HISTORY VERSUS POLICY? DOES HISTORY AND TRADITION REALLY LIMIT JUDICIAL DISCRETION?

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"History and tradition" as a lens for interpretation has become increasingly prominent in recent Supreme Court jurisprudence.[1] But exactly why judges should use history and tradition rather than other methods is an open question.[2] In a concurring opinion in *United States v. Rahimi*, Justice Kavanaugh provides one of the leading answers.[3] When interpreting a vague constitutional text that lacks a controlling precedent, he writes, a judge is faced with a choice—history or policy.[4] "History, not policy," he emphasizes, "is the proper guide."[5]

This Essay contends that the judicial distinction between history and policy may not be quite as sharp as Justice Kavanaugh suggests.[6] In some areas of constitutional law, history does not provide a singular view or doctrine. Indeed, history may allow or even require a judge to adopt a preferred policy under the guise of following history.[7] I make

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1 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022); Vidal v. Elster, 144 S. Ct. 1507, 1516 (2024).

2 Also in question is to what degree history and tradition or "traditionalism" is originalist. On this question, see generally Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653 (2020).

3 *United States v. Rahimi*, 144 S. Ct. 1889 (2024) (Kavanaugh, J., concurring).

4 *See id.* at 1912.

5 *Id.*

6 Let me note that I do not here consider whether history and policy exhaust the alternatives. One possible alternative would be to turn to the underlying natural rights political philosophy that animated the Constitution as a whole and various provisions in particular.

7 For an earlier statement making this argument, which this Essay complements, see generally Vincent Phillip Muñoz, *History and Tradition in the Trump Justices' Church-State*

this argument via commenting on the three Symposium articles addressing the First Amendment's Religion Clauses. In her paper, Nicole Garnett raises difficulties with applying history and tradition in the context of religion cases pertaining to public schools.[8] Since public schools did not exist at the time of the adoption of the Bill of Rights, which history and which time periods can a judge consult ?[9] Annika Barkdull, while exploring the historical origins of denominational neutrality, indirectly points to a different though related difficulty: which history should a judge invoke when multiple histories exist?[10] Michael Helfand seeks to map the terrain of post-*Carson* Free Exercise Clause jurisprudence and how *Carson* could reshape church-state constitutional law.[11] His speculations help us see that history may not be as constraining as Justice Kavanaugh's history-or-policy dichotomy suggests.[12] If one attempts to apply history and tradition to the Religion Clauses, significant shortcomings and difficulties of the approach emerge, especially if it is defended in terms of limiting judicial discretion. At least in matters of church-state law, a turn to "history and tradition" likely will not prevent judges from devising policy.

I. HISTORY AND TRADITION IN CHURCH-STATE JURISPRUDENCE

In *Kennedy v. Bremerton,*[13] a six-member Supreme Court majority declared that the Establishment Clause "must be interpreted by 'reference to historical practices and understandings,'" quoting Justice Kennedy's majority opinion in *Town of Greece v. Galloway.*[14] In *Town of Greece*, which upheld a city council prayer practice, Justice Kennedy crafted his "historical practices and understandings" standard by construing Chief Justice Warren Burger's Court opinion in *Marsh v.*

Jurisprudence, 713 ANNALS AM. ACAD. OF POL. & SOC. SCI. 183 (2024). *See also* Reva B. Siegel, *The Levels-of-Generality Game: "History and Tradition" in the Roberts Court*, 47 HARV. J.L. & PUB. POL'Y 563, 584 (2024) ("[T]he Justices engaged in history-and-tradition modes of decision making have more discretion than their own self-accounting suggests.").

8 Nicole Stelle Garnett, *The Original Understanding of the First Amendment in Public Schools*, 101 NOTRE DAME L. REV. 1271 (2026).

9 *Id.* at 1273–74.

10 Annika Barkdull, *The Historic Origins of Denominational Neutrality*, 101 NOTRE DAME L. REV. 1471 (2026).

11 Michael A. Helfand, *Mapping* Carson*: New Frontiers of Religious Exclusion in Government Programs*, 101 NOTRE DAME L. REV. 1283 (2026).

12 *See id.* at 1286–87.

13 Kennedy v. Bremerton Sch. Bd., 142 S. Ct. 2407 (2022).

14 *Id.* at 2428 (2022) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

Chambers.[15] *Marsh* can be considered the foundational moment in church-state history and tradition.[16]

Marsh, of course, is one of the more unprincipled church-state decisions ever rendered. As noted by Justice Brennan in his understated but sharp dissent in the case, the majority opinion "makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause."[17] Chief Justice Burger disregarded without explanation or justification the then-leading precedent *Lemon v. Kurtzman* and its three-pronged test, which he himself had formulated.[18] The Chief Justice instead turned to the drafters of the First Amendment. "[I]t would be incongruous to interpret" an incorporated Establishment Clause, he wrote, "as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government."[19] "[H]istorical evidence sheds light," he explained, "not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent."[20]

Chief Justice Burger in this case adopted what is now labeled expectations originalism, or expected-applications originalism.[21] His reasoning was as follows: Practices contemporaneous with the adoption of the First Amendment convey the Framers' expected applications of the text; the Framers' expected applications reveal the Framers' intentions; the Framers' intentions can be held as synonymous with the text's meaning; and Founding-era practices, accordingly, can be taken to convey the Establishment Clause's meaning.[22]

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15 *Town of Greece*, 572 U.S. at 576 (quoting Cnty. of Allegheny v. Am. Civ. Liberties Union, 492 U.S. 573, 670 (1988)); *id.* at 576–77 (citing Marsh v. Chambers, 463 U.S. 783 (1983)). For an elaboration of this point, see Muñoz, *supra* note 7, at 189–92.

16 This is not to say that the Court had not relied on history or consulted tradition prior to *Marsh*. *Everson v. Board of Education*, the Court's first significant Establishment Clause case, turned to history to attempt to uncover the Establishment Clause's original meaning. Everson v. Bd. of Educ., 330 U.S. 1, 2–14 (1947). In *Marsh*, however, a Court majority for the first time used historical practices themselves as determinative of constitutional meaning and not as evidence for another, more general or abstract doctrine or meaning.

17 *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting).

18 *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

19 *Marsh*, 463 U.S. at 790–91.

20 *Id.* at 790.

21 *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 296 (2007).

22 *Marsh*, 463 U.S. at 790–92.

Chief Justice Burger's version of original-intent originalism has since been rejected by originalists and nonoriginalists alike.[23] "Specific expectations about the consequences of a legal rule are distinct from the meaning of the rule itself," Keith Whittington asserts.[24] Larry Solum makes the same point: "The linguistic meaning of a text is one thing, and expectations about the application of that meaning to future cases are a different thing."[25] What now matters for most originalists is neither the original intentions that animated the text nor the authors' expectations of how the text would be applied.[26] Neither intentions nor expectations, the argument goes, were ratified by the people, and thus expectations originalism does not accord with the popular-sovereignty defense on which the strongest case for originalism rests.[27] The type of expectations originalism employed by Chief Justice Burger in *Marsh* is now generally viewed as not defensible.

That Chief Justice Burger turned to history and tradition utilizing a now-rejected approach does not discount every use of history or tradition, of course. It does suggest, however, that an appeal to history and tradition requires justification beyond any histories or traditions themselves and beyond prior judicial appeals to it. There may be good reasons to rely on history and tradition—long-standing traditions might themselves serve as a proxy for wisdom,[28] some elements of history and tradition may help elucidate a more defensible form of originalism,[29] or history may even be the most effective means available to constrain and minimize judicial policymaking.[30] Whatever the case, history and tradition is a not a self-justifying method of constitutional interpretation. Justice Kennedy did not provide a sufficient defense in *Town of Greece* and, at least in the context of church-state jurisprudence, no other Justice has attempted to elaborate why, exactly, history

23 *See, e.g.*, Ronald Dworkin, *Comment*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 119 (1997); Balkin, *supra* note 21, at_300–01 (2007). For further discussion of this point, see Muñoz, *supra* note 7, at 191.

24 Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 383 (2013).

25 Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 25 (Grant Huscroft & Bradley W. Miller eds., 2011).

26 *See id.* at 25–26.

27 Not all originalists have abandoned the importance of intentions. *See, e.g.*, DONALD L. DRAKEMAN, THE HOLLOW CORE OF CONSTITUTIONAL THEORY: WHY WE NEED THE FRAMERS (2020).

28 *See, e.g.*, Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1173–76 (2020).

29 *See, e.g.*, United States v. Rahimi, 144 S. Ct. 1889, 1924 (2024) (Barrett, J., concurring) ("So for an originalist, the history that matters most is the history surrounding the ratification of the text; that backdrop illuminates the meaning of the enacted law.").

30 *See, e.g.*, *id.* at 1912 (Kavanaugh, J., concurring).

and tradition should serve as a guide.[31] For the reasons developed below, I argue there are good reasons to doubt whether history and tradition cabins judicial discretion (as asserted by Justice Kavanaugh) or is even a desirable method of interpretation for church-state jurisprudence.[32]

II. DIFFICULTIES WITH HISTORY AND TRADITION THAT EMERGE IN THE CHURCH-STATE CONTEXT

Nicole Garnett's article helps us understand a specific difficulty for originalists who might use history and tradition in the context of cases involving public schools: There were no public schools at the time of the Founding, and thus no clear historical analogues exist that can be employed to guide constitutional interpretation.[33] This could lead a judge to consult periods of history and tradition when public schools existed. In *Mahanoy Area School District v. B.L.*, Garnett points out, Justice Thomas relied on a Vermont Supreme Court decision from 1859.[34] But post-dating the adoption of the First Amendment by generations seems deeply problematic from an originalist perspective, at least if the originalist goal is to understand the original public understanding of the First Amendment at the time of adoption.[35] Professor

31 Typically, Justices point out that history and tradition frequently have been consulted in church-state jurisprudence, which, they imply, justifies continued reliance on history and tradition. For a recent example, see Justice Gorsuch's concurring opinion in *Shurtleff v. Boston*, 142 S. Ct. 1583, 1606 (2022) (Gorsuch, J., concurring). For a recent scholarly exchange of history and tradition in church-state jurisprudence, see, for example, NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL, AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE (2023) and Vincent Phillip Muñoz, *What is an Establishment of Religion? And What Does Disestablishment Require?* 38 CONST. COMMENT. 219 (2023) (reviewing CHAPMAN & MCCONNELL, *supra*).

32 I do not here develop an alternative to "history and tradition," but for such an alternative in the church-state context that focuses on natural rights, see VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES (2022).

33 *See* Garnett, *supra* note 8, at 1272–73.

34 *See id.* at 1273–74 (citing Mahanoy Area Sch Dist. v. B.L., 141 S. Ct. 2038 (2021)).

35 *See, e.g.*, United States v. Rahimi, 144 S Ct. 1889, 1924 (2024) (Barrett, J., concurring) ("So for an originalist, the history that matters most is the history surrounding the ratification of the text; that backdrop illuminates the meaning of the enacted law. History (or tradition) that long postdates ratification does not serve that function."). Incorporation complicates this question, of course, as, properly speaking, the constitutional text that applies the First Amendment to the states is the Fourteenth Amendment. But most assume that the incorporated meaning of the Fourteenth Amendment is the same as the original meaning of the First Amendment.

Garnett reasonably asks: Which history ought the history-and-tradition judge consult?[36]

I might reframe her question differently: What insight or knowledge is the history-and-tradition judge aiming to gain from history and tradition? What is the product that history and tradition is supposed to produce? At the risk of oversimplifying the matter, the history-and-tradition judge can turn to history and tradition to discover either a principle or a rule. Chief Justice Roberts's majority opinion and Justice Clarence Thomas's dissenting opinion in *United States v. Rahimi* illustrate the two distinct approaches.

In *Rahimi*, the Court upheld 8–1 (Justice Thomas dissenting) a federal law that prohibited individuals subject to domestic-violence restraining orders from possessing firearms.[37] Chief Justice Roberts's majority opinion, following the Court's precedent in *New York State Rifle & Pistol Ass'n v. Bruen*,[38] examined America's "'historical tradition of firearm regulation' to help delineate the contours of the [Second Amendment] right [to bear arms]."[39] "[T]he appropriate analysis," Chief Justice Roberts explained, "involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition."[40] "The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'"[41] The principle Chief Justice Roberts found in history and tradition is that "[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed."[42]

Justice Thomas dissented, in part, because he consulted history and tradition seeking a different product. Justice Thomas turned to history and tradition to find the rule or analogous rules that might provide guidance as to when an individual's presumptive Second Amendment rights might be legitimately regulated.[43] Justice Thomas's inquiry did not seek to discover a general principle that might be applied to the case at hand, but rather whether the nation's historical tradition of firearm regulations addressed the same issue involved in *Rahimi* through means analogous to the challenged regulations.[44] Justice Thomas aimed to find in history and tradition the specific rule or

36 Garnett, *supra* note 8, at 1274–78.
37 *See Rahimi*, 144 S Ct. at 1903.
38 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S Ct. 2111 (2022).
39 *Id.* at 1897 (quoting *Bruen*, 142 S. Ct. at 2126).
40 *Id.* at 1898.
41 *Id.* (quoting *Bruen*, 142 S. Ct. at 2133).
42 *Id.* at 1901.
43 *See id.* at 1933–38 (Thomas, J., dissenting).
44 *See id.* at 1932.

rules that a judge could employ to evaluate the constitutionality of contemporary regulations on the same subject. Finding that the nation's history and tradition of firearm regulations addressed the possession of firearms by potentially dangerous people differently and less restrictedly than the federal statute in question, Justice Thomas voted to strike down the statute.[45]

Professor Garnett's point, if I understand her paper correctly, is that Justice Thomas's approach—using history and tradition to determine constitutionally allowable rules—can only work for subject matters in which there exist analogous rules.[46] Given that there were no public schools at the time of the adoption of the First Amendment, there are not likely any analogous rules that would allow the type of rule-finding that Justice Thomas's approach requires, at least if the history that is relevant to First Amendment cases is the history surrounding the First Amendment's adoption. Professor Garnett's observations help us see that, as history and tradition is employed more broadly across different subject matters, it may be forced to focus on discerning principles rather than rules, simply because there were no analogous rules adopted in the relevant historical period. Alternatively, a history-and-tradition judge could adopt an expansive time frame of which history counts, thus making it more likely that tradition could provide analogous rules relevant to the case at hand. But the more that time frame extends beyond when the relevant constitutional text was adopted, the more the history-and-tradition approach loses touch with originalism. Moreover, whatever course is adopted—using history and tradition to generate principles or extending the relevant time frame so as to find historically analogous rules—history and tradition decreasingly constrains judges. The process of abstracting principles and the freedom to consult a wide swath of history to find an analogous rule *increases* judicial discretion.[47]

Annika Barkdull's paper presents a second difficulty with history and tradition that emerges when the approach is applied to church-state issues. Barkdull notes that the Court has long held that "the government may not 'officially prefer' one religious denomination over another,"[48] and she herself concludes that "[t]he Founding generation's state constitutions show that denominational neutrality emerged as an American principle in the country's earliest years."[49] At the same time, she recognizes that "Revolutionary-era Americans did not

45 *See id.* at 1933.

46 *See* Garnett, *supra* note 8, at 1273.

47 For a different account that reaches a similar conclusion, see Siegel, *supra* note 7.

48 Barkdull, *supra* note 10, at 1471 (quoting Catholic Charities Bureau v. Wis. Lab. & Indus. Rev. Comm'n, 145 S. Ct. 1583, 1591 (2025)).

49 *Id.* at 1477.

understand the doctrine in the full sense we do today."[50] At least to my mind, the historical evidence she brings forth actually raises doubts as to how historically grounded denominational neutrality truly is. It also helps to illuminate some of the difficulties and limitations of history and tradition discussed above.

Key pieces of historical evidence pertaining to denominational neutrality from Founding-era state declarations of rights and constitutions include:

- Express textual provisions prohibiting "legal preferences among sects, denominations, and modes of worship";[51]
- Text recognizing the right to worship according to the dictates of conscience in universal terms for all, regardless of religious denomination;[52]

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50 *Id.*

51 *Id.* at 1472; *see* DEL. CONST. of 1776, art. XXIX ("There shall be no establishment of any one religious sect in this State in preference to another . . . ."); MASS. CONST. of 1780, pt. 1, art. III. ("[A]nd no subordination of any one sect or denomination to another shall ever be established by law."); N.J. CONST. of 1776, art. XIX ("That there shall be no Establishment of any one religious Sect in this Province in Preference to another . . . ."); N.H. CONST. of 1783, pt. 1, art. I, § 6 ("[N]o subordination of any one sect or denomination to another, shall ever be established by law."); N.C. CONST of 1776, art. XXXIV ("That there shall be no establishment of any one religious church in this State in preference to any other . . . ."); N.Y. CONST. of 1777, art. XXXV (incorporating the prior law of the colony, but providing "[t]hat all such parts of the said common law, and all such of the said statutes and acts aforesaid; or parts thereof, as may be construed to establish or maintain any particular denomination of christians or their ministers . . . be, and they hereby are, abrogated and rejected").

52 *See* Barkdull, *supra* note 10, at 1473 n.14 (first citing DEL. DECLARATION OF RIGHTS of 1776, § 2 ("[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings . . . ."); then citing DEL. CONST. of 1792, pmbl. ("[A]ll men have by nature, the rights of worshipping and serving their Creator, according to the dictates of their consciences . . . ."); then citing GA. CONST. of 1777, art. LVI ("All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State . . . ."); then citing K.Y. CONST. of 1792, art. XII, § 3 ("That all men have a natural and indefeasible right to worship Almighty GOD according to the dictates of their own consciences . . . ."); then citing MASS. CONST. of 1780, pt. 1, art. II ("[N]o subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the publick peace, or obstruct others in their religious worship."); then citing N.H. CONST. of 1783, pt. I, art. I, § 5 ("Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments or persuasion; provided he doth not disturb the public peace, or disturb others in their religious worship."); then citing N.J. CONST. of 1776, art. XVIII ("That no Person shall ever within this Colony be deprived of the inestimable Privilege of worshipping Almighty God in a Manner agreeable to the Dictates of his own Conscience . . . ."); then citing N.Y. CONST of 1777, art. XXXVIII ("[T]hat the free exercise

- Textual provisions limiting the equal protection of the laws on grounds of religious belief or denominational affiliation;[53]
- Textual provisions limiting political rights based on religious profession and denominational affiliation.[54]

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and enjoyment of religious profession and worship, without discrimination or preference, shall for ever hereafter be allowed within this state, to all mankind . . . ."); then citing N.C. DECLARATION OF RIGHTS of 1776, § XIX ("That all men have a natural and unalienable right to worship almighty God according to the dictates of their own conscience."); then citing PA. CONST. of 1776, art. II ("That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences . . . ."); then citing PA. CONST of 1790, art. IX, § III ("That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences . . . ."); then citing VT. CONST. of 1777, ch. I, § III ("[A]ll men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding, regulated by the word of God . . . ."); and then citing VA. BILL OF RIGHTS of 1776, art. 16 ("[A]ll men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . .")). "Maryland alone limited 'protection in their religious liberty' to those 'professing the christian religion,' but in the same article stated that 'no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice.'" Barkdull, *supra* note 10, at 1474 n.14 (quoting MD. DECLARATION OF RIGHTS of 1776, art. XXXIII).

53 *See id.* at 1474 n.16 (first citing DEL. DECLARATION OF RIGHTS of 1776, § 3 ("[A]ll persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state, unless, under colour of religion, any man disturb the peace, the happiness or safety of society."); then citing MASS. CONST. of 1780, pt. 1, art. III ("[E]very denomination of Christians, demeaning themselves peaceably, and as good subjects of the Commonwealth, shall be equally under the protection of the law: and no subordination of any one sect or denomination to another shall ever be established by law."); then citing N.H. CONST. of 1783, pt. I, art. I, § 6 ("[E]very denomination of christians demeaning themselves quietly, and as good subjects of the state, shall be equally under the protection of the law . . . ."); then citing N.J. CONST. of 1776, art. XIX ("[N]o Protestant Inhabitant of this Colony shall be denied the Enjoyment of any civil Right merely on Account of his religious Principles . . . ."); then citing PA. CONST. of 1776, ch. I, art. II ("[N]or can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship . . . ."); then citing S.C. CONST. of 1778, art. XXXVIII ("That all denominations of Christian protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges."); and then citing VT. CONST. of 1777, ch. I, § III (protecting only Protestants from religiously-motivated deprivation of rights)).

54 *See* Barkdull, *supra* note 10, at 1475 n.17 (first citing MD. DECLARATION OF RIGHTS of 1776, art. XXXV (requiring "a declaration of a belief in the christian religion"); then citing MASS. CONST. of 1780, pt. II, ch. II, § I, art. I; then citing *id.* pt. II, ch. II, § II, art. I; then citing N.H. CONST. of 1783, pt. II; then citing N.J. CONST. of 1776, art. XIX ("[A]ll Persons, professing a Belief in the Faith of any Protestant Sect, who shall demean themselves peaceably under the Government as hereby established, shall be capable of being elected into any Office of Profit or Trust, or being a Member of either Branch of the Legislature . . . ."); then citing N.C. CONST. of 1776, § XXXII (excluding from public office individuals who deny "the truth of the protestant religion"); then citing PA. CONST. of 1776, ch. II, § X (requiring legislators to affirm Christian beliefs); then citing S.C. CONST. of 1778,

The 1776 Delaware Declaration of Rights and Constitution exemplify all four of these elements, respectively:

- "There shall be no establishment of any one religious sect in this state in preference to one another . . .";[55]
- "[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings . . .";[56]
- "[A]ll persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state, unless, under colour of religion, any man disturb the peace, the happiness or safety of society";[57]
- "Every person, who shall be chosen a Member of either House, or appointed to any office or place of trust, before taking his seat, or entering upon the execution of his office, shall take the following oath, or affirmation if conscientiously scrupulous of taking an oath, to wit. . . . 'I, A. B. do profess faith in God the Father, and in Jesus Christ his only Son, and in the Holy Ghost, one God blessed for evermore; and I do acknowledge the Holy Scriptures of the Old and New Testament to be given by divine inspiration.'"[58]

These four provisions are not unique to the state of Delaware.[59] Given their seemingly incongruous character, what can a history-and-tradition judge deduce, especially one who holds that the First Amendment Religion Clauses "must be interpreted by 'reference to historical practices and understandings'"?[60] What principle do all these provisions, taken as a consistent whole, reveal? What rule or rules do they convey and what contemporary regulations would they suggest are constitutionally permissible?

Arguably, the four provisions suggest that equal civil rights and privileges *can* be restricted on the basis of religious denomination and belief[61]—including the most basic and fundamental political right of

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arts. III, XIII (limiting public office to Protestants); and then citing VT. CONST. of 1777, ch. II, § IX (limiting public office to Protestants)).

55 DEL. CONST. of 1776, art. XXIX.

56 DEL. DECLARATION OF RIGHTS of 1776, § 2.

57 *Id.* § 3.

58 DEL. CONST. of 1776, art. XXII.

59 For an in-depth consideration of the church-state provisions of the Founding-era state declarations of rights and constitutions, including provisions similar to those in the 1776 Delaware Declaration of Rights and Constitution, see Vincent Phillip Muñoz, *Church and State in the Founding-Era State Constitutions*, AM. POL. THOUGHT, Winter 2015, at 1.

60 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

61 DEL. DECLARATION OF RIGHTS of 1776, § 3.

eligibility to hold an office or place of public trust[62]—consistent with the right to worship according to conscience and a prohibition on preferential establishments.[63] If history and tradition reveals the principle as well as the rule that the constitutional rights of religious free exercise and nonestablishment permit legal disabilities based on religious belief and denomination, then it would seem that the Bremerton School District could dismiss, consistent with American history and tradition, an employee from a public high school coaching position (an office of trust) on account of his religious profession.[64] The same principle and rule also would suggest that some religious schools—or, at least, non-Christian schools—could be excluded from programs of public funding. If the 1776 Delaware Declaration of Rights and Constitution can be considered as conveying the nation's historical traditions, then civil rights and privileges can be denied on account of religious denomination and belief. This history and tradition does not support the results that the Court reached in *Kennedy*, *Trinity Lutheran Church v. Comer*, *Espinoza v. Montana Department of Revenue*, or *Carson v. Makin*.[65] According to this history and tradition, the Free Exercise Clause should not be read to require nondiscrimination in legal rights or privileges. It's unclear that even *Employment Division v. Smith* is consistent with such a history and tradition of religious discrimination.[66] Arguably, the nation's traditions could even permit animus toward specific denominations and religions, thus raising doubt about the Court's majority reasoning in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.[67]

Barkdull's paper notes that "the adoption of the First Amendment marked a turning point at which the states began to move toward a broader denominational neutrality."[68] Article I, Section 1 of the 1792 Delaware Constitution prohibited "preference given by law to any religious societies, denominations, or modes of worship."[69] Article I, Section 2 provided, "No religious Test shall be required as a qualification to any office, or public trust, under this State."[70] These aspects of the nation's history and tradition *could* be used to generate principles and rules that could support the Court's decisions in *Kennedy*, *Trinity*

62 DEL. CONST. of 1776, art. XXII.

63 DEL. CONST. of 1776, art. XXIX.

64 *Cf. Kennedy*, 142 S. Ct. at 2416–19.

65 *See* Trinity Lutheran Church v. Comer, 582 U.S. 449 (2017), Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2022); Carson v. Makin, 142 S. Ct. 1987 (2022).

66 *See* Emp. Div., Dep't of Hum. Recs. v. Smith, 494 U.S. 872 (1990).

67 *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018).

68 Barkdull, *supra* note 10, at 1477. Whether the First Amendment or something about it caused this turning point, Barkdull does not clearly say.

69 DEL. CONST. of 1792, art. 1, § 1.

70 *Id.* § 2.

Lutheran, *Espinoza*, and *Carson*. Which history a judge consults would seem to make all the difference. If the history and tradition can produce either result in *Kennedy*, *Trinity Lutheran*, *Espinoza*, and *Carson*, one ought to question whether history and tradition is sufficiently determinate to resolve these cases.

While not focused on the method of history and tradition per se, Professor Michael Helfand's paper further reveals a core difficulty with the approach. Helfand's paper explores possible post-*Carson* free exercise jurisprudence. According to Helfand, *Carson* set forth the clear and limited rule: "Governments may not open a generally available program to private entities while excluding religion from participation."[71] If to this rule one adds the unconstitutional conditions doctrine, Helfand reasons, then not only is government prohibited from expressly excluding religion from funding programs, but it may not condition participation in a generally available program on the "surrender of a constitutional right."[72] If religious schools possess the church autonomy rights that the Court has previously recognized and if those rights include the right to define one's own faith community through the selection of students as well as members, then *Carson* forbids the government from conditioning funding on a religious school accepting nondiscrimination regulations.[73] If these conditions hold, then the post-*Carson* Free Exercise Clause would protect "not only equal access to public programs but also the independence of religious institutions to govern themselves free from the leverage of state funding conditions."[74]

Helfand's analysis seems sound to me, but the result is generated from the premises that religious schools possess church autonomy rights and that church autonomy rights include the right to define one's own faith community. Helfand implies that whether religious schools possess church autonomy rights and whether church autonomy rights include defining one's own faith community are legal questions.[75] But one can wonder if that is true. Arguably, they are what Justice Kavanaugh calls policy.[76] They are extraordinarily important questions of policy—indeed, they involve fundamental questions of justice, the relationship between what is public and what is private, and how both the public and private spheres ought to be governed. At the deepest levels, these questions involve the relationship between faith and

71 Helfand, *supra* note 11, at 1284. This is not to say that this rule was articulated in *Carson* for the first time. For prior cases consonant with this rule, see *id.* at 1284 n.2.

72 *Id.* at 1315.

73 *Id.* at 1319.

74 *Id.* at 1320.

75 *See id.* at 1319.

76 *See supra* notes 4–5 and accompanying text.

reason, the nature of the human person vis-à-vis human sexuality, and the nature of human freedom. To call these policy questions understates their immense significance. Regardless, it is unclear to me that they are legal questions that the Constitution itself resolves or possibly could resolve.

Perhaps judges ought to answer these questions. It is not altogether clear to me that judges are less well equipped or perhaps even less democratically accountable than the administrative bureaucracies that effectively exercise authority and shape legal answers to these questions today. But it seems erroneous to presume that these are questions that the Constitution's text clearly resolves. And when a judge turns to history and tradition to find answers, the judge is most likely doing policy, hiding behind a fig leaf of his or her own selection. We may not all be living constitutionalists now, but it seems the judicial turn to history and tradition, in important ways, facilitates judges devising policy.