did it impose "social pressures [on] nonadherents to remain in the room or even feign participation" during the prayers?).[205] The Court found that neither principle was violated (more about that shortly); but it conducted the inquiry.

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[199] See *American Legion*, 588 U.S. at 64 (stating that "[t]he monument would not serve [the] role [of honoring soldiers] if its design had deliberately disrespected area [Jewish] soldiers who perished in World War I," but finding "no evidence" of such disrespect).
[200] 463 U.S. 783 (1983).
[201] *Id.* at 795.
[202] Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359 (1988).
[203] *Id.* at 363.
[204] *Greece*, 572 U.S. at 576.
[205] *Id.* at 577–78.

Greece thus relies on a tradition that is bounded or defined by principles, much as principles against religious hostility overrode the pattern of 19th-century no-aid provisions in *Espinoza*.[206] But if principles set the bounds, what work is the tradition doing? One possibility is that the constraints come from within the specific tradition itself. The Court in *Greece* said that "the relevant constraint" on sectarianism in legislative prayer "derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage": if the invocations denigrate or proselytize nonbelievers, they will fail in the purpose to "elevate" the occasion and "unite lawmakers."[207] But the other boundary principle, that the prayers should not be coercive, did not come from practice's internal logic. The Court simply called it "an elemental First Amendment principle."[208] It was external to the prayer practice: drawn from the broader purposes of the constitutional provision.

Kennedy v. Bremerton School District also referred to history and tradition, but only briefly, and turned in the end on whether the action in question was coercive.[209] The Court said nothing about any history or tradition specific to the case: say, religious expression by public school teachers, let alone expression by coaches. There could be no such tradition extending back to early America, since public schools appeared only in the mid-1800s and athletics coaches presumably far later. Rather, the Court appeared to use history to support limiting the Establishment Clause to cases of coercion.[210] And both non-sectarianism and non-coercion as fundamental principles arise plainly from history. Nondiscrimination among religions is "the clearest command of the Establishment Clause,"[211] although even that principle becomes more complicated in the context of noncoercive displays. Noncoercion is firmly supported by the original understanding as well.[212]

In short, even under recent Establishment Clause decisions, a longstanding tradition must be bound or defined by broader fundamental principles. Those principles themselves may be drawn from history or tradition, but they remain general. The result is that the court may frequently have to raise the level of generality at which it considers tradition.

3. Applying principles vigorously, not weakly

Traditions may be bounded by principles, but the Court has applied the principles in lenient rather than strict ways. *Greece* held that the town had satisfied the requirement of non-sectarianism

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[206] See *supra* notes XX–XX and accompanying text.
[207] 572 U.S. at 582–83.
[208] *Id.* at 586.
[209] *Kennedy*, 597 U.S. at 535 ("In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'") (quoting *Greece*, 572 U.S. at 576).
[210] *Id.* at 536 ("coercing worship amounts to an Establishment Clause violation on anyone's account of the Clause's original meaning").
[211] Larson v. Valente, 456 U.S. 228, 244 (1982).
[212] Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

even though, over 15 years, all but three of the prayer-givers were Christian (and those three were invited only during a brief spell after the plaintiffs filed suit).[213] The board recruited clergy only from congregations located within the town, all of which were Christian, and the Court found it sufficient that this method was formally nondiscriminatory.[214] But as the dissents pointed out, several non-Christian congregations "[lay] just outside [the town's] borders and include[d] citizens of Greece among their members." By reaching out to them, the town could have achieved a less discriminatory result with modest extra effort.[215]

The Court also applied the non-coercion rule leniently. It rejected the argument that local councils differ from the legislature in *Marsh* because citizens present zoning or other requests to them, and thus prayers "put some residents to the unenviable choice of either pretending to pray like the majority or declining to join its communal activity, at the very moment of petitioning their elected leaders."[216] The Court reasoned that the board members never "directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity."[217] Clergy giving prayers often asked the audience to rise, but the Court excused that by saying they "presumably are accustomed to directing their congregations in this way and might have done so thinking the action was inclusive, not coercive."[218] The majority's answers reflect a weak notion of coercion, one that minimizes the overall effect of the circumstances on the lone citizen, with council business, who dissents from the prayers. The pressure to join can arise whether or not council members make explicit statements, and whatever the prayer-giver's subjective intent.

The weak policing of coercion in *Greece* might reflect that the Court thinks the tradition of legislative prayer is especially long and continuous. Even though *Greece* treated noncoercion as a boundary on legislative prayer, it also read *Marsh* to mean that "it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted"; the Court also presumed that "the reasonable observer is acquainted with [the legislative prayer] tradition," given its long endurance, "and understands that its purposes are … not to afford government an opportunity to proselytize."[219] So the length and duration of the tradition can affect the Court's willingness to apply a principle limiting the tradition.

Kennedy, like *Greece*, approached coercion in a narrow rather than holistic sense. Coach Kennedy had first conducted his postgame midfield prayers with the majority of his players around

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[213] *Id.* at 613 (Breyer, J., dissenting); *id.* at 627–28 (Kagan, J., dissenting).
[214] *Id.* at 585–86.
[215] *Id.* at 613 (Breyer, J., dissenting) ("[I]n a context where religious minorities exist and where more could easily have been done to include their participation, the town chose to do nothing"); *id.* at 632–33 (Kagan, J., dissenting).
[216] *Id.* at 631 (Kagan, J., dissenting).
[217] *Id.* at 588.
[218] *Id.*
[219] *Id.* at 577 (citing *Marsh*, 463 U.S. 783); *id*. at 587.

him (in addition to giving religious exhortations in his locker-room speeches). The superintendent directed him to stop those practices; Kennedy at first complied but then determined he needed to resume his midfield recognition of God immediately after games. He did so for three weeks, over the district's objections, and was then put on paid leave and sued.[220]

The Court rejected the school district's argument that the midfield prayers could coerce students to join him because of the power he had over their playing time, their opportunities for college recruitment, and so forth. Echoing the reasoning in *Greece*, the majority noted that Kennedy never explicitly required or asked students to pray (even the earlier team postgame prayers, the majority noted, started when he prayed on his own "and some players asked whether they could pray alongside him").[221] At the three games directly in dispute, Kennedy prayed while his players were occupied singing the school fight song; the only students joining him were "from the opposing team," who could hardly have feared he would "decrease their playing time … if they did not participate."[222]

But the majority disregarded how coercion could develop in the circumstances. Players might not always be busy at the time of the prayers; and as everyone agreed, the earlier postgame team prayers had started when Kennedy prayed alone at midfield and players began to join him.[223] Why, Justice Sotomayor asked in dissent, wouldn't prayers "in the same spot, at that same time, and in the same manner" induce students to join just as before?[224] The majority opinion painted Kennedy as amenable to delaying his prayers until his team members left the field; but that overlooked the record as a whole (and both of the lower courts so found).[225] As the dissent observed: "Kennedy himself apparently anticipated that his continued prayer practice would draw student participation, requesting that the District agree that it would not 'interfere' with students joining him in the future."[226]

The majority read the record narrowly; if *Kennedy* stands only for a finding of no coercion under those selected facts, it may cause only limited damage. Perhaps, too, the majority's

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[220] *Kennedy*, 597 U.S. at 517–18.
[221] *Id.* at 537–38, 515.
[222] *Id.* at 539 (quotations omitted).
[223] *Id.* at 515; *id.* (Sotomayor, J., dissenting).
[224] *Id.* (Sotomayor, J., dissenting).
[225] The majority said that Kennedy "even considered it 'acceptable' to say his 'prayer while the players were walking to the locker room' or 'bus,' and then catch up with his team." *Id.* at 538 (record citations omitted). But the trial judge, on the whole record, concluded that "[t]he injunctive relief Kennedy requests, which would permit him to pray 'at the 50-yard line at the conclusion of BHS football games' with no other limitations," gave "no assurance that, if [he] were allowed to resume his post-game prayers, students would not become involved again." Kennedy v. Bremerton School Dist., 443 F. Supp. 3d 1220, 1240 (W.D. Wash. 2020), aff'd, 991 F.3d 1004 (9th Cir. 2021).
[226] *Kennedy*, 597 U.S. at 563 (Sotomayor, J., dissenting).

reluctance to find inherent coercion can be limited to cases, like *Kennedy*, where a government employee's speech could be seen (as the majority indeed saw it) personal rather than official.[227]

The lenient application of nondiscrimination and noncoercion rules raises two problems. First, it arguably contrasts with the Court's stringency in applying these principles in free exercise cases (stringency that, to reiterate, is justified[228]). Free exercise doctrine stringently restricts discrimination against religion by applying heightened scrutiny when the government exempts even a small number of comparable secular activities but denies a religious exemption.[229] That doctrine inevitably requires judgment calls, such as what constitutes a "comparable" activity, rather than establishing a bright-line rule. If nondiscrimination among religions is likewise a fundamental principle in the Establishment Clause context of official religious prayers, then its enforcement should likewise be strong rather than lenient. Conversely, if the Court trusts a majoritarian body's facially neutral procedures to respect minority interests in a case of government religious speech like *Greece*, people not already strongly committed to free exercise rights will ask why facially neutral regulations shouldn't be deemed sufficient in those cases.[230]

So too with coercion. On the free exercise side, the Court rightly reads coercion and governmental "burdens" broadly: it finds burdens, for example, in the denial of government benefits to both individuals and organizations.[231] If it is sensitive to instances of coercion to forego religious practices, it should also be sensitive to instances of coercion to engage in religious practices. The consistent principle is that stated in 1789 by Maryland Congressman Daniel Carroll, supporting the proposed First Amendment during the House debate: "[T]he rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand."[232]

If the goal is to protect the contending sides in a polarized society, it's crucial for courts to protect fundamental principles like nondiscrimination and noncoercion consistently—and with consistent vigor. Justice Kagan in *Greece* offered her own principle explaining the importance of protecting religious dissenters against government impositions:

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[227] *Id.* at 529–31 (finding Kennedy's speech "private, not governmental"); *id.* at 540–41 (the district's position "would defy this Court's traditional understanding that permitting private speech is not the same thing as coercing others to participate in it").
[228] See *supra* notes XX and accompanying text.
[229] See, e.g., *Tandon*, 593 U.S. at 62–63.
[230] See Brownstein, *supra* note XX, at 1726.
[231] Sherbert v. Verner, 374 U.S. 398 (1963) (denial of unemployment benefits); *Fulton*, 593 U.S. 522 (termination of government social-services contract); *Carson*, 596 U.S. 767 (denial of educational benefits to families and schools); *Espinoza*, 591 U.S. 464 (same); *Trinity Lutheran*, 582 U.S. 449 (denial of funding to church-operated daycare).
[232] 1 Annals of Cong. 729 (Aug. 15, 1789), available https://press-pubs.uchicago.edu/founders/documents/amendI_religions53.html.

> The not-so-implicit message of the majority's opinion—"What's the big deal, anyway?"—is mistaken. The content of Greece's prayers *is* a big deal, to Christians and non-Christians alike. A person's response to the doctrine, language, and imagery contained in those invocations reveals a core aspect of identity—who that person is and how she faces the world.[233]

True; and for that reason the Court, going forward, should give meaningful rather than weak protection against coercion to engage in religious practices. For the same reason, the Court should continue to give strong protection against coercive burdens on religious practice, under free exercise, free speech, or religious freedom statutes. By the very terms in which Justice Kagan stated it, the "core aspect of identity" includes the right to exercise religion, to live consistently with one's religious beliefs. The liberal justices should strongly protect that right too.

4. Going forward

If the Court wishes to protect both sides meaningfully in today's conflicts, it should not proceed further in shrinking the Establishment Clause. As Chip Lupu and Bob Tuttle discuss in this symposium, the first test of how far the Court will proceed may involve Louisiana's statute requiring the posting of a Ten Commandments display in every public-school classroom in the state. In a suit brought by a group of parents, the district court entered a preliminary injunction against the law.[234] The court first held that it was bound by *Stone v. Graham*, the 45-year-old Supreme Court decision striking down such a state-required display.[235] The state argued that *Stone*, which had rested on the *Lemon* test, had been undercut by *Lemon*'s rejection in later decisions: *Greece*, *American Humanist*, and *Kennedy*. But the court found an Establishment Clause violation even under the principles that have survived or replaced *Lemon*. It ruled, accepting the arguments of the plaintiff's expert, that there was no "'evidence for a longstanding historical practice and acceptance of widespread and permanent displays of the Ten Commandments in public-school classrooms.'"[236]

The court also found that requiring such displays was affirmatively "inconsistent with the broader historical tradition" underlying government religious expression, in two ways: it was "sectarian," discriminating among religious views, and it "coerce[d] religious exercises."[237] In other words, it violated the two key principles that, as discussed above, set boundaries on the

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[233] 572 U.S. at 636 (Kagan, J., dissenting) (emphasis in original).
[234] Roake v. Brumley, 2024 WL 4746342 (M.D. La. Nov. 12, 2024),
[235] *Id.* at *38–47 (following Stone v. Graham, 449 U.S. 39 (1980) (per curiam)).
[236] *Id.* at *78 (quoting Expert Report of Professor Steven K. Green, ¶39); *id.* at *49 (same). The district court set forth facts and legal conclusions in rejecting the state officials' motion to dismiss; it then repeated those or incorporated them by reference in granting plaintiffs' preliminary-injunction motion. I include citations from both parts of the opinion.
[237] *Id.* at *64; see *id.* at *68 ("even if there were a broader tradition in play, the practice mandated by the Act would be inconsistent with that tradition because it is discriminatory and coercive"); *id.* at *81 (finding the statute "is inconsistent with any historical tradition by being discriminatory and coercive").

permissibility of historical practices.[238] The requirement was sectarian because "many Louisianians … (a) do not subscribe to the specific version of the Ten Commandments listed in the Act; (b) are not religious and do not agree with any version of the Decalogue; or (c) believe in other religions (such as Hinduism, Buddhism, and Taoism) that 'generally do not consider the commandments to be part of their belief system.'"[239] It was coercive because, with permanent displays in their classrooms over multiple school years, students would "be unconstitutionally coerced into religious observance, veneration, and adoption of the state's favored religious scripture, and they will be pressured to suppress their personal religious beliefs and practices … to avoid the potential disfavor, reproach, and/or disapproval of school officials and/or their peers."[240]

The district court's reasoning approaches tradition in the ways the Article has advocated. First, any specific tradition of a particular practice should be constrained by the broader principles that fundamental to America's religious-freedom tradition, especially nondiscrimination among religions and noncoercion. Those principles may themselves be characterized as "broader historical traditions," as the district court characterized them in *Roake*;[241] and they draw support from history.[242] But they generate results and put bounds on specific historical practices. They have done so in free exercise cases like *Espinoza*; they provide the best historical basis for mandatory free exercise exemptions; and they should play that role in Establishment Clause cases as well.

Second, broader principles and traditions should be read in a sufficiently general and flexible way to serve the historic purposes of the constitutional provision. Consider the district court's ruling on the principle of non-sectarianism. The court found a violation not only because the state had mandated "a specific version of the … Commandments" that was disputed among the Abrahamic faiths, but also more fundamentally, because other Hinduism, Buddhism, and Taoism) "'generally do not consider the commandments to be part of their belief system.'"[243] The historic principle of nondiscrimination among religions, which originally arose to prevents the evils from government taking sides between groups or denominations of Christians. The district court's reasoning applies the principle faithfully in today's circumstances of far greater religious pluralism. And although discrimination among religions was not fatal in the context of a noncoercive display erected decades ago (*American Legion*), it should be fatal in the far more sensitive setting of a new displays mandated across public-school classrooms.

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[238] See *supra* notes XX-XX and accompanying text.
[239] *Id.* at *65 (quoting Compl. ¶¶ 57–62); see *id.* ("[The Act] requires a version of the Ten Commandments that many Protestants use and that this is inconsistent with versions recognized by Jews or Catholics.").
[240] *Id.* at 66 (quoting Compl. ¶ 160).
[241] *Roake*, 2024 WL 4746342 at *64.
[242] See *supra* notes XX–XX and accompanying text.
[243] *Id.* at *65 (quoting Compl. ¶¶ 57–62).

Relatedly, the broad principles and traditions should be enforced with sufficient vigor that they in fact set boundaries on a more specific tradition. The Court has done so on the free exercise side. It has given the concept of coercion meaningful content to invalidate laws that significantly discourage religious practice without prohibiting it. It read the ban on anti-religious hostility broadly strongly enough in *Espinoza* to identify and disapprove the anti-Catholic and Protestant premises in the 19th-century no-aid movement. It should do the same with respect to key principles that limit official government religious expression. The district court rightly reasoned in *Roake* that in the classroom setting, day after day over years, the display of the Commandments would not just express religious values but would push a student toward expressing "veneration" of them and toward "suppressing their [own] personal religious beliefs and practices."[244]

Kennedy's finding of no coercion should be limited in its effect not only because the Court premised it on a limited aspect of the record, but also because the determination what counts as improper official coercion may be affected by the countering right of an individual, even an official, to engage in personal religious expression. In cases near the boundary between these two domains, arguments about inherent coercion arguably lose their conclusive force and the record of coercion must be clearer. A teacher wearing a headscarf or a pendant cross might have some influence on the students in her classroom, but that must be judged against the significant daily burden she would suffer daily if the school stopped her from wearing it.[245] *Kennedy* was different because he had more ready alternatives for postgame prayer besides the 50-yard line, but his case still fell near the boundary between official power and a personal expressive rights.[246] No such countering right is present when state mounts a permanent religious display in public schools. If the rights of conscience "will little bear the gentlest touch of governmental hand,"[247] that concern in the Louisiana Ten Commandments case points almost entirely in the plaintiffs' favor.

E. Other Rights

Finally, no strategy of protecting conflicting sides can succeed unless it addresses one of the nation's most stubborn, deep conflicts: that between LGBTQ persons and conservative religious believers. On one side, LGBTQ people face discrimination, especially in conservative parts of America. They must have the ability to live their lives, form families, and participate fully in the economy and civil society. On the other side, teachings about sex and marriage are central to many religious traditions, including those widely practiced in America. Religious groups cannot exercise

[244] *Id.* at *66 (quoting Compl. ¶ 160).
[245] See *Kennedy*, 597 U.S. at 540 (arguing that a rule that "visible religious conduct by a teacher or coach" was inherently coercive would allow schools to "fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice").
[246] See Brief of Baptist Joint Committee for Religious Liberty *et al.* as Amici Curiae in Support of Respondent, *Kennedy v. Bremerton School Dist.*, 2022 WL 1032638, at *13–16.
[247] See *supra* note XX and accompanying text (quoting Daniel Carroll).

religion freely if they are penalized for acting according to those teachings. The harms and potential harms to each side provoke fear and resentment, aggravating polarization.

The commitment to religious freedom alone cannot resolve this issue. Religious freedom can protect a wide variety of religious believers and positions, including potentially atheism and agnosticism.[248] But LGBTQ claims do not inherently involve religious commitments (although, of course, many same-sex couples understand their marriage in religious terms). LGBTQ nondiscrimination claims (constitutional or statutory) involve other interests: family, privacy, sex or gender equality. The differing grounds for LGBTQ claims and religious-freedom claims increase the challenge of protecting both sides. At best, the differing grounds mean that the two constitutional claims fare differently under some theories of constitutional interpretation. At worst, the differing grounds give each side opportunity to promote the claim it likes and denigrate the other.

As noted above, the Court has so far protected both sides substantially by declaring the constitutional right to same-sex marriage, encompassing many instances of sexual-orientation and gender-identity discrimination within Title VII, and protecting the rights of religious objectors both explicitly and, through protective general standards for free exercise, implicitly.[249] But the "history and tradition" approach raises questions whether the Court will continue to protect constitutional same-sex marriage rights. As noted above, after *Dobbs* and *Glucksberg*, the dominant version of "history and tradition" the Court will likely use for unenumerated privacy rights is narrow: it protects only those rights "'deeply rooted in our history and tradition,'"[250] and the right must be defined at a very specific rather than general level.[251] Same-sex marriage was far too new at the time of *Obergefell* to meet that standard; *Obergefell* unsurprisingly said that the "circumscribed" approach of *Glucksberg* was inappropriate for deciding the scope of the right to marry.[252] But now that approach may be dominant.

This Court would not have issued *Obergefell* in the first place, but the question now is whether it will overrule it. That seems unlikely to happen; it certainly ought not happen. One key consideration under *stare decisis* principles is whether a decision has caused such damage that it must be overruled.[253] *Obergefell* has caused no such consequences. *Dobbs* itself said that overruling abortion rights would not lead to overruling same-sex-marriage rights, since abortion

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[248] See, e.g., POLARIZED AGE, *supra* note 3, at 113–15; Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEG. ISS. 313, 328–36 (1996).
[249] See *supra* notes 9–13 and accompanying text.
[250] *Dobbs*, 597 U.S. at 237–38 (quoting, e.g., Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).
[251] *Glucksberg*, 521 U.S. at 724 (requiring a "careful description" of the right, in that case not a general "self-sovereignty" over "end-of-life decisions," but "a right to commit suicide with another's assistance"); *Dobbs*, 597 U.S. at 238 (requiring a "careful analysis of the history").
[252] See 576 U.S. at 690, 693 (Roberts, C.J., dissenting); *id.* at 576 U.S. at 671–72 (Court's opinion).
[253] Cf. *Dobbs*, 597 U.S. at 268 (arguing that *Roe* was "egregiously wrong and deeply damaging").

is a "unique" act.[254] What makes it unique—and leads many people to resist "live and let live" or compromise solutions—is that, set against women's important interests, there is the asserted termination of a human life (or "potential" life).[255] But same-sex marriage harms no one else unless it imposes on the religious objector; and religious liberty protections can prevent that.

Overruling marriage rights could also cause significant problems of reliance and fairness. In *Dobbs*, the Court argued that no one relies on abortion's availability in the sense of planning specific, concrete activity: "[G]etting an abortion is generally 'unplanned activity,' and 'reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.'"[256] Whether that reasoning is convincing or not, *Obergefell* is different. Same-sex couples planned specific, concrete activity in reliance on the ruling. They decided they could get married in certain states after, and only after, *Obergefell* required those states to recognize the marriages. Any overruling of *Obergefell* would have to be prospective only; neither the overruling nor any state laws reinstituting bans on same-sex marriage could strip couples of the rights and benefits that had vested in them as a matter of constitutional right when they married legally. But a prospective-only ruling would create an unacceptable distinction in many states between two classes of same-sex couples: those who enjoyed civil marriage's many rights and benefits, and those who would be ineligible for them because their relationship formed after *Obergefell* was overturned. The Court should shrink, and likely would shrink, from inviting such a mess.

Of course, the prospects of a mess have been reduced by passage of the Respect for Marriage Act, which requires all states to give full legal effect to same-sex marriages entered into in another state.[257] So even in the very unlikely event that the Court undid the constitutional right to same-sex marriage, same-sex couples would retain a significant statutory right. But the right would not be fully equal, and uncertainties would remain.[258]

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[254] *Id.* at 257, 290 (both quoting Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992)).
[255] *Id.*
[256] *Id.* at 287–88 (quoting *Casey*, 505 U.S. at 856).
[257] See *supra* notes XX–XX and accompanying text. See also Laycock et al., *supra* note XX, at 528 ("Congress could justifiably conclude that requiring recognition is necessary to protect strong reliance interests and to prevent 'the chaos and injustice that would be caused by allowing one state to nullify another state's existing legal marriage.'") (quoting Ilya Somin, *Steve Sanders on Full Faith and Credit and the Respect for Marriage Act*, REASON: VOLOKH CONSPIRACY (July 20, 2022, 9:22 PM), https://perma.cc/Y7AL-QXEU.
[258] For example, there is some uncertainty about the security of vested rights that derive from marriages recognized by a state only because of *Obergefell*, were *Obergefell* overturned. The RMA explicitly protects against retroactive denial of federal marriage benefits but does not explicitly do the same for state benefits. See Laycock et al., *supra* note XX, at 535 (noting that if a state tried to invalidate previously recognized marriages after an overruling of *Obergefell*, couples would have to "challenge the invalidation … in court on theories of nonretroactivity, vested rights, or substantive due process").

Nor should the Court overrule *Bostock*. The arguments for adhering to it based on reliance and lack of concrete harms are bolstered because "*stare decisis* carries enhanced force when a decision … interprets a statute."[259] As with other statutory decisions, "critics of [*Bostock*] can take their objections across the street, and Congress can correct any mistake it sees."[260]

CONCLUSION

If we are speaking about "history and tradition," we should remember a central feature of America's history and tradition with respect to religion and government: namely, that protecting religious freedom strongly and even-handedly prevents human suffering and thereby increases the chances of heading off fear, resentment, and retaliatory cycles in a divided society. That lesson is as vital today as it ever was. The Court has heeded it by vigorously protecting the right to practice religion. For similar reasons, it should hold the line and also meaningfully protect the right not to practice the government's favored religion.

[259] Kimble v, Marvel Entertainment, LLC, 576 U.S. 446, 456 (2015).
[260] *Id.* at 456 (citing Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989)).