KEEPING OUR BALANCE: WHY THE FREE EXERCISE CLAUSE NEEDS TEXT, HISTORY, AND TRADITION

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In *Fiddler on the Roof*, the main character—Tevye der Milkhiker—begins the play with an ode to "Tradition." The song recounts how the duties of religion, family, and work ensure continuity amid change. This enduring stability is tradition's virtue—or as Tevye puts it, "how we keep our balance." Without that balance, "our lives would be as shaky as a fiddler on the roof."[1] *Fiddler*'s understanding of tradition—a means to ensure continuity amid change—would be a helpful corrective to current Free Exercise doctrine.

During the past decade, Free Exercise doctrine has become something like a fiddler on a roof. More than before, religious liberty is a prominent feature of the U.S. Supreme Court's docket. These cases raise many doctrinal questions: What is religious speech?[2] When and how is government "neutral" toward religion?[3] What does it mean for religious groups to participate equally in public

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1. JERRY BOCK ET AL., *Tradition*, *in* FIDDLER ON THE ROOF (1964).
2. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1721 (2018).
3. *Id.* at 1723–24; Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020).

programs?[4] What protections do the religious have against government discretion?[5] Do those protections change based on corporate status?[6] What if the government admits it could accommodate a religious organization, but refuses to do so?[7] Can a government refuse religious accommodations based on comparisons to secular accommodations, and if so, what is properly comparable?[8] What makes a church employee a "minister"?[9] And to what extent can civil courts intrude into a religious organization's internal decisions?[10] Although these myriad contexts call the Free Exercise "fiddler" to dance to many tunes, one thing is clear: the fiddler is dancing on unstable doctrine.

That is because current doctrine often rests on *Employment Division v. Smith.*[11] *Smith* refused to authorize a religious exemption from an "across-the-board-criminal prohibition on a particular form of conduct."[12] The folk understanding of *Smith* is that the government never has to accommodate religious believers burdened by "neutral" and "generally applicable" laws. This baseline treatment continues even as five sitting Supreme Court justices acknowledge "compelling" reasons to overrule *Smith.*[13] And, as will be discussed, *Smith*'s premises are disintegrating. In short, the Free Exercise Clause needs surer footing than *Smith.*

4. Carson v. Makin, 142 S. Ct. 1987, 1997 (2022) (discussing Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2255, 2261 (2020) and Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017)).

5. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1878 (2021).

6. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 713–717 (2014).

7. Zubik v. Burwell, 578 U.S. 403, 407–08 (2016).

8. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021).

9. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–92 (2012).

10. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020).

11. 494 U.S. 872 (1990).

12. *Id.* at 872–74, 884.

13. *See, e.g.*, *Fulton*, 141 S. Ct. at 1931 (Gorsuch, J., concurring) ("[N]ot a single Justice has lifted a pen to defend" *Smith.*).

Smith should be abandoned and "text, history, and tradition" should be adopted in its place. This latter approach is taken by standard originalism,[14] fully expressed in the Second Amendment context, and—notably for the Free Exercise Clause—already applies to other Religion Clause doctrines.[15] On this approach, the Free Exercise Clause would presumptively protect a given religious exercise unless the opposing party can show a long, unbroken tradition of restriction that is analogous to the burden at issue. Text and history are already well-established interpretive commitments.[16] But tradition's contribution is less clear. This article explains the role tradition should play in Free Exercise doctrine.

The Free Exercise Clause "has infrequently been interpreted traditionally."[17] The complicating factor is Justice Scalia's opinion for the Court in *Smith.*[18] There, *Smith* responded to the textual ambiguity of the Free Exercise Clause toward religious accommodations

14. *See, e.g.*, Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 60 GEO. WASH. L. REV. 1127, 1136 (1998). Originalism and its statutory cousin, textualism, are "capacious term[s] for a variety of theories that are very different in their specifics." Marc O. DeGirolami, *Traditionalism Rising*, J. CONTEMP. LEGAL ISSUES (forthcoming 2023) (manuscript at 18), https://ssrn.com/abstract=4205351 [https://perma.cc/EK4S-PK73]. But the "Standard Approach" to defining those theories is to contrast them with theories that interpret a legal text using something other than the text's original public meaning. J. Joel Alicea, *Liberalism and Disagreement in American Constitutional Theory*, 107 VA. L. REV. 1711, 1714 (2022). This article will limit its discussion of originalism to the standard approach, exemplified by Justice Scalia. *See* ANTONIN SCALIA, SCALIA SPEAKS 184 (Christopher J. Scalia & Edward Whelan eds., 2017) (describing Scalia's originalism); *see also infra* Part I.B.

15. *Infra* Part II. The mantra of "text, history, and tradition" seems to have first gained interpretive force in the Second Amendment context (though there were earlier passing usages). *See* Dru Stevenson, *"Text, History, and Tradition" as a Three-Part Test*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS (Mar. 11, 2020), https://sites.law.duke.edu/secondthoughts/2020/03/11/text-history-and-tradition-as-a-three-part-test/ [https://perma.cc/E3GE-2URE].

16. *See* Michael W. McConnell, Lecture, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1747–51 (2015).

17. Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1148 (2020).

18. *Infra* Part II.D.

with Justice Scalia's preference: judicial restraint.[19] *Smith* admits this was a "prefer[ence]," not a constitutional mandate.[20] And this preference overrode any regard for longstanding practices of religious accommodation—evidence that *Smith* (and Justice Scalia again in *City of Boerne v. Flores*[21]) deemed inappropriate for courts to consider.[22] These choices make Free Exercise jurisprudence a doctrinal outlier.[23] Moreover, by jumping straight from the Free Exercise Clause's textual ambiguity on accommodation to *Smith*'s restraint preference, "restraint" is enforced by two abstract standards ("neutrality" and "general applicability") that have no necessary connection to the Clause's semantic or historical meaning—to say nothing of longstanding practices toward religious accommodation. Unsurprisingly, the result of these abstract standards is not restraint, but the interpretive tools that Justice Scalia considered unrestrained: legislative history, decisionmaker motive, and analysis of a law's disparate impacts. These tools not only license judicial manipulation to uphold government burdens on religion,[24] they remove the Free Exercise Clause from its ordinary understanding as a guarantee of religious liberty.[25]

Here, because there are open methodological points related to tradition,[26] it is important to clarify what I mean when I refer to "text, history, and tradition." This article advocates for the use of

19. *Id.* Here, I am using "judicial restraint" as *Smith* did: ambiguity in constitutional text means "judges should defer to the decisions of present-day representative institutions." McConnell, *supra* note 14, at 1136.

20. *Emp. Div. v. Smith*, 494 U.S. 872, 890 (1990).

21. 521 U.S. 507 (1997).

22. *Smith*, 494 U.S. at 889–90; *City of Boerne*, 521 U.S. at 541–42 (Scalia, J., concurring).

23. *Infra* Part II.D.

24. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring) ("Nor can any amount of after-the-fact maneuvering by our colleagues save the Commission.").

25. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1904 (2021) (Alito, J., concurring) (evaluating the text of the Free Exercise Clause in "1791 (and today)"); *see also id.* at 1896 ("These words had essentially the same meaning in 1791 as they do today.").

26. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2162 (2022) (Barrett, J., concurring) (highlighting open questions around "the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution").

"text, history, and tradition"—in that order—when interpreting the Free Exercise Clause. Some have argued for a form of "tradition" that disregards text and original public meaning.[27] Others have argued for the role of "liquidation," whereby an ambiguity in the Constitution's original meaning is "settled" by a post-ratification practice or practices, regardless of their temporal endurance before and after ratification.[28] Neither tradition alone nor liquidation is my claim. Rather, a political community's longstanding practices toward particular religious accommodations—practices that can come both before and after the Constitution's ratification—should illuminate what text and history do not definitively resolve about the Free Exercise Clause's original meaning. Illumination would result by the judiciary answering "historical, analogical questions," akin to the Court's approach in the recent Second Amendment decision, *New York State Rifle & Pistol Association v. Bruen*.[29] As *Bruen* said, this approach was adopted from a "similar" one governing Establishment Clause doctrine.[30] The church autonomy context reflects this approach too. All these contexts provide strong reasons for extending "text, history, and tradition" to the Free Exercise Clause.

In particular, this article makes three doctrinal suggestions: (1) moving from a grand unified theory governing all Free Exercise cases—as *Smith* sought—to context-specific rules rooted in

27. *See* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 674 (1994); David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

28. DeGirolami, *Traditionalism Rising*, *supra* note 14, at 20 (citing William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019)).

29. *Bruen*, 142 S. Ct. at 2134.

30. *Id.* at 2130; *see also, e.g.*, Firewalker-Fields v. Lee, 58 F.4th 104, 122 n.7 (4th Cir. 2023) ("So, in Establishment Clause cases, the plaintiff has the burden of proving a set of facts that would have historically been understood as an establishment of religion. This requires proving both a set of facts, like in all litigation, and proving that those facts align with a historically disfavored establishmentarian practice." (citing *Bruen*, 142 S. Ct. at 2130 n.6)). As *Bruen* shows, this is a "legal inquiry" that can be decided at the pleading stage. *See Bruen*, 142 S. Ct. at 2130 n.6.

historical analogues;[31] (2) limiting any inquiry into "compelling" interests to those that the opposing party shows, through longstanding practice, are well-accepted reasons to burden the religious exercise at issue;[32] and (3) crafting distinct protections for religious institutions.[33] These changes reflect tradition's insight: self-government requires enduring consent, and that consent is demonstrated by the American people's longstanding practices toward their constitutional guarantees. Free Exercise doctrine, in both its substance and its administrability, would benefit from this practical wisdom.

I. TRADITION AS AN INTERPRETIVE AID TO TEXT AND HISTORY

Tradition's distinct interpretive role is often "elided" when the Supreme Court discusses text and history.[34] It is therefore important to understand what tradition itself brings to the interpretive table. That is this section's subject.

There are many ways to distinguish tradition from text and history. One could explain why tradition is not as widely used.[35] One could discuss tradition's distinct justifications in morality and politics, contrast tradition with less standard forms of originalism, or distinguish tradition from "liquidation."[36] These distinctions have been drawn well by others, especially Professor Marc DeGirolami.[37] Instead of retreading those grounds, this section will explain tradition's distinct contribution to a jurisprudence of text, history, and tradition. The first subsection will explain how tradition's

31. *Infra* Part III.B; *see also* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) (plurality opinion) ("While the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance.").

32. *Infra* Part III.C.

33. *Infra* Part III.D.

34. *See* DeGirolami, *supra* note 14, at 17.

35. *See* DeGirolami, *supra* note 17, at 1124.

36. *See, e.g.*, DeGirolami, *supra* note 14, at 43.

37. *See supra* notes 14, 17.

supplemental contribution to text and history compensates for text and history's potential for overtheorizing and unworkable rules. The second subsection will explain how originalism's standard approach—the approach of text, history, and tradition—provides examples of how to operationalize tradition's supplementary role.

A. Tradition compensates for the shortcomings of text and history.

"Almost all interpreters, whatever their school of thought, agree that the constitutional text (including inferences from structure) is the place to begin, and that when the text is clear it is binding."[38] A commitment to the primacy of text is rooted in certain theories about the binding nature of a written constitution.[39] A similar point can made about the importance of history. Among all constitutional interpreters, "[t]he importance of the temporal dimension is well recognized."[40] Where interpreters differ is not so much on the importance of *an h*istorical "moment," but *what* that historical moment should be. For originalists, the history of "the moment at which the Constitution was adopted" matters.[41] For living constitutionalists, the present moment's—purportedly—"better informed understanding"[42] is what matters. But no matter the preferred "moment," history-based jurisprudence is accepted, and text-based jurisprudence is too.

However, interpreting text and history can be very mechanical and empirical.[43] That is not necessarily a problem. Technical tools

38. Michael W. McConnell, *Time, Institutions and Interpretation*, 95 B.U. L. REV. 1745, 1747 (2015).

39. *See* McConnell, *supra* note 14, at 1134–39.

40. McConnell, *supra* note 38, at 1751.

41. *Id.*

42. Obergefell v. Hodges, 576 U.S. 644, 671–72 (2015).

43. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 n.6 (2022) (quoting William Baude & Stephen Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 810–811 (2019)); *see also* Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1174–75 (2021) (Alito, J., concurring) (discussing the interplay of canons of construction and "empirical" attempts to determine textual and historical evidence); Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1766 (2020) (Alito, J., dissenting) (arguing that "[d]ictionary

and rules can be quite helpful. And for both text and history interpretation—where the inquiries are either semantic or consider the meaning of a word in an isolated "moment"—technical methods can make sense.[44] But tradition-based evidence is different, because tradition does not "view[] authoritative history as the snapshot of a particular moment."[45] Rather, by analyzing longstanding practice, tradition-based interpretation is analogical—finding meaning when "multiple institutions independently reach[] the same conclusion" on a practice "over a long period of time."[46] This analogical inquiry, while necessarily comparative, "is not a mere likeness between diverse objects, but a proportion or relation of object to object."[47] The interpretive insight of tradition comes not from more historically researched "facts," but from immersing the interpreter in social memory.[48] That is, the interpreter ascertains how American culture *received* its past, demonstrated by longstanding practice.[49] By identifying interpretive meaning in how generations

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definitions are valuable . . . . But they are not the only source of relevant evidence" in determining an "ordinary" meaning); *see also* John S. Ehrett, *Against Corpus Linguistics*, 108 GEO. L.J. ONLINE 50, 72–73 (2019) ("Hidden beneath the fig leaf of 'science' are the same value judgments that have long bedeviled all questions of textual interpretation—only this time, those underlying value commitments are harder to immediately ascertain.").

44. Though technical approaches still have their limits and problems. *See, e.g.*, Ehrett, *supra* note 43, at 72–73.

45. Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 174 (1998).

46. McConnell, *supra* note 38, at 1772.

47. *Analogy in Metaphysics and Scholastic Philosophy*, CATHOLIC ANSWERS, https://www.catholic.com/encyclopedia/analogy [https://perma.cc/3X4Q-BF83].

48. *See* Judge Neomi Rao, *The Province of Law*, 46 HARV. J.L. & PUB. POL'Y 87, 99 (2023) ("In analyzing the meaning of the Constitution and understanding its legal background, we must be mindful of the animating spirit and the institutional structure of *our* law. We must draw on our distinctly Anglo-American legal reasons and principles." (emphasis in original)).

49. *See* Josef Piper, *Tradition Concept and Claim* 16–22 (2010) (contrasting "historical knowledge" and accepting a tradition).

receive an understanding, the interpreter can retain "continuity with the past" and harmony with the Constitution as a whole.[50]

Tradition's regard for continuity can be in tension with restraint. Again, for purposes of this essay, I am discussing judicial restraint as it is deployed in *Smith*—the idea that, when faced with constitutional ambiguity, "judges should defer to the decisions of present-day representative institutions."[51] Restraint's emphasis on presentism is in tension with tradition's emphasis on endurance—that is, how "the words of the Constitution . . . have been understood by the people over the course of our constitutional history, from enactment through the present."[52] Some tradition advocates look at this distinction and conclude that traditionalists should be "neither committed to nor supportive of" standard originalism and judicial restraint.[53] But text, history, and tradition is after something different.

For text, history, and tradition, these tensions are good. Tradition's practical focus helps ground text and history.[54] The authority for text and history rests on the political theory that, in short, "[i]f the Constitution is authoritative because the people of 1787 had an original right to establish a government for themselves and their posterity, the words they wrote should be interpreted—to the best of our ability—as they meant them."[55] This piece assumes that this theory is correct.[56] But if it is correct, then the interpretive authority for text and history can rest in abstraction and eschew knowledge

50. McConnell, *supra* note 14, at at 1136–37; *see also Facebook*, 141 S. Ct. at 1175 (Alito, J., concurring) ("Empirical evidence might prove me wrong, but that's not what matters." What matters is whether such tools "accurately describe how the English language is generally used.").

51. McConnell, *supra* note 14, at 1136.

52. *Id.*

53. *See* Young, *supra* note 27; Strauss, *supra* note 27.

54. McConnell, *supra* note 14, at 1128.

55. *Id.* at 1132.

56. *See id.*

from experience[57]—a form of knowledge that "comes to man in many more forms than" syllogistic reasoning, empirical analysis, or filtering history by theory.[58] The knowledge of experience is sometimes called "social knowledge,"[59] and it recognizes that certain principles only receive full elucidation through application over time.[60]

When an interpreter acquires meaning from practice, he will permit longstanding practices to distill the meaning suggested by the technical analyses of text and history.[61] Such distillation does not,

57. For examples of privileging abstract conceptions of text and history, *see, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1750–51 (2020) ("One could easily contend that legislators only intended expected applications or that a statute's purpose is limited to achieving applications foreseen at the time of enactment. However framed, the employer's logic impermissibly seeks to displace the plain meaning of the law in favor of something lying beyond it."); Troxel v. Granville, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting) ("[W]hile I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) an unenumerated right.").

58. F.A. HAYEK, THE CONSTITUTION OF LIBERTY 125 (Ronald Hamowy ed., Routledge 2011) (1960).

59. *See* ROGER SCRUTON, THE MEANING OF CONSERVATISM 31 (3d ed., Palgrave Macmillan 2001) (1980).

60. *See* JOHN HENRY CARDINAL NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE 185 (Univ. Notre Dame Press 1994) (1845) (distinguishing "a true development and a corruption"); *cf.* POPE JOHN PAUL II, THE CATECHISM OF THE CATHOLIC CHURCH 23 (2d ed. 2019) (1992) ("Yet even if Revelation is already complete, it has not been made completely explicit; it remains for the Christian faith gradually to grasp its full significance over the course of the centuries.").

61. As shown by the cases discussed *infra,* the longstanding practices that tradition-based interpretation considers include those *both* before and after the Constitution's ratification. If an interpreter only considers post-ratification evidence, he overlooks the lessons taught by a practice's roots and soil—that is, the *how* and *why* a practice became longstanding. Moreover, a case that purported a basis in tradition, but only considered recent practice, is not tradition-based. And the opinion would probably reveal it. *Cf.* Lawrence v. Texas, 539 U.S. 558, 571–72 (2003) ("we think that our laws and traditions in the past half century are of most relevance here," and then claiming that history and tradition are not "the ending point of the substantive due process inquiry") (internal quotation marks and citation omitted).

by definition, authorize overriding what text and history definitively show. Rather, longstanding practice brings to light meaning left ambiguous by text and history. Proper tradition-based evidence, then, "illustrates, not obscures; corroborates, not corrects the body of thought from which it proceeds."[62] On this view, the interpreter is not a "technician," willing to invalidate longstanding practices because his "archaeological excavation" cannot explain them on "rationalistic" grounds, or from a single moment's "history."[63] Nor is the interpreter an antiquarian, whose "wise and laudable" interest in returning to original practices would "reduce everything to antiquity by every possible device."[64] An interpreter using tradition acknowledges that meaning does not change. Yet he also acknowledges the limits of that insight when interpretation does not only require knowing history, but also exercising judgment in applying historical meaning to present circumstances. The interpreter must ensure the historical meaning's fitting application "to meet the changes of circumstances and situation."[65] Tradition reveals the fitting application.

Tradition, as Edmund Burke illustrated,[66] gives insight into *how* original meaning should apply, because inherent to a successful tradition—that is, a tradition handed on to a new generation—is some proven good use.[67] By definition, then, successful traditions are not static—they show how a people carry out an understanding of their history. That endurance depends on "interpretation and reformulation in order [for the preserved practice] really to reach

62. NEWMAN, *supra* note 60, at 200.

63. Joseph Cardinal Ratzinger, *Preface,* ALCUIN REID, THE ORGANIC DEVELOPMENT OF THE LITURGY 11–12 (2d ed. 2005) (discussing tradition and proper development regarding the Catholic Mass).

64. Pope Pius XII, *Mediator Dei,* ENCYCLICAL ON THE SACRED LITURGY § 62 (1947).

65. *Id.* at § 63.

66. Burke never used the term "tradition," but instead invoked "prescription," a term that "originated in Roman property law, where it referred to ownership by virtue of long-term use, rather than by formal deed." YUVAL LEVIN, THE GREAT DEBATE 140 (2014).

67. *Id.*

each new generation."[68] As such, consulting a tradition helps an interpreter determine the difference between (acceptable) *translation* of original meaning to new contexts and (unacceptable) *transformation* of the original meaning to a new essence. By being immersed in how a practice underlying a constitutional provision applies over time, a judge therefore becomes immersed in the society's tradition of the underlying substance. In being so immersed, the judge approaches interpretation like a "gardener," determining the "the inner structural logic" of text and history well enough to ensure that, even as circumstances give rise to new questions and situations, constitutional meaning is faithfully transmitted to subsequent generations.[69]

Tradition's regard for enduring practice provides a check against overly theoretical approaches to text and history interpretation. As Professor Michael McConnell put it, "[t]he fundamental conceptual error with respect to all [judicial] methodologies, but especially originalism, is the belief that they will necessarily produce a single right answer to the disputed legal question."[70] Rather, text and history "more often exclude[] certain possibilities" than they "provide[] clear answers."[71] If, in the face of that ambiguity, tradition is ignored, then the inertia of wanting a Single Right Answer will still insist on one—even if it means contravening longstanding practices that support an alternative reading of the original evidence. Insisting on such interpretations reflects a view of text and history that expects them to "accomplish too much" by "wrest[ing] a greater precision" than either warrant.[72] Moreover, this approach sacrifices the judiciary's distinct vantage point in the federal system: an

68. JOSEF PIEPER, TRADITION 50 (St. Augustine Press 2010).

69. *See R*atzinger, *supra* note 63.

70. McConnell, *supra* note 38, at 1761.

71. *Id.* at 1761, 1787.

72. *Id.* at 1760; *see also* Thomas Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 520–21 (1996) ("[O]riginalism by its very nature requires that the interpreter comprehend and adopt the values, aspirations, and linguistic conventions of a society several steps removed in time from our own. . . . One can fairly question whether the average judge or lawyer . . . is capable of carrying off this kind of inquiry.").

institution removed from political forces such that it can apply foundational principles to the "flesh-and-blood" of an actual case.[73] Tradition upholds the judicial role by taking the "range of plausible interpretations" from text and history and identifying "concrete practices"—ones of "substantial duration," from both "the political organs of government" and also "individual citizens or groups of citizens"—that then become presumptively "determinative" of constitutional meaning.[74]

For similar reasons, American constitutionalism "accords the past an authority that philosophy does not."[75] This is evident in the embrace of *stare decisis*,[76] discussions of constitutional interpretation in the *Federalist Papers*,[77] the widespread influence of the British common law,[78] and the role of longstanding practice in foundational Supreme Court decisions, like *McCulloch v. Maryland*.[79] Indeed, James Wilson—known today for his commitment to natural law and natural rights—called custom "the most significant, and

73. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 116 (1962).

74. DeGirolami, *supra* note 14, at 6–7. See also McConnell, *supra* note 16, at 1771 & n.106 ("I wrote of this methodology years ago under the name of 'traditionalism,'" but "that name did not catch on," as the Court would prefer "longstanding practice."); NLRB v. Noel Canning, 573 U.S. 513, 513–14 (2014). For the presumptive role, *see infra* Part II.A–B (discussing *Bruen*'s use of presumptions and presumptions in the Establishment Clause context).

75. Anthony Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1034 (1991).

76. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

77. "Laws," Hamilton says "are a dead letter without courts to expound and define their true meaning and operation." *Id.* NO. 22, at 146 (Alexander Hamilton). And those meanings will be "liquidated and ascertained by a series of particular discussions and adjudications." *Id.* NO. 37, at 225 (James Madison). As such, "the natural and obvious sense of [the Constitution's] provisions, apart from any technical rules, is the true criterion of construction." *Id.* NO. 83, at 496 (Alexander Hamilton). Because such "rules of legal interpretation" are determined by "conformity to the source which they are derived," *id.* at 495, and American law draws on authority that is "ancient as well as numerous," *id.* NO. 49, at 312 (James Madison) (emphases omitted), judges must be formed in the "long and laborious" study in not only law's technical maxims, but also its origins in the people's traditions, *id.* NO. 78, at 470 (Alexander Hamilton).

78. DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 73 (1941).

79. 17 U.S. (4 Wheat.) 316, 401–407 (1819); *see also* BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 73, at 105 (discussing *McCulloch)*.

the most effectual" sort of law, because its continuance shows "internal evidence, of the strongest kind, that the law has been introduced by common consent; and that this consent rests upon the most solid basis—experience as well as opinion."[80] Such customs are identified and upheld by text, history, and tradition. That interpretive sequence assesses constitutional ambiguities by taking the longstanding practice of a given political institution or community and relating it—"at least analogically"—to "the historically defined hard core" of the guarantee at issue.[81]

B. Standard originalism operationalizes text, history, and tradition.

As standard originalism's foremost expositor,[82] it is no surprise that Justice Scalia offered the most thorough guidance for operationalizing tradition's supplemental role to text and history.[83]

Scalia's guidance began with a crucial point: tradition "giv[es] content only to *ambiguous* constitutional text; no tradition can supersede the Constitution."[84] Second, "tradition" cannot be invoked abstractly. Rather courts should identify traditions at "the most specific level," regardless of whether the identified tradition is "protecting, or denying protection to, the asserted right."[85] That is not to say that more "general" traditions are unhelpful. They can be helpful.[86] But the more general the tradition, the more "imprecise" its "guidance," and the more important it becomes that the

80. JAMES WILSON, ON THE GENERAL PRINCIPLE OF LAW AND OBLIGATION (1790 – 1791), *reprinted in* COLLECTED WORKS OF JAMES WILSON 470 (Kermit L. Hall & Mark David Hall eds., 2007).

81. *See* ALEXANDER BICKEL, THE MORALITY OF CONSENT 18, 29 (1975).

82. *See Samuel A. Alito Jr., Remarks to the 2020 Federalist Society National Lawyers Convention,* 45 HARV. J.L. & PUB. POL'Y 83, 100 (2022).

83. McConnell, *supra* note 14, at 1136 ("What Scalia rejects is the idea that the nation should be governed not by the will of the people over time, but by the opinions of judges, or of the legal elite.").

84. Rutan v. Republican Party of Ill., 497 U.S. 62, 96 n.1 (1990) (Scalia, J., dissenting); *see also* NLRB v. Noel Canning, 573 U.S. 513, 573 (2014) (Scalia, J., concurring).

85. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (Scalia, J.).

86. *Id.* (saying you can "consult and (if possible) reason from" them).

tradition is continuing and widespread before it can be determinative.[87] Third, the invoked tradition must be one of "unchallenged validity."[88] A tradition has unchallenged validity when it "ha[s] not been vigorously opposed on constitutional grounds," meaning it hasn't been "litigated up to th[e Supreme] Court," or "upheld only over [a historically vindicated] dissent."[89] When unchallenged traditions are identified, they "are the best indication of what fundamental beliefs [a constitutional text] was intended to enshrine."[90] Yet fourth, if the tradition itself is not going to resolve the case—but instead helps direct one of the Court's "abstract tests"—then the Court should "craft[]" the test "*so as to reflect[*]those constant and unbroken traditions."[91]

Yet Justice Scalia's guidance for "text, history, and tradition" is in tension with his regard for judicial restraint.[92] Scalia did not "articulate the connection between these methods, or . . . explain how to decide cases when they are in conflict."[93] His judicial opinions suggest, however, that tradition should be subordinated to judicial restraint. As he said in *McIntyre v. Ohio Elections Commission,*[94] this is "the most difficult" issue for originalists.[95] That is because in cases where tradition-based evidence could illuminate ambiguities in

87. *Id.*

88. *See Rutan,* 497 U.S. at 96 n.1 (Scalia, J., dissenting) (explaining why *Brown v. Board of Education* was right to overrule *Plessy v. Ferguson:* "a tradition of unchallenged validity did not exist with respect to the practice in Brown"); see also *Noel Canning*, 573 U.S. at 573 (Scalia, J., concurring) (arguing that "a self-aggrandizing practice adopted by one branch well after the founding, often challenged, and never blessed by this Court" cannot contravene original understanding).

89. *See Rutan,* 497 U.S. at 96 n.1 (Scalia, J., dissenting).

90. McIntyre v. Ohio, 514 U.S. 334, 378 (1995) (Scalia, J., dissenting).

91. United States v. Virginia, 518 U.S. 515, 570 (1996) (Scalia, J., dissenting); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 981 (1992) (Scalia, J., dissenting) ("in defining 'liberty,' we may not disregard a specific, 'relevant tradition protecting, or denying protection to, the asserted right'" (quoting Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989)).

92. McConnell, *supra* note 14, at 1137 & n.45.

93. *Id.* at 1137 n.45.

94. 514 U.S. 334 (1995).

95. *Id.* at 375 (Scalia, J., dissenting).

semantic or original meaning, "constitutional adjudication necessarily involves not just history but judgment: judgment as to whether the government action under challenge is consonant with the concept of the protected freedom . . . that existed when the constitutional protection was accorded."[96] But Scalia's preference for general rules that "hedge" judges in[97] was designed to prevent judges from rendering judgment on "the concept of the protected freedom" at issue. This led Justice Scalia to condition his evaluation of longstanding practice on what would, in his view, better limit judges. For example, in *McIntyre* he wrote that if "[a] governmental practice" restricting a Founding-era practice "has become general throughout the United States," then it is presumptively constitutional—even if it began over a century after the Founding.[98] Similarly in *Brown v. Entertainment Merchants Association*,[99] Justice Scalia (for the Court) acknowledged that "long (if heretofore unrecognized) traditions of proscription" *could* allow governments to adopt "novel restriction[s]" on speech issues.[100] But, his reasoning discouraged their development, lest the Court encourage case-by-case adjudication.[101] Scalia's theoretical concerns about restraint also explain why he embraced tradition in the Establishment Clause context. Scalia's concerns about limiting judicial judgment aligned with his opposition to "formulaic abstractions" that take decisions about permissible religious expression away from a community's "long-accepted constitutional traditions."[102] But in the Free Exercise

96. *Id.*

97. *See* Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. CHI. L. REV. 1176, 1180 (1989) ("Only by announcing rules do we hedge ourselves in.").

98. *Id.* at 375–76 ("The earliest statute of this sort was adopted by Massachusetts in 1890 . . . .") (Scalia, J., dissenting).

99. 564 U.S. 786 (2011).

100. *Id.* at 792.

101. *See id. But cf. id.* at 821 (Alito, J., concurring) ("I would not squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem. If differently framed statutes are enacted by the States or by the Federal Government, we can consider the constitutionality of those laws when cases challenging them are presented to us.").

102. Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting).

context—where "long-accepted constitutional traditions" regarding religious accommodation might increase case-by-case adjudication—Scalia preferred the formulaic abstraction ("neutrality" + "general applicability" = no relief).

While there can be a tension between tradition and restraint, standard originalism does not require a conflict. As Professor McConnell put it, "[t]he important point here is the sequencing."[103] Both tradition and restraint "respect the will of the people as expressed at various points in time."[104] Neither tradition nor restraint seek to "upend existing social policy and to substitute its opposite."[105] But invoking restraint before tradition uproots restraint from any grounding in text, history, and analogically demonstrated practices. Such a jump means that deference to a present majority is no longer a command of text, history, or analogical practice. Rather, this "restraint" is just "the judges' own view of what *should be* the constitutional constraint" that is allowed to "brush[] aside" "the conventional legal analyses of text, history, practice, and precedent."[106] By contrast, as evidenced in recent Second Amendment and Religion Clause decisions, text, history, and tradition could achieve durable restraint by improving the court's analytical precision. Judges could analogize the practice or regulation at issue to what is known about the constitutional provision's original meaning. Over time, with the development of more specific historical analogies, the increased analogical precision would either define or displace the court's resort to balancing tests.[107]

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103. McConnell, *supra* note 16, at 1788.

104. McConnell, *supra* note 14, at 1137 n.45.

105. McConnell, *supra* note 16, at 1781.

106. *Id.*

107. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 360 (1995) (Thomas, J., concurring); *see also id.* at 370–71; Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 839 (2011) (Thomas, J., dissenting) ("Whether the statute would survive an as-applied challenge . . . is a question for another day."); *id.* at 806 (Alito, J., concurring) ("In considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution. . . .").

II. TEXT, HISTORY, AND TRADITION IN PRACTICE

New York State Rifle & Pistol Association v. Bruen[108] is a recent Second Amendment decision that provides a comprehensive example of text, history, and tradition. And *Bruen*'s use of tradition is "adopt[ed from] a similar approach"[109] in recent Establishment Clause cases. This section will consider both those cases and *Bruen,* along with tradition's use in the church autonomy context. All these contexts contrast sharply with the Free Exercise Clause, where the *Smith* approach spurns text, history, and tradition.

A. Bruen.

*B*uilding on Justice Scalia's opinion for the Court in *District of Columbia v. Heller,*[110] *Bruen* evaluated whether the Second Amendment allowed New York to condition a license to carry a gun on a "special need for self-defense."[111] The Court held that "the Constitution presumptively protects th[e] conduct" that is "cover[ed]" by a constitutional amendment's "plain text"—unless the government can "demonstrate that [its] regulation is consistent with this Nation's historical tradition of" regulating that conduct.[112] On this reading, the Constitution's text provides a presumption that government *cannot* restrict a clearly granted freedom. In response, "the government must affirmatively prove that" it can restrict the freedom based on "the historical tradition that delimits the outer bounds" of the right at issue.[113] This can be satisfied via "analogical reasoning," which requires "that the government identify a well-established

108. 142 S. Ct. 2111 (2022).

109. *Bruen,* 142 S. Ct. at 2130 (citing Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) (plurality opinion)).

110. 554 U.S. 570 (2008). *Heller* refers to a tradition-based approach in identifying acceptable limits on the right to keep and carry arms. *See id.* at 627. But in defining the right, Justice Scalia explained that the Second Amendment's history is "unambiguous[]." *See id.* at 580, 584.

111. *Bruen,* 142 S. Ct. at 2122.

112. *Id.* at 2126.

113. *Id.* at 2127.

and representative historical analogue" to the law at issue, "not a historical *twin*."[114]

Bruen's analogical analysis illustrates well how tradition supplements text and history. For example, *Bruen* says that the Court "look[s] to history" because the Second Amendment "was not intended to lay down a novel principle but rather a codified right inherited from our English ancestors."[115] Consulting tradition, then, identifies proper historical analogues and excludes "endorsing outliers that our ancestors would never have accepted."[116] *Bruen* distilled a tradition of analogous firearm regulation from "(1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late 19th and early 20th centuries."[117] Yet none of this evidence was meant to serve antiquarian ends—such that a single category of evidence or isolated practices could displace the Second Amendment's ordinary understanding. As *Bruen* put it, "when it comes to interpreting the Constitution, not all history is created equal."[118] Excluded from the inquiry would be "an ancient practice that had become obsolete . . . at the time of the adoption of the Constitution and never was acted upon or accepted in the colonies."[119] Similar caution is deployed toward post-enactment history. While a court can "liquidat[e] indeterminacies in written laws," that is no license to "expand[] or alter[] them."[120] "Thus, post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text."[121] Even with that caveat, *Bruen* acknowledged that "other cases implicating unprecedented societal concerns or dramatic

114. *Id.* at 2133.
115. *Id.* at 2127 (internal quotation marks and citations omitted).
116. *Id.* at 2133 (quoting Drummond v. Robinson, 9 F.4th 217, 226 (3rd Cir. 2021).
117. *Id.* at 2135–36.
118. *Id.* at 2136.
119. *Id.* (internal quotation marks and citation omitted).
120. *Id* at 2137 (internal quotation marks and citation omitted).
121. *Id.* (internal quotation marks and citation omitted).

technological changes may require a more nuanced approach."[122] "Although [the Constitution's] meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated."[123]

In adopting text, history, and tradition, *Bruen* "expressly rejected the application of any judge-empowering interest-balancing inquiry."[124] At the same time, *Bruen* perceives no conflict between drawing precise historical analogies and the judicial role. Rather, "answering these kinds of historical, analogical questions" is "an essential component of judicial decisionmaking under our enduring Constitution."[125]

Under *Bruen*, a "text, history, and tradition test"[126] identifies how "earlier generations addressed the societal problem"—and those resolutions give rise to constitutional presumptions.[127] "[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with [the Constitution]."[128] At the same time, "if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional."[129]

B. A "similar approach" to the Establishment Clause.

Bruen is "adopt[ed from] a similar approach"[130] in recent Establishment Clause cases. Those cases "abandoned" the "ambitious,

122. *Id.* at 2132; *see also id.* at 2162 (Barrett, J., concurring).
123. *Id.* at 2132 (majority opinion).
124. *Id.* at 2129 (internal quotation marks and citation omitted).
125. *Id.* at 2134 (internal quotation marks and citation omitted).
126. *Id.* at 2161 (Kavanaugh, J., concurring).
127. *Id.* at 2131 (majority opinion).
128. *Id.*
129. *Id.*
130. *Id.* at 2130 (citing Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) (plurality opinion)).

abstract, and ahistorical"[131] attempt to impose a "grand unified theory" of "neutrality" on all public religious expression.[132] Instead, starting with *Marsh v. Chambers*[133] and confirmed by *Kennedy v. Bremerton*,[134] Establishment Clause jurisprudence is governed by text, history, and tradition.

In *Marsh*, the Supreme Court upheld Nebraska's practice of opening legislative sessions with prayer.[135] It did so by referencing "historical practices and understandings."[136] "Standing alone," *Marsh* said, "historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns."[137] What confirmed the historical analysis was enduring "practice."[138] One simply cannot "cast aside" "two centuries of national practice"—such an "unambiguous and unbroken history" is a "part of the fabric of our society."[139]

Another legislative prayer case, *Town of Greece v. Galloway*,[140] built on *Marsh*. That case built out tradition's distinct contribution to text and history. That is because, unlike *Marsh*, the "specific practice" of prayer in *Town of Greece* "lacked the very direct connection, via the First Congress, to the thinking of those who were responsible for framing the First Amendment."[141] Thus, appealing to the First Amendment's ratification history was insufficient. Instead, *Town of Greece e*xplained that "[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has

131. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022).

132. *Am. Legion*, 139 S. Ct. at 2087 (plurality opinion).

133. 463 U.S. 783 (1983).

134. 140 S. Ct. at 2427–2428.

135. *Marsh*, 463 U.S. at 786.

136. Cnty. of Allegheny v. Am. Civ. Liberties Union, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part).

137. *Marsh*, 463 U.S. at 790.

138. *See id.*

139. *Id.* at 792.

140. 572 U.S. 565 (2014).

141. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2088 (2019) (plurality opinion).

withstood the critical scrutiny of time and political change."[142] And in *Town of Greece*, because the town's practice "fi[t] within the tradition" carried out by the First Congress and other state legislatures, it was presumptively constitutional.[143]

Further, in *American Legion v. American Humanist Association*—(upholding the constitutionality of the Bladensburg peace cross, a public religious memorial)—the Supreme Court's analysis embraced tradition's regard for social knowledge. There, the Court's opinion relied on a historical Establishment Clause analysis, but not one that compared the Bladensburg cross to the Establishment Clause's original meaning.[144] Rather, "[t]he passage of time gives rise to a strong presumption of constitutionality."[145] That is because "[w]ith sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community's landscape and identity. The community may come to value them without necessarily embracing their religious roots."[146] But, if such a community icon was removed "or radical[ly] alter[ed] at this date," such an act "would be seen by many not as a neutral act but as the manifestation of a hostility toward religion that has no place in our Establishment Clause traditions."[147]

C. Church autonomy.

Tradition influences the use of text and history in "church autonomy" cases too. This autonomy has several "component[s],"[148] but, "in short," it is the "power" of religious organizations "to decide

142. *Town of Greece*, 572 U.S. at 576.

143. *Am. Legion*, 139 S. Ct. at 2088 – 2089 (quoting *Town of Greece*, 572 U.S. at 577) (plurality opinion).

144. *Id.* at 2078 (majority opinion).

145. *Id.* at 2085.

146. *Id.* at 2084.

147. *Id.* at 2074 (internal quotation marks and citation omitted).

148. Our Lady of Guadalupe v. Morrissey-Berru, 140 S. Ct. 2049, 2060–61 (2020) ("[A] component" of church autonomy is the "ministerial exception," but the doctrine is a "broad principle" covering "internal management decisions that are essential to the institution's central mission.").

for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[149]

Tradition's effect on church autonomy doctrine is obvious from the protection's constitutional source. Church autonomy, says the Supreme Court, is neither the result of textualism nor purposivism, but rather "the foundation of our political principles,"[150] a "broad and sound view of the relations of church and state under our system of laws,"[151] and a "sphere" of authority protected by the Free Exercise Clause working in conjunction with the Establishment Clause.[152] The Court's two most recent church autonomy cases on the merits—*Hosanna-Tabor v. EEOC*[153] and *Our Lady of Guadalupe v. Morrissey-Berru*,[154] both involving the right of religious organizations to select their ministers without judicial interference—are good examples.

Echoing tradition's regard for social knowledge, both *Our Lady* and *Hosanna-Tabor* expressly rejected the use of "rigid formula" to identify who a "minister" is.[155] One reason why, as *Our Lady* explains, is that "judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition."[156] Therefore, the religious institution's understanding is "important."[157] Similarly, both *Hosanna-Tabor* and *Our Lady* specify that the goal of historical analysis isn't to capture a given "moment's" understanding, but rather to determine the kind of "practices" "that the founding generation sought to prevent a repetition

149. Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952).

150. Watson v. Jones, 80 U.S. 679, 728 (1871).

151. *Id.* at 727.

152. *Our Lady*, 140 S. Ct. at 2060; Hosanna-Tabor v. EEOC, 565 U.S. 171, 181, 183 – 84, 188–89 (2012).

153. 565 U.S. 171 (2012).

154. 140 S. Ct. 2049 (2020).

155. *Our Lady*, 140 S. Ct. at 2067 (quoting *Hosanna-Tabor*, 565 U.S. at 190).

156. *Id.* at 2066.

157. *Id.*

of . . . in our country."[158] This analysis of longstanding practice thus included both pre- and post-ratification evidence. For example, *Hosanna-Tabor* began with a discussion of historical British statutes and their effect on Founding era practices.[159] Practices that occurred post-ratification were also illustrative, including Thomas Jefferson's response to John Carroll in 1806, when Carroll sought federal guidance on appointing a Catholic bishop for the territory acquired via the Louisiana Purchase.[160] James Madison's reaction to the 1811 incorporation controversies surrounding the Anglican Church in Virginia was also considered.[161] Likewise, *Our Lady* surveyed the historical importance of religious education across faiths, both at present and "from the earliest settlements in this country."[162]

D. Smith is the outlier.

Justice Scalia did not employ text, history, and tradition in *Smith.* Rather, he "filtered his originalism through the twin lenses of democracy and the need for clear rules over vague standards."[163]

Excluding evidence of longstanding practices regarding religious accommodation, *Smith* attempted to develop a bright line rule: "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[164] *Smith*'s new test displaced the compelling interest test articulated in *Sherbert v. Verner.*[165] "Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling

158. *Id.* at 2061; *see also Hosanna-Tabor,* 565 U.S. at 183–184.

159. *Id.* at 182.

160. *Id.* at 184.

161. *Id.* at 184 – 85.

162. *Our Lady,* 140 S. Ct. at 2064–2066.

163. Amul R. Thapar, Smith*, Scalia, and Originalism,* 68 CATH. U. L. REV. 687, 695 (2019).

164. Emp. Div. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring in the judgment)).

165. 374 U.S. 398 (1963); *see* Fulton v. City of Philadelphia, 142 S. Ct. 1868, 1893 (2021) (Alito, J. concurring) (recognizing the displacement).

governmental interest."[166] *Smith,* however, claimed the compelling interest test was "never applied" to provide free-exercise accommodations,[167] and that this was for good reason because it would produce a "constitutional anomaly"[168] and "court[] anarchy."[169]

Smith displays the "sequencing" problem discussed above, whereby the supplementary role of tradition is discarded by jumping immediately from textual ambiguity to judicial restraint. "As a textual matter," all *Smith* holds is that it "do[es] not think the [Free Exercise Clause] must" be construed to require accommodations.[170] Rather, *Smith* rests on a self-consciously pragmatic construction—calling its new interpretation "permissible," "preferred," and "sounder" than a pro-accommodation interpretation, but never required.[171] Seven years later, when Justice Scalia would respond to historical evidence against *Smith* in *City of Boerne v. Flores,* he made similar defenses.[172] These arguments led Scalia in both opinions to eschew any reliance on evidence of longstanding religious accommodations. "There is no reason to think [those practices] were meant to describe what was constitutionally required (and judicially enforceable), as opposed to what was thought to be legislatively or even morally desirable."[173] That a legislature was "expected to be solicitous of [religious accommodation] in its legislation" does not mean "the appropriate occasions for [their] creation can be discerned by the courts."[174] True, "[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not

166. *Smith,* 494 U.S. at 883 (citing *Sherbert,* 374 U.S. at 402 – 03.
167. *Id.* at 884–85.
168. *Id.* at 886.
169. *Id.* at 888.
170. *Id.* at 878.
171. *Id.*
172. *See City of Boerne v. Flores,* 521 U.S. 507, 539 (1997) (Scalia, J., concurring).
173. *Id.* at 541 (Scalia, J., concurring); *see also Smith,* 494 U.S. at 890.
174. *Smith,* 494 U.S. at 890.

widely engaged in."[175] But that "unavoidable consequence of democratic government must be preferred" by judges.[176]

III. FREE EXERCISE DOCTRINE SHOULD ADOPT TEXT, HISTORY, AND TRADITION

Free Exercise doctrine would benefit from abandoning *Smith* and instead applying text, history, and tradition. That approach would, like *Bruen*, presumptively protect religious exercise unless the opposing party shows a historically analogous tradition of restricting it. This section will begin by defending that approach against *Smith* and its failed promise of judicial restraint. This section will then offer specific ways in which Free Exercise doctrine could apply text, history, and tradition.

A. Text, history, and tradition are more conducive to judicial restraint than Smith.

As discussed, the engine behind *Smith* is a certain view of judicial restraint. This view of restraint might prompt some, who are otherwise supportive of text, history, and tradition interpretation, to resist using it in *Smith*'s place. On this view, "tradition" is the problem, because it is otherwise accepted that "text" and "history" should take priority over "restraint." This objection argues that "tradition" could compromise "restraint" in at least three ways: (1) by giving judges a reason to depart from what we know of the Free Exercise Clause's original meaning; (2) by introducing a subjective debate over the proper way to characterize and analogize traditions to the practice at issue; and (3) by using political choices regarding religious accommodation as a presumptive indication of the Free Exercise Clause's meaning, tradition would erode the distinction between legislative discretion and constitutional mandate. These concerns are serious. But none is sufficient to keep the Free Exercise

175. *Id.*
176. *Id.*

Clause a doctrinal outlier from tradition's general use in Religion Clause jurisprudence and other areas of constitutional law.

To counter these concerns, first consider that *Smith* is hardly upholding judicial restraint. As discussed, *Smith* skipped from the Free Exercise Clause's textual ambiguity on the issue of accommodations to a preference of judicial restraint.[177] The result was "restraint" unmoored from text, history, and tradition—and thus not really restraint at all.[178] Instead, *Smith*'s preference is policed by "neutrality" and "general applicability," two open-ended inquiries that analyze a law's legislative history,[179] decisionmaker motive,[180] and its disparate impacts.[181] Whether or not Justice Scalia intended it, *Smith*'s inquiries resemble the *Lemon* test that he rightly derided in the Establishment Clause context: "formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions."[182] And just like the *Lemon* test, the Supreme Court often distinguishes *Smith*'s inquiries, opting for a context-specific rule instead.[183] *Smith*'s context—an "across-the-

177. *Smith*, 494 U.S. at 890.

178. See Scalia, *supra* note 97, at 1184–85 ("It is, of course, *possible* to establish general rules, no matter what theory of interpretation or construction one employs. As one cynic has said, with five votes anything is possible.").

179. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 557–558 (1993) (Scalia, J., concurring) (explaining that "[t]he Court analyzes the 'neutrality' and the 'general applicability'" questions "in separate sections . . . and allocates various invalidating factors to one or the other of those sections," while rejecting the need to make "a clear distinction between the two terms" and the "legislative motive" analysis).

180. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1919 (2021) (Alito, J., concurring) (identifying problems with applying the "neutrality" analysis and motivations).

181. *See id.* at 1921–22 (Alito, J., concurring) ("Cases involving rules designed to slow the spread of COVID-19 have driven that point home" that "[i]dentifying appropriate comparators" "has been hotly contested").

182. Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting); *see also Fulton*, 141 S. Ct. at 1922 (Alito, J., concurring) ("Much of *Smith*'s initial appeal was likely its apparent simplicity. . . . Experience has shown otherwise.").

183. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019) (plurality) (discussing *Lemon* test); *see also* Hosanna-Tabor v. EEOC, 565 U.S. 171, 190 (2012) (*Smith* only applies to "outward physical acts"); Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246 (2020) (no mention of *Smith)*; Carson v. Makin, 142 S. Ct. 1987 (2022) (no mention); *Fulton*, 141 S. Ct. at 1877 ("falls outside *Smith*").

board-criminal prohibition on a certain form of conduct"[184]—sheds little light on the lion's share of Free Exercise cases. Treating *Smith* like the doctrinal baseline, then, does not restrain judges. Rather, judges can—and do—freely engage in "after-the-fact maneuvering"[185] to retrofit government action around *Smith*'s inquiries. "[S]ubscribing to *Smith*, particularly if one also believes the overstated claims of predictability made on its behalf, may mask the truth of what judges actually do with free exercise cases."[186]

Second, these concerns overlook the fact that tradition is a *supplementary* tool to text and history. Tradition does not override text and history. Rather, it allows courts to analogize from longstanding political or cultural practices toward religious exercise to resolve ambiguities within semantic and original meaning. Here—as virtually everyone in the *Smith* debate acknowledges—the text and original meaning[187] of the Free Exercise Clause are ambiguous about the constitutional mandate for religious accommodations.[188] Therefore, there must be some supplementary tool. For *Smith*, that

184. Emp. Div. v. Smith, 494 U.S. 872, 884 (1990).

185. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1737–39 (2018) (Gorsuch, J., concurring).

186. MARC O. DEGIROLAMI, THE TRAGEDY OF RELIGIOUS FREEDOM 165 (2013).

187. Post-Civil War history cuts against *Smith*, as the Fourteenth Amendment's framers "explicitly target[ed]" religion-neutral and generally applicable laws in the South "as examples of what would become unconstitutional" via incorporation. Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1149 (1994).

188. *Supra* note 19 and accompanying text (*Smith* discussion on textual ambiguity); City of Boerne v. Flores, 521 U.S. 507, 544 (1997) (Scalia, J., concurring in part) (original meaning "more supportive of [*Smith*'s] conclusion than destructive"); McConnell, *supra* note 16, at 1761; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990) ("possible interpretation"); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 947–948 (1992) ("[T]he claim that the Free Exercise Clause provided a right of exemption from civil laws depends upon evidence that may be questioned."); *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring) ("history looms large," but not "compelling"). Moreover, Justice Alito's *Fulton* concurrence does not purport a conclusive original meaning answer either—partly because, as he explained, the original meaning of the Clause occurred "before the concept of judicial review took hold." *Fulton*, 141 S. Ct. at 1907 (Alito, J., concurring).

supplementary tool was restraint. But its reasons for that preference—that judicial review of governmental practices could produce "danger[ous]" results,[189] be "horrib[ly]" standardless,[190] and be "a constitutional anomaly"[191]—have all proven hyperbolic.[192]

Another proposal to keep *Smith* would root its inquiries in another preference: "principle," one that would eschew tradition-based evidence by claiming the Free Exercise Clause only protects "religious worship as such."[193] This is the view of Professor Vincent Phillip Muñoz. Professor Muñoz candidly admits that he does not favor the results his approach would produce—and for good reason. This proposal suffers from the Single Right Answer problem: by leaning heavily on theory and excluding practice, this approach attempts to wrest more from original meaning than it can provide.[194] As a result, the inability to administer *Smith* remains,[195]

189. *Smith*, 494 U.S. at 888.

190. *Id.* at 890 n.5.

191. *Id.* at 886.

192. For example, there is historical evidence of judicially mandated religious accommodations. *See* Stephanie Barclay, *The Historical Origins of Judicial Religious Exemptions*, 95 NOTRE DAME L. REV. 55, 69 (2020). And judicial review of religious accommodations resembles "as-applied" relief. Stephanie Barclay & Mark Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1611 (2018). Moreover, the judicial outputs in such cases show the Supreme Court is "up to the task" of assessing "specific claims for exemptions as they ar[i]se." Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006).

193. *See* VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING 59 (2022) ("worship as such," a "cumbersome modifier" intended to prohibit only "outlawing a practice *on account of its religious character*.").

194. *Id.* at 306 ("The most fundamental tradition of American constitutionalism, moreover, is not reliance on tradition. . . . To follow the Founders requires that we follow their philosophical thinking.").

195. For example, if a jurisdiction bans "all wine uses," it bans religious wine uses too. But on Professor Muñoz's theory, that is not a Free Exercise violation. To Muñoz, a jurisdiction would violate the Free Exercise Clause if it banned "religious uses of wine." But what if the jurisdiction banned "all wine uses, including religious uses?" In every case, the violation of religious exercise is the same—but, to Muñoz, in only one is it clear that the Free Exercise Clause cares. *See id.* at 260 n.10 (calling a regulation on "drive-in spiritual services" "[a]n example of government regulation of religious exercises as such," and noting—but not explaining whether it's significant—that the order

while the content of the Free Exercise guarantee gets murkier.[196] And the virtue of tradition-based analysis—how ordinary Americans understood the real-world application of their political principles—is considered a barrier to taking a principle to its furthest extent.[197]

By contrast, with text, history, and tradition, religious exercise that has a strong analogical connection to the Founding Era[198]

"pertained exclusively to religious services"). While Muñoz claims that the Founders understood "the natural boundaries" of religious liberty "to be established by the laws of nature," *see id.* at 60, applying his theory would seem to mark the boundaries on religious liberty by legislative pedantry.

196. For example, Professor Muñoz claims that *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993), is correct, because it invalidated a New York school district's "after-hours-school-use polic[y]" that "forb[ade] religious exercises as such." MUÑOZ, *supra* note 193, at 263. Muñoz is right that *Lamb's Chapel* is correct, but it's not clear why he would think so. In *Lamb's Chapel*, the religious exercise was "a film series dealing with family and child-rearing issues faced by parents today." 508 U.S. at 387. Muñoz never explains how this is encompassed by what he calls "religious exercise as such," a concept his book equates with "the natural right of religious worship." MUÑOZ, *supra* note 193, at 67; *see also id.* at 263. Indeed, one might think a jurisdiction following his theory *could* prohibit showing this film series—because a film series is not worship, and Muñoz claims that "the state may make exclusions on the basis of religion as long as it does not exercise jurisdiction over religious exercises as such." *Id.* at 269. In *Lamb's Chapel*, the government rule prohibited using school premises after hours "for religious purposes." 508 U.S. at 387. And the "six-part film series" was refused by the school district because it appeared "'to be church related.'" *Id.* at 389. Muñoz never explains why either this ban or this denial crossed the line from what he considers permissible ("exclusions on the basis of religion") to what he considers impermissible ("jurisdiction over religious exercise as such"). Unlike Professor Muñoz's theory, the Supreme Court doesn't condition religious liberty on drawing such difficult lines. *See Good News Club v. Milford Central School District*, 533 U.S. 98, 126–27 (2001) (Scalia, J., concurring) ("we have previously rejected the attempt to distinguish worship from other religious speech, saying that the distinction has [no] intelligible content, and further, no *relevance* to the constitutional issue." (internal quotation marks and citation omitted) (alterations in original).

197. MUÑOZ, *supra* note 193, at 226 ("[T]he aim of the inquiry is to determine as much as possible about the original meaning of the principle itself, *not* any particular expected applications of it, since these may fall short of or even contradict the principle.").

198. This is not to say that the religious exercise at issue need have been exactly present at the Founding. Long practice, as in *American Legion*, does give rise to a presumption of constitutionality. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2082 (2019)

would be presumptively protected, unless the opposing party shows that a long history of analogous restriction can overcome that protection.[199] This approach possesses a built-in respect for enduring democratic judgment. It cannot contravene what is known about text and history, but it can help illuminate what they do not definitively resolve. That is because "[e]nduring cultural and political practices reflect the people's judgments about what is consistent with their fundamental law."[200] This is the logic of "implied ratification"—whereby the Constitution "derives its continued authority from the implicit consent of each subsequent generation."[201] Implied ratification only makes sense if the people's longstanding practices can generally be presumed to reflect what the Constitution guarantees.[202] To quote natural lawyer James Wilson again, this is "evidence[] of the strongest kind" of enduring, "common consent."[203] The goal of this approach, then, is not one-sided. Sometimes, text, history, and tradition will benefit religious liberty. Other times, the best analogies might justify restriction. But in either case, Free Exercise doctrine would be more administrable than judicially invented inquiries into "neutrality" and "general

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(plurality opinion). But more recent religious exercise that implicates the government's reason for regulating in an analogous way would also receive the presumption. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1288 (2022) (Kavanaugh, J., concurring) (suggesting that the "history of religious advisors at executions" shapes whether a compelling interest in banning audible prayer and religious touch in death chamber exists, even as "some of the history is not precisely on point").

199. Religious liberty claimants may also use history and tradition—from that perspective, to affirmatively show that religious liberty presumptively includes the religious exercise at issue. *See infra* Part III.C (discussing *Ramirez*).

200. Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1656 (2020).

201. McConnell, *supra* note 14, at 1132.

202. *See id.* Professor McConnell argues that implicit consent "must rest on more than the mere fact that the people have not often amended the Constitution through the Article V procedures," as that process "is sufficiently onerous that the mere lack of amendments cannot, without more, be taken as proof of continued popular satisfaction with the Constitution." *Id.* Rather, it is the continued "venerat[ion of] the Constitution" by the American people that shows enduring consent. *Id.*

203. WILSON, *supra* note 80, at 470.

applicability"—and the Clause's substance would better reflect "the spirit of practical accommodation that has made the United States a Nation of unparalleled pluralism and religious tolerance."[204]

Below are some specific ways in which these insights could be applied.

B. Developing context-specific rules, not a one-size-fits-all test.

One way text, history, and tradition could improve Free Exercise doctrine is, in place of *Smith*, courts could determine the propriety of burdens on religious exercise through analogical reasoning about longstanding practices. This approach would resemble *Bruen* and the Establishment Clause cases: religious exercise is presumptively protected by the Free Exercise Clause's text, unless the opposing party shows an unbroken, analogous tradition of restriction. Used this way, tradition can help overcome the temptation toward a single test to rule all Free Exercise cases.

For example, by using analogical reasoning to reconcile new government regulations with religious exercise, the judiciary can ensure that "the Free Exercise Clause [does not] shrink every time the government expands its reach and begins to regulate work that has historically and traditionally been done by religious groups."[205] *Smith*, however, devised a rule from one context—"an across-the-board criminal prohibition" enacted by a legislature[206]—and purports to apply that rule to myriad contexts, without regard to whether those other contexts bear any resemblance to *Smith*'s. This dynamic creates many awkward fits, especially with growing regulatory power. Indeed, most religious freedom cases at the Supreme Court in the past decade have come from administrative

204. *Salazar v. Buono*, 559 U.S. 700, 723 (2010) (Alito, J., concurring in part and concurring in the judgement).

205. Transcript of Oral Argument at 23, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) (statement of Lori Windham).

206. Emp. Div. v. Smith, 494 U.S. 872, 884 (1990).

actions, not general, democratically enacted criminal laws.[207] As Justice Scalia knew well, the administrative context is distinct from legislation. Unlike the legislature, regulatory bodies—premised on their "expertise" in technical knowledge—are generally disinclined to accommodate religious orthodoxy or account for social knowledge.[208] Outsourcing decisions to that context "breaks down" *Smith*'s "political logic."[209] By contrast, a context-specific approach to religious exercise would allow text, history, and tradition to harmonize free exercise with modern government power.

Two recent Free Exercise cases suggest a shift like this is already underway. Tellingly, neither case cites *Smith.* In the first, *Espinoza v. Montana Department of Revenue*,[210] the Court invalidated a funding prohibition on religious schools in part because there was no "historic and substantial" tradition supporting such a ban.[211] Rather, the only "tradition" of such bans that did exist were the

207. *See* Carson v. Makin, 142 S. Ct. 1987, 1993 (2022) (executive department funding determination); *Fulton*, 141 S. Ct. at 1875–76 (administrative decision from Department of Human Services); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65–66 (2020) (*per curiam)* (shutdown executive order); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723 (2018) (ruling of Colorado Civil Rights Commission); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017) (agency funding rule); Holt v. Hobbs, 574 U.S. 352, 358 (2015) (department grooming policy); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 696–97 (2014) (agency-crafted mandate); Stormans, Inc. v. Wiesman, 136 S. Ct. 2433, 2434 (2016) (Alito, J., dissenting from denial of certiorari) (state pharmacy board rules).

208. Antonin Scalia, *Rulemaking as Politics*, 34 ADMIN. L. REV. xxv, xxxi (1982) ("More needs to be done to bring the political, accommodationist, value-judgment aspect of rulemaking out of the closet."); *see also* Philip P. Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 NOTRE DAME L. REV. 1919, 1939–40 (2015) ("[T]he administrative idealization of scientism and centralized rationality usually renders administrative acts—compared with acts of Congress—relatively indifferent and even antagonistic to religion and religious concerns.")

209. *See* Hamburger, *supra* note 208, at 1938; *see also* Brief for Dominican Sisters of Mary, et al. as Amici Curiae Supporting Petitioners at 3, Zubik v. Burwell, 578 U.S. 403 (2016) (No. 14-1418), 2016 WL 212595, at *3 ("HHS's decision to gerrymander the exemption in this way was intentional; it knew that in significant cases, virtually identical religious groups would be treated differently based on nothing more than their classification under tax law.").

210. 140 S. Ct. 2246 (2020).

211. *Id.* at 2258–59.

nineteenth-century Blaine Amendments, laws reflecting a "bigotry" toward Catholic immigrants—"hardly . . . a tradition that should inform our understanding of the Free Exercise Clause."[212] The Free Exercise Clause instead contains a "principle" of nondiscrimination against religious status.[213] And the post-ratification application of that principle illuminated no tradition denying religious schools the right to participate in neutral benefit programs.[214]

In the second, *Carson v. Makin,*[215] the Supreme Court invalidated a Maine statute that prohibited tuition assistance payments from going to religious schools.[216] Echoing *Smith,* Maine (and Justice Breyer in dissent) attempted to distinguish *Espinoza* from *Carson:* Religious schools are not "'bar[red] from receiving funding simply based on their religious identity,' but instead 'based on the religious use that they would make of it in instructing children.'"[217] This means the restriction only has "the effect of burdening a particular religious practice," and under *Smith,* that is not a cognizable Free Exercise concern.[218] But *Carson* didn't limit its analysis to "how the benefit and restriction are described"—the Court focused instead on how "the program operates."[219] As in *Espinoza,* the Court said there was no "historic and substantial tradition" that could credit "promot[ing] stricter separation of church and state than the Federal Constitution requires."[220]

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212. *Id.* at 2259.

213. *Id.* at 2254 (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 – 21 (2017)).

214. *Id.* at 2258 – 59.

215. 142 S. Ct. 1987 (2022).

216. *Id.* at 2002.

217. *Id.* at 2001 (quoting Carson v. Makin, 979 F.3d 21, 40 (1st Cir. 2020), *rev'd,* 142 S. Ct. 1987 (2022)).

218. *See* Emp. Div. v. Smith, 494 U.S. 872, 886 & n.3 (1990).

219. *Carson,* 142 S. Ct. at 2002.

220. *Id.* at 1997, 2002 (quoting Espinoza v. Mont. Dep't of Rev., 140 S. Ct. 2246, 2259 (2020)).

C. Determining "compelling" interests.

Text, history, and tradition could also be used to define the search for "compelling" interests. This way, those interests are interpreted "*so as to reflect*" the practices that illuminate how Americans applied the free exercise guarantee.[221] Three justices in *Fulton* suggested something like this, saying that the compelling interest test could replace *Smith* and be "rephrased or supplemented with specific rules."[222] And Justice Scalia's guidance for tradition's use, discussed above, suggests some ways this could be implemented: Identify, at the most specific level of analogy, a tradition of burdening a particular religious exercise.[223] This tradition must be one of "unchallenged validity," meaning that Supreme Court jurisprudence has neither rejected such regulation nor put it into serious doubt.[224] New regulatory traditions can emerge, but they must have roots in older, analogous ones.[225]

The Supreme Court gestured toward this approach in *Ramirez v. Collier*.[226] There, the longstanding protection for clergy prayer in the death chamber meant that Texas lacked a compelling interest in denying an inmate's request to have "his long-time pastor . . . pray with him and lay hands on him while he is being executed."[227] Although a statutory case, *Ramirez*'s compelling interest analysis mirrors what would occur under the Free Exercise Clause. In defining the compelling interest, the Court illustrated the role tradition plays

221. United States v. Virginia, 518 U.S. 515, 568 (Scalia, J., dissenting).

222. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1924 (2021) (Alito, J., concurring); *see also* Ramirez v. Collier, 142 S. Ct. 1264, 1288 (2022) (Kavanaugh, J., concurring) (arguing that a tradition-based analysis could ensure that "the Court does not merely point to its own policy assessment" when determining state interests).

223. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (opinion of Scalia, J.).

224. *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting).

225. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022).

226. 142 S. Ct. 1264 (2022).

227. *Id.* at 1272.

in focusing the inquiry.[228] Justice Kavanaugh, moreover, concurred to explain how "the history of religious advisors at executions" meant "the Court does not merely point to its own policy assessment of how much risk the State must tolerate in the execution room."[229] While "the history is not precisely on point," because the nature of the execution here was different than in prior examples, "[s]till, the history generally demonstrates that religious advisors have often been present at executions."[230] That historical analysis, as the majority opinion says, evidenced a "tradition [that] continued throughout our Nation's history" and "continues today"[231]—a fact Justice Kavanaugh considered "perhaps even more relevant" than history.[232]

D. Crafting specific rules for institutional religious exercise.

Text, history, and tradition would also be helpful in building out distinct protections for religious institutions. This build-out could happen alongside or independent of the previous suggestions.

As explained, church autonomy cases are already incorporating tradition's regard for social knowledge by adopting legal standards that are not rooted in abstractions.[233] Similarly, recent Free Exercise decisions have relied on the distinctive knowledge and mission of religious institutions when crafting legal rules. For example, in *Fulton*, the Court's ruling is colored by the "incongruity" of labeling a religious foster care agency a public accommodation when it is asked to evaluate marriages but disregard its religious understanding of marriage.[234] Similarly in *Carson*, the Court rejected Maine's "semantic" distinctions between restricting a religious school's use

228. *See id.* at 1277–79 (citing "[a] tradition of such prayer continu[ing] throughout our Nation's history" to undermine the need for "a categorical ban on audible prayer in the execution chamber").

229. *Id.* at 1288 (Kavanaugh, J., concurring).

230. *Id.*

231. *Id.* at 1279 (majority opinion).

232. *Id.* at 1289 (Kavanaugh, J., concurring).

233. *Supra* Part II.C.

234. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021).

of public money and its status as a religious organization.[235] Doing otherwise would let courts "scrutiniz[e] whether and how a religious school pursues its educational mission," thereby "rais[ing] serious concerns about state entanglement with religion and denominational favoritism."[236] To make this point, *Carson* explicitly connects free-exercise doctrine with the church autonomy cases.[237] This parallel could be further developed should the Supreme Court consider "whether the freedom for religious employers to hire their co-religionists is constitutionally required," especially as "federal statutory exemptions" and lower court decisions have long acknowledged it.[238] Building out these tradition-based rules would allow courts to better distinguish "internal management decisions that are essential to the institution's central mission" from decisions capable of secular regulation.[239]

CONCLUSION: KEEPING OUR BALANCE.

If the Free Exercise Clause is going to "translat[e]" its guarantees "into concrete restraints" over time, then it needs text, history, and tradition.[240] Applying that approach would resolve the morass created by *Smith*'s unrestrained inquiries into "neutrality" and "general applicability." Further, adopting text, history, and tradition would bring the Free Exercise Clause into line with the rest of Religion Clause jurisprudence, and the growing use of text, history, and tradition throughout constitutional law. Finally, and as important, by accounting for the people's longstanding practices toward religious accommodation, the Free Exercise Clause would be neither a

235. Carson v. Makin, 142 S. Ct. 1987, 1999–2001 (2022).

236. *Id.* at 2001 (citing, *inter alia,* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2068 – 69 (2020)).

237. *Id.* Four justices would reiterate this connection again in Yeshiva Univ. v. YU Pride All., 143 S. Ct. 1, 2 (2022) (Alito, J., dissenting).

238. Seattle's Union Gospel Mission v. Woods, 142 S. Ct. 1094, 1094 (2022) (Alito, J., statement respecting the denial of certiorari).

239. *Our Lady,* 140 S. Ct. at 2060.

240. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

"living" text nor a "dead" letter. Rather, it would be as it should: an enduring guarantee.