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## Establishment as Tradition

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**ABSTRACT.** Traditionalism is a constitutional theory that focuses on concrete political and cultural practices, and the endurance of those practices before, during, and after the ratification of the Constitution, as the presumptive determinants of constitutional meaning and constitutional law. The Supreme Court has long interpreted traditionally but now says explicitly that it uses a method of “text, history, and tradition” in several areas of constitutional law. Foremost among these is the Establishment Clause. This Essay examines two questions about traditionalism, both of which concern the Establishment Clause in distinct but related ways. First, why has traditionalism had special salience in this area? Second, is traditionalism more a mood or disposition than a theory, more a matter of the heart than of the head?

On the first matter, traditionalism did not materialize out of thin air in the 2021 term, and it has had unusual power in the interpretation of the Establishment Clause for decades. The question is why, and answering it has implications for constitutional theory more generally. For if some domains of constitutional law are more amenable than others to traditionalist interpretation, the same may be true of other theories. The answer for the Establishment Clause is that establishments are made up of politically foundational traditions. Political establishments are constituted by the concrete, authoritative, and enduring practices and institutions that make up the essential settlements of a polity. To interpret the phrase, “Congress shall make no law respecting an establishment of religion” is immediately to be directed by the text not to an idea or an abstraction, but to something solid, authoritative, and lasting—“an establishment.” This is a reading supported by the other uses of “establishment” and its cognates in the Constitution. “An establishment of religion,” therefore, is a political practice that sits outside the limits of the constitutionally permissible practices of the American political establishment. Unconstitutional establishments of religion depend upon the prior existence of constitutional establishments, and those establishments are often instantiated in a people’s most powerful political traditions. More than certain other domains of constitutional law, the text of the Establishment Clause is inherently traditionalist because its meaning takes shape against a network of concrete, authoritative, and enduring institutional political practices. And the practices of establishment are essential to fostering the civic trust that is necessary for any polity’s survival. Without them, the political community fractures. In time, it dies.

As for the second question, some critics have argued that traditionalism is not a full-fledged theory so much as a mood or disposition and that traditions are too manipulable and insubstantial to form the raw material for a theory of constitutional meaning or constitutional law. The question matters because it concerns whether traditionalism is an independent constitutional theory in its own right or, instead, at most a feature of others, dependent on their methods and justifications. I will argue that traditionalism is as much a constitutional theory as any of its rivals, though that

claim will depend on just what it means to count as a theory. It is, in fact, its application in Establishment Clause cases that most clearly demonstrates its comparative systematicity, generality, and predictability of application, three critical elements for qualifying as a constitutional theory. Traditionalism is, to be sure, not a decisional algorithm, but neither is any attractive constitutional theory; it acknowledges and even welcomes reasonable disagreement within shared premises, as do other plausible theories. Still, the critics are in a sense correct: traditionalism has a characterological or dispositional component that other approaches may lack, and this, too, is illustrated in its application to the Establishment Clause. Its character, and the kind of disposition it develops in interpreters subscribing to it, is preservative and custodial. That is not a flaw but a distinguishing virtue. It makes traditionalism preferable to other interpretive possibilities because it makes traditionalism more than just an interpretive theory, reflecting and shaping character even as it provides a coherent framework for adjudicating constitutional cases.

## INTRODUCTION

The future of the Establishment Clause is likely to be traditionalist. In rejecting what it called the “abstract and ahistorical” *Lemon* test and its “endorsement test offshoot,” and in embracing “historical practices and understandings” as forming the meaning of the Establishment Clause, the Supreme Court last term officially announced a doctrinal change.<sup>1</sup> The Court’s new approach in this area is part of a broader methodological transformation across constitutional law toward what I have called “traditionalism.”<sup>2</sup> Traditionalism is a constitutional theory that takes concrete political and cultural practices, and the endurance of those practices before, during, and after the ratification of the Constitution, as the presumptive determinants of constitutional meaning and constitutional law.<sup>3</sup> In

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1. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427-28 (2022) (rejecting *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). The change was, however, presaged by several other cases including *American Legion v. American Humanist Ass’n*, 139 S. Ct. 2067 (2019) and *Town of Greece v. Galloway*, 572 U.S. 565 (2014).
  2. See Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1123 (2020) [hereinafter DeGirolami, *Traditions*]; Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1653 (2020) [hereinafter DeGirolami, *First Amendment Traditionalism*]; Marc O. DeGirolami, *Traditionalism Rising*, J. CONTEMP. LEGAL ISSUES (forthcoming 2023) (manuscript at 1) [hereinafter DeGirolami, *Traditionalism Rising*]. The change is partial and peppered with other methodological approaches, originalism and other less distinct methods included. The extent to which traditionalism may be compatible with originalism is a complex question that depends upon the variety of originalism espoused, but I have discussed it elsewhere and set it to the side in this Essay. See DeGirolami, *Traditions*, *supra*, at 1164-65; DeGirolami, *First Amendment Traditionalism*, *supra*, at 1672-85.
  3. It is worth emphasizing that traditionalism does not focus on judicial precedent or legal reasoning, principally because the theory would in that case be institutionally self-referential. Traditionalism, as I have explained at greater length elsewhere, is justified in part by democratic-populist reasons that sit uneasily with taking judicial precedent as a determinant of constitutional meaning and law. For another, quite different, tradition-based theory that does emphasize judicial precedent, see Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 622 (1994).

fact, the Court has applied this method before to many other areas, including free speech, substantive due process, the Second Amendment, personal jurisdiction, the separation of powers, the relationship between the federal and state governments, the Eighth Amendment, and more.<sup>4</sup> The difference today is that the Court now says explicitly that it will use a method of “text, history, and tradition” to guide decisions across many constitutional domains.<sup>5</sup> Traditionalism will probably be with us for some time to come. But even if it is not— even, that is, if the Court, or a future Supreme Court, suddenly changes course and opts for some other approach— traditionalism is now coming into its own as an independent constitutional theory. It will need to be clarified, understood, justified, and, if possible and in time, rendered the best theory it can be.

In that spirit, this Essay examines two questions about traditionalism, both of which concern the Establishment Clause in distinct but related ways. First, why has traditionalism had special salience in this area? Second, is traditionalism more a mood or disposition than an interpretive theory, more a matter of the heart than of the head, a quality clearly illustrated in Establishment Clause jurisprudence?

On the first matter, traditionalism did not materialize out of thin air in the 2021 term,<sup>6</sup> and it has had unusual power in the interpretation of the Establishment Clause for decades.<sup>7</sup> The question is why, and answering it has implications for constitutional theory more generally. For if some domains of constitutional law are more amenable than others to traditionalist interpretation, the same may be true of other theories. In Section I.A, this Essay contends that the answer for the Establishment Clause is that establishments are made up of foundational traditions. Political establishments are constituted by the concrete, authoritative, and enduring practices and institutions that make up the essential settlements of a polity. To interpret the text, “Congress shall make no law

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4. For systematic discussion of each of these areas and more, see DeGirolami, *Traditions*, *supra* note 2, at 1134–61.

5. See *Kennedy*, 142 S. Ct. at 2450 (Sotomayor, J., dissenting) (“[W]hile the Court has long referred to historical practice as one element of the analysis in specific Establishment Clause cases, the Court has never announced this as a general test or exclusive focus.”).

6. For extensive documentation of traditionalism in the Court’s pre-2021 work, see DeGirolami, *Traditions*, *supra* note 2, at 1134–61.

7. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 786 (1983); *Lynch v. Donnelly*, 465 U.S. 668, 673–74 (1984) (surveying the history of enduring practices concerning the recognition of religion’s political role in America and concluding that “[t]here is an unbroken history of official acknowledgement by all three branches of government of religion in American life from at least 1789”); *Walz v. Tax Comm’n*, 397 U.S. 664, 681–85 (1970) (Brennan, J., concurring) (drawing on the historical lineage of the practice of tax exemptions during the Jefferson Administration and Madison’s tenure in the Virginia Assembly in rebuffing an Establishment Clause challenge).

respecting an establishment of religion,”<sup>8</sup> is to be directed not to an idea or an abstraction, but instead to something solid, authoritative, and lasting: “an establishment.” This is a reading supported by other uses of “establishment” and its cognates in the Constitution. “An establishment of religion,” Section I.B argues, is a political practice that sits outside the limits of the constitutionally permissible practices of American political establishment. Unconstitutional establishments of religion depend upon the prior existence of constitutional establishments, and those establishments are often instantiated in a people’s most powerful political traditions. More than certain other domains of constitutional law, therefore, the text of the Establishment Clause is inherently traditionalist because its meaning takes shape against a network of foundational institutional political practices. The concrete, authoritative, and enduring practices of establishment are essential to fostering the civic trust that is necessary for any polity’s survival. Without them, the political community fractures. In time, it dies.

As for the second question, some critics have argued that traditionalism is not a full-fledged theory so much as a mood or disposition, and that traditions are too manipulable and insubstantial to form the raw material for a theory of constitutional meaning or constitutional law. The question matters because it concerns whether traditionalism is an independent constitutional theory in its own right or instead at most a feature of others dependent on their methods and justifications. In Section II.A, this Essay argues that traditionalism is as much a constitutional theory as any of its rivals, though that claim will depend on just what it means to count as a theory. It is, in fact, its application in Establishment Clause cases that most clearly demonstrates its comparative systematicity, generality, and predictability of application, three critical elements for qualifying as a constitutional theory. Traditionalism is, to be sure, not a decisional algorithm, but neither is any attractive constitutional theory; it acknowledges and even welcomes reasonable disagreement within shared premises, as do all other plausible theories. Still, the critics are in a sense correct: traditionalism has a characterological or dispositional component that other approaches may lack. The Essay contends in Section II.B that this, too, is illustrated in its application to the Establishment Clause. Its character, and the character it develops in interpreters adopting it, is preservative and custodial.<sup>9</sup> That is not a flaw but a distinguishing virtue. It makes traditionalism preferable to other interpretive possibilities because it makes traditionalism more than just an interpretive theory, reflecting and shaping character even as it provides a coherent framework for adjudicating constitutional cases.

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8. U.S. CONST. amend. I.

9. For further explanation of what theories, and constitutional theories of meaning and law, are, and how disposition-shaping effects might influence them, see *infra* Part II.

A passing word on the stakes of the questions considered here. Understanding what sort of constitutional theory traditionalism is, what type of civic character it tends to cultivate, and what broader insights about constitutional interpretation and adjudication it illuminates—all of these are reasons enough to pursue the inquiries in this Essay, particularly given the increasing salience of traditionalism in constitutional law, at the Supreme Court and elsewhere. But a deeper and perhaps more urgent problem concerns the civic fracture that America now suffers, the steady depletion of the shared commitments of its citizens, and, especially, the deepening mistrust with which Americans regard their institutions of politics and law.<sup>10</sup> To the extent that legal scholars study this problem, they tend to overlook the core function of political establishments—of which “establishments of religion” are only a subset—in fostering trust and civic affection among citizens. Traditionalism highlights and explains this critical feature of political establishments, and in so doing, it may also offer the beginnings of an answer to the intractable problem of civic alienation that now afflicts the American polity.

**I. ESTABLISHMENTS: CONCRETE, AUTHORITATIVE, ENDURING**

The Court’s Establishment Clause doctrine has formed the tip of the traditionalist spear<sup>11</sup>—a domain of constitutional law where the Court has self-consciously, if not systematically, developed traditionalist interpretation for

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10. The civic fracture that America now suffers is a contemporary phenomenon noted more than a decade ago in DANIEL T. RODGERS, *AGE OF FRACTURE* (2011), but which has only intensified. For only a very partial sampling of the literature on the subject, offering different explanations, see, for example, STEVEN E. SHIER & TODD E. EBERLY, *POLARIZED: THE RISE OF IDEOLOGY IN AMERICAN POLITICS* (2016); YUVAL LEVIN, *THE FRACTURED REPUBLIC: RENEWING AMERICA’S SOCIAL CONTRACT IN THE AGE OF INDIVIDUALISM* (2017); and DONALD F. KETTL, *THE DIVIDED STATES OF AMERICA: WHY FEDERALISM DOESN’T WORK* (2022). For discussion of depleting levels of trust in political and legal institutions, see the seminal ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000). See also Lee Rainie, Scott Keeter & Andrew Perrin, *Trust and Distrust in America*, PEW RSCH. CTR. (July 22, 2019), <https://www.pewresearch.org/politics/2019/07/22/trust-and-distrust-in-america> [<https://perma.cc/A7F2-QNL9>] (describing the perception among a majority of Americans that trust in government and in each other is declining). For a recent treatment of intensifying polarization in religious-liberty disputes, see THOMAS C. BERG, *RELIGIOUS LIBERTY IN A POLARIZED AGE* (2023).

11. See, e.g., *Marsh v. United States*, 463 U.S. 783 (1983); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022).

decades.<sup>12</sup> Why so? I am going to make the strong claim that the text of the Establishment Clause is not merely highly susceptible to, but actually *compels*, traditionalist interpretation. I do not mean that every interpreter of the Establishment Clause since 1791 has been a traditionalist interpreter, even if an unwitting or unwilling one. I mean instead that serious engagement with the constitutional text of the Clause naturally orients an interpreter toward traditionalism, and that nontraditionalist interpretations of the Clause are consequently and necessarily textually disoriented.<sup>13</sup> Establishments, I will claim, are concrete, authoritative, and enduring political institutions and the practices constituting them. Establishments are made of politically essential or civically foundational traditions, and for that reason, traditionalism is the theory that unlocks the Clause's meaning.

#### A. *On Establishments, Full Stop*

Close consideration of the meaning of political establishment regrettably has too often been bypassed by scholars of the Religion Clauses in a hurry to explain just what establishments *of religion* might be. But a cursory glance at the first few words of the First Amendment discloses that before getting around to religion, the text talks about “an establishment.”<sup>14</sup> It does not refer to ideas, abstractions,

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12. Executive removal power, due process, and free speech are some other constitutional domains that are also highly traditionalist. See generally DeGirolami, *Traditions*, *supra* note 2.
  13. There may be only small differences between traditionalism and an originalism that considers Founding Era historical practices, as well as patterns of similar practice before and after ratification taken at a low level of generality, to determine constitutional meaning and law. Some originalists may believe (some of) these things. But originalism has become a sufficiently capacious theory, encompassing a suite of sufficiently variegated and sometimes mutually incompatible methodological commitments, to know for sure. For every three originalists, there seem to be at least four originalisms.
  14. It might be that “establishment of religion” was a well-defined term of art that cannot be broken up into its constituent parts—“establishment” and “religion.” Indeed, the Oxford English Dictionary includes an entry for “establishment” as connoting an “established church.” See *Establishment*, OXFORD ENG. DICTIONARY (2023), <https://www.oed.com/search/advanced/Meanings?textTermText=establishment&textTermOpto=WordPhrase> [<https://perma.cc/K3JP-UTMU>]. But the term of art possibility is belied by at least three considerations. First, by the use of the term “establishment” or its cognates many times in other portions of the Constitution (in which case “establishment” would have to mean something unique in the Establishment Clause, an improbable possibility); second, by the comparative dearth of evidence at the Constitutional Convention about what “establishment of religion” was understood to mean; and third, by the textual redundancy that “establishment of religion” would thereby imply, since “Congress shall make no law respecting an establishment” would then have been adequate to convey “established church.” On the first issue, see Section I.B. On the second, see DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 125-26 (2010). Thanks to Mark Movsesian for this point.

or high-level purposes. It does not speak about church-state separation, equality, liberty, neutrality, endorsement, or coercion as categorically required, forbidden, or somewhere in between. It does not advert to a value-laden concept, such as “the equal protection of the laws”<sup>15</sup> or “all Laws which shall be necessary and proper.”<sup>16</sup> It refers to a concrete thing. The common meaning of that thing—“an establishment” and the “law respecting” it—sounds on first hearing like an edifice or structure.<sup>17</sup> As Steven D. Smith has observed, “an establishment” connotes the sort of solidity in physical space and time that one might associate with a building.<sup>18</sup> A business establishment, for example, or a commercial establishment (a pub or a grocery store), an athletic establishment (a sports stadium or a gym), an academic establishment (for example, The Catholic University of America or Yale Law School), or some other physical institution in the world.

Now, it might be that the Establishment Clause is talking about an actual building, but a more plausible reading within the context of the political constitution in which the Clause sits is that “an establishment” refers to a concrete legal or political institution and the laws and practices appurtenant to it. Other references to establishment and its cognates in the Constitution support that reading, though this type of intratextualist examination has rarely, if ever, been conducted to understand the Establishment Clause’s meaning.<sup>19</sup> Indeed, the Constitution’s text offers several structural clues about what political establishment is all about. In the only other full reference to “establishment” in the Constitution, Article VII says that the ratification of nine states shall be “sufficient for the Establishment of this Constitution,” a clear indication that the Constitution itself is a political establishment—the American political establishment—and an entirely unproblematic (indeed, a highly desirable) one.<sup>20</sup> In other references in the Constitution to establishments, the Preamble says that “We the People” “ordain

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15. U.S. CONST. amend. XIV, § 1.

16. U.S. CONST. art. I, § 8, cl. 18.

17. Merriam-Webster, for example, includes in the definition of establishment, “a place of business or residence with its furnishings and staff.” See *Establishment*, MERRIAM-WEBSTER (2023), <https://www.merriam-webster.com/dictionary/establishment> [<https://perma.cc/7CUR-ALV6>].

18. Steven D. Smith, *Freedom of Religion or Freedom of the Church?*, in LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS 275 (Austin Sarat ed., 2012).

19. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

20. U.S. CONST. art. VII. The Oxford English Dictionary indicates that this political usage of establishment—establishment as “a settled arrangement, a settled constitution or government”—is older and more continuous than any other. See *Establishment*, OXFORD ENG. DICTIONARY (2023), <https://www.oed.com/search/advanced/Meanings?textTermText=establishment&textTermOpto=WordPhrase> [<https://perma.cc/K3JP-UTMU>].

and establish this Constitution” in order to “establish justice”<sup>21</sup> – the foundational, binding American political act – and the several institutions and practical arrangements of government created by the Constitution are meant to do just that. The text itself says so. For example, the system of inferior federal courts and the network of practices and laws relating to (or “respecting”) them, which Article III states that Congress “may from time to time ordain and establish,” is an establishment.<sup>22</sup> Likewise, the institution of the armed forces is an establishment, constituted by various branches, charges, regulations, activities, and patterns of practice.<sup>23</sup> As are the immigration system, the bankruptcy system, and the postal system, all of which, the Constitution says, Congress shall have the power to “establish.”<sup>24</sup>

All of these are constitutionally prescribed establishments. In fact, one might think of political establishments as existing at different levels, like the different structural supports of a home. At the very bottom is the foundation of the home – in political terms, the Constitution itself. But above that sit many other structures – stones, bricks, beams, posts, columns, load-bearing walls, and so on – each with their own designated function to hold up, in their own way, the weight set on them. What binds them all, and what is critical in this aspect of establishment, is their solidity and institutional concreteness. Establishments are things.

There are also many other, nonconstitutionally prescribed establishments: the institution of the American public school, for example, though the practices of this particular establishment will vary somewhat depending on individual state and local preference;<sup>25</sup> or the scientific establishment, particularly in its outward, policymaking functions, as when it formulates and imposes public-health mandates backed by government imprimatur or sanction.<sup>26</sup> These and many others are fundamental settlements of the American political community. One could say of them that they are concrete manifestations of “the way we do things around here” on discrete matters of central importance to the American

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21. U.S. CONST. pmbl.; see also *Martin v. Hunter’s Lessee*, 14 U.S. 304, 324 (1816) (Story, J.) (“The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by ‘the people of the United States.’”).

22. U.S. CONST. art. III, § 1.

23. U.S. CONST. art. I, § 8.

24. *Id.*

25. For discussion of the rise of school choice in the states as one of the principal new disestablishmentarian movements, see Marc O. DeGirolami, *The New Disestablishments*, 33 GEO. MASON U. CIV. RTS. L.J. 31, 65–68 (2022).

26. See, e.g., Marc O. DeGirolami, *Public-Private Drift and the Shattering Polity*, 68 AM. J. JURIS. 119, 126–27 (2023).



polity. All of these establishments are, in principle, permissible under the Establishment Clause. Indeed, some types of concrete, foundational, political institutions, and the practices and laws by and through which they operate, are essential for the support and flourishing of any polity.

These last reflections suggest a second feature of political establishments. In addition to being concrete, political establishments are authoritative and uniform. Establishments promote and inculcate a common set of beliefs through the direct and more diffuse use of governmental authority.<sup>27</sup> Political establishments are what the political theorist Pierre Manent has called the “common thing”<sup>28</sup> of the political community, its regime,<sup>29</sup> formed by the practices that have bound a people over long periods of time, that have been accepted and entrenched across different levels of government, and that have penetrated deeply into the public and private institutions and customs of a people. The political establishment, therefore, is not merely the set of concrete and foundational institutions of the political community but also the *orthodoxy* of that community as formulated and disseminated by those institutions. A truly powerful political establishment influences the character of the citizenry, habituating citizens to accept and embrace it in the repeated practices and behaviors that inculcate it.<sup>30</sup> It is the polity’s coagulant. We do not have a multiplicity of U.S. Constitutions, federal court systems, postal services, immigration systems, militaries, and so on. We have one, and it is the only establishment in town. To be sure, some important establishments are federated rather than national, as in the examples of the public-school system or the criminal-justice system. In those cases, it is more accurate to say that we have a network of federated establishments that are, nevertheless, the only operative orthodoxies in their respective jurisdictions.<sup>31</sup>

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27. See NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL, *AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE* 18 (2023).

28. PIERRE MANENT, *METAMORPHOSES OF THE CITY: ON THE WESTERN DYNAMIC* 64 (Marc Lepain trans., Harvard Univ. Press 2013) (2010). For further discussion, see Marc O. DeGirolami, *Establishment’s Political Priority to Free Exercise*, 97 NOTRE DAME L. REV. 715, 721-22 (2022).

29. I use the term “regime” as a synonym both for “establishment” and for Aristotle’s term, “politeia”—sometimes translated as “constitution”—which runs through the *Politics* as describing the entrenched institutions and practices of political culture. See ARISTOTLE, *POLITICS* bk. III, at 1278b15-30, 1279a22-32, 1280a34-1280b12 (Carnes Lord trans., Univ. of Chicago Press 2d ed. 2013) (c. 350 B.C.E.).

30. See DeGirolami, *supra* note 25, at 35-37.

31. See generally JEFFREY S. SUTTON, *51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* (2018) (detailing the importance of state courts and constitutions to American constitutional law). Some establishments are more expansively formulated than others. Laws enacting coerced tithes establish an impermissible religious orthodoxy, even if they leave to individual choice just where the money should go.

Finally, in addition to their concreteness and authoritativeness, political establishments are stable and enduring. True, they are not fixed in amber forever,<sup>32</sup> and they may be contested and even shifting,<sup>33</sup> but establishments connote something of permanence and longevity. It would make no sense to speak of a political establishment that changed every day, or every year, or even (*pace* Thomas Jefferson) every nineteen years.<sup>34</sup> To bear the weight and fulfill the orthodoxy-entrenching functions demanded of them in their concreteness and authoritativeness, political establishments require time and a relative lack of disruption and challenge. Just as well-crafted houses with sturdy beams may endure for centuries, so may well-crafted, sturdy political establishments. One could make an analogy to the value of *stare decisis* in the law, in which it can be just as important that the law be “settled” as that it be “right.”<sup>35</sup> The longer and the more uninterrupted the settlements of the establishment endure, the more powerful, difficult to displace, and constitutive of the polity they tend to become. Promoting the efficacy and stability of the most basic political establishment is one reason that the Constitution is so difficult to amend.<sup>36</sup> But all political establishments, constitutionally mandated or otherwise, tend to become stronger as their endurance increases, which might be measured by how old they are, whether they have had serious challengers to their hegemony, whether they have been widely or only partially embraced, and so on.<sup>37</sup>

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32. John Witte, Jr., Joel A. Nichols, and Richard W. Garnett provide evidence that “[i]n the dictionaries and common parlance of the founders’ day, to ‘establish’ meant,” among other things, “to fix unalterably” or “to settle firmly.” JOHN WITTE, JR., JOEL A. NICHOLS & RICHARD W. GARNETT, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 85 (5th ed. 2022).

33. See the discussion in DeGirolami, *supra* note 28, at 723-25, concerning the disputed quality of the American church-state dispensation.

34. See Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 *THE PAPERS OF THOMAS JEFFERSON* 396 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958) (arguing for all laws, including the Constitution, to sunset at nineteen years). In an important new article, Sherif Girgis argues that what he calls “living traditionalism” may face the problem of the “ratchet” – that practices can move the case law in one direction but not in another if practices change. See Sherif Girgis, *Living Traditionalism*, 98 *N.Y.U. L. REV.* (forthcoming 2023) (manuscript at 41-42), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4366019](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4366019) [<https://perma.cc/4W2E-WC89>]. It is true that if traditionalism does not incorporate an account of the endurance of practices, it can be subject to problems of arbitrariness in the drawing of the tradition. Courts can simply pick and choose which practices entrench the law and which do not. But if traditions grow in strength as they endure along axes of age, continuity, and density of adoption, the problem of the ratchet is greatly mitigated.

35. See RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* (2017).

36. U.S. CONST. art. V.

37. Mary Ziegler points out to me, rightly I think, that in ordinary parlance, “the establishment” may be intended pejoratively, as in “the Movement establishment” or “the Democratic/Republican Party establishment.” In this sense, establishment connotes the old way of doing business or a kind of fossilized resistance to new ideas. This is true, though it seems to me

These three components of establishments—concreteness, authoritative-ness, and endurance—suggest a set of key moral or political functions of establishments. Polities depend upon mutual trust among citizens, and establishments are trust-generating devices on a broad and deep scale.<sup>38</sup> Establishments are a safeguard against the debilitating ills of political fracture. When political establishments are strong and functioning well, they are manifested in the repeated, even the ritualized, foundational civic practices of the people over long periods of time and at different levels of governance. Under those circumstances, establishments create the conditions of trust and mutual forbearance necessary to bind any polity, especially when disagreements arise (as they will do). Establishments foster civic commitment, and they are in turn strengthened by that commitment. But when political establishments are weak and contested, they cannot perform their orthodoxy-entrenching functions, and as they dissipate further, the polity and the mutual trust essential for its survival fractures. In time, the polity dies.

### B. *On Establishments of Religion*

What about *religious* establishments? On the hotly contested, but secondary, question of what establishments of religion might be, scholars have come to very different conclusions, as have courts. Many insist that the meaning of the Establishment Clause embodies a high principle, like separationism, equality, neutrality, or nonfavoritism.<sup>39</sup> Others, most prominently Michael W. McConnell, have

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that the use of establishment as a term of abuse implies an establishment that has already been (or is in the process of being) destabilized such that it cannot perform its proper and essential political functions.

38. On the centrality of trust to politics, and on the problem of its dissolution in America, see KEVIN VALLIER, *TRUST IN A POLARIZED AGE* (2020), and on the related issue of increasing political enmity and bitter division, see Yuval Levin, *Constituting Unity*, *L. & LIBERTY* (Aug. 1, 2023), <https://lawliberty.org/forum/constituting-unity> [<https://perma.cc/T2NU-NF8J>], and his forthcoming book, YUVAL LEVIN, *CHARTER OF UNITY* (forthcoming 2024).
39. See, e.g., ERWIN CHERMERINSKY & HOWARD GILLMAN, *THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE* 19 (2020) (arguing that the meaning of the Establishment Clause embodies the principle of separationism); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 9 (2010) (arguing that the meaning of the Establishment Clause embodies “equal liberty”); NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE* 14 (2017) (listing several egalitarian principles by which religious freedom should be constrained); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 *DEPAUL L. REV.* 993, 998 (1990) (arguing that the meaning of the Establishment Clause embodies voluntaristic neutrality); ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 16, 25 (2013) (arguing that the meaning of the Establishment Clause embodies “fluid neutrality”); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 *ARIZ. ST. L.J.* 1085, 1089 (1995) (discovering a novel 19<sup>th</sup> century “principle” in the Clause forbidding “government from either

argued that as a historical matter, an “establishment of religion” signaled or referred to a set of “hallmarks” that included government control of church doctrine and personnel, compelled attendance and support for the church, suppression of alternative faiths, limitation of privileges or offices to members of the official church, and the setting aside of official positions in government for church representatives.<sup>40</sup> Using the tools of corpus linguistics, Stephanie H. Barclay, Brady Earley, and Annika Boone have claimed that “establishment of religion” referred historically, in part, to “a legal or official designation of a specific church or faith by a particular nation or colony.”<sup>41</sup> John Witte, Jr., Joel A. Nichols, and Richard W. Garnett have likewise documented the progress of various drafts of what eventually became the Establishment Clause at the state ratification conventions and the First Congress.<sup>42</sup> Still other scholars and judges focus on the historical purpose of the Clause, and here there continue to be disagreements about whether its sole object was to protect state establishments of religion from national interference or something else (or something more) – for example, a proscription against an idea like state preferentialism, state non-neutrality, or state coercion.<sup>43</sup> These are all approaches that focus almost exclusively not on establishment but on religion.

But emphasizing “religion” first, rather than “establishment” (or to the latter’s exclusion, as is common), can mislead interpreters in several ways. One is conceptual. The meaning of permitted political establishments is structurally antecedent to the meaning of prohibited religious establishments. Or put it another

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supporting *or* suppressing religion as religion”). For criticism of monovalent, principle-based theories of the Religion Clauses, see MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* (2013).

40. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003).
41. Stephanie H. Barclay, Brady Earley & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505, 538 (2019).
42. See WITTE, NICHOLS & GARNETT, *supra* note 32, at app. 1. Most of the rejected federal drafts that used “establish” or its cognates opted for the gerund form, referring to “establishing religion” or “establishing any particular denomination of religion in preference to another.” *Id.* at 362-63. It is of some interest that the more concrete noun form, establishment, was ultimately selected.
43. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 51 (2004) (Thomas, J., concurring). For different scholarly perspectives on the federalism interpretation of the Establishment Clause, compare Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, U. PA. J. CONST. L. 479 (2006), and Douglas Laycock, *Comment: Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 241-43 (2004), with PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 101-07 (2002), and AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 32-42 (1998). See also CHAPMAN & MCCONNELL, *supra* note 27, at 40 (noting the emphasis on federalism that the Clause was thought to have at the founding).

way: first come the legitimate, even essential, political establishments; then come the impermissible political establishments of religion. One needs, as an initial matter, to know the sorts of political establishments that are constitutionally acceptable, or even essential, to have a clear idea about the other political kind—the “religious” kind—that is excluded.<sup>44</sup> It is only because the Constitution is the foundational political establishment that establishments of religion are forbidden by that very instrument’s First Amendment. The First Amendment, after all, is simply the first *alteration* to the political establishment that is the basic structure of the Constitution. Just as the Articles precede the Amendments conceptually, so, too, does the prescribed establishment precede the prohibited establishment of religion. A proscription on a narrow category of establishments presupposes a larger class of establishments that is allowed. To begin with the smaller group without understanding the larger of which it is a part is far less logical and far more likely to mislead than proceeding the other way round. Theorists of the Religion Clauses would gain a deeper understanding of what is a prohibited establishment of religion by reflecting first on what is a permissible—even a desirable—political establishment, as that term is used throughout the rest of the Constitution.

Another problem with the “religion forward” approach to discerning the meaning of the Establishment Clause concerns the meaning of religion, and here the trouble is twofold: in the definitions of established religion and religion itself. As historians of the Religion Clauses have long pointed out, what was meant by “religious establishments” was largely tacitly assumed by the Founders without almost any deliberation or public debate.<sup>45</sup> Nathan S. Chapman and Michael W. McConnell argue that while Americans at the Founding, as British subjects, were intimately familiar with political arrangements in which there was an

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44. There are analogies in other areas of law. Consider the linguistic canon of statutory interpretation, *expressio unius est exclusio alterius*: “the expression of one thing is (or implies) the exclusion of another.” The canon presupposes that one begins with the expression of something, and from that expression one can understand exceptions to that thing, or the other things excluded from it. The word “establishment” or its cognates, as I have argued, is used repeatedly throughout the text of the Constitution, and it is only in the Establishment Clause that we get a unique proscription on a certain class of establishment—“establishment of religion.” To understand what that “establishment of religion” might be, one needs to know what the other permitted, and even mandated, constitutional establishments are.

45. DRAKEMAN, *supra* note 14, at 203–05, 213 (“[W]e need to realize that the circumstances giving rise to the Bill of Rights did not require James Madison or any of his congressional compatriots either to define their terms or to agree on any substantive church-state policy.”); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 79 (1986) (“The debate was sometimes irrelevant, usually apathetic and unclear. Ambiguity, brevity, and imprecision in thought and expression characterize the comments of the few members who spoke.”); CHAPMAN & MCCONNELL, *supra* note 27, at 33 (“Religion was scarcely mentioned at the Constitutional Convention of 1787 . . .”).

institutional “church by law established,” today, establishments of religion are virtually unknown.<sup>46</sup> Indeed, and as already noted, on some readings, the Establishment Clause was a federalism provision meant to protect preexisting state establishments of religion rather than to protect against a hypothetical, future national establishment of religion.<sup>47</sup> If accepted, that reading would strongly support the position that an “establishment” is reflected in concrete practices, because the Clause would then, necessarily, be referring not to criteria for determining whether a future thing has been created but to something that *already existed* in multifarious ways in various states. But whether or not the federalism reading is correct (a matter on which this Essay takes no firm position), today we lack the kind of concrete cultural and legal referents that once gave the Establishment Clause clear meaning, albeit a meaning tacitly understood or accepted at the time of its ratification. We have to talk so much about what establishments of religion might be because we do not know what we are talking about. It would be like arguing today about the meaning of a giraffe: everybody knows what a giraffe is, and it would be puzzling or silly to spend much time discussing it. But in a future world in which giraffes had not been seen for many hundreds of years, nobody would have a common frame of reference to understand what they were, and in consequence, great debates over their nature would probably erupt.<sup>48</sup>

A somewhat different, but perhaps even more grievous, defect afflicts the legal definition of “religion” which has greatly clouded the meaning of both Religion Clauses. The Supreme Court has been almost deliberately obscure in its conception of religion under the Constitution. It has refused to acknowledge any official criteria at all other than that the claimant ought to hold a sincere belief—a requirement that is, in any event, only rarely challenged for fear of entangling the government in religious concerns—and it has insisted that even individuated and balkanized conceptions of it can sometimes count.<sup>49</sup> The Court has drained the Religion Clauses of much of their meaning by hyperinflating their core

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46. CHAPMAN & MCCONNELL, *supra* note 27, at 9. Establishments of religion continued in several of the American states until the early 1830s. *Id.* We are nearly 200 years distant from the last state establishment of religion. *Id.* Even in countries like Great Britain, where there is still a nominal and formal establishment, it hardly resembles the thicker establishments of religion of the past.

47. See, e.g., AMAR, *supra* note 43, at 32-42.

48. Thanks to Nathan Chapman for the analogy.

49. For discussion and criticism, see DeGirolami, *supra* note 28, at 741-42; and Marc O. DeGirolami, *The Death and New Life of Law and Religion* (unpublished manuscript) (on file with author).

subject to the point of incoherence.<sup>50</sup> Understanding the Establishment Clause's meaning through the Court's confusing and unhelpful statements about the legal meaning of religion is about as unpromising an approach as one could imagine.

All this is in contrast to the meaning of political establishment itself, which is comparatively familiar and clear: a concrete, authoritative, and enduring set of institutions and their constituent practices. This definition, as it happens, maps almost perfectly onto traditionalist interpretation because establishments are constituted by politically foundational traditions. Traditions, as I am using the term, are patterns of political and cultural practice that have long endured, as measured by their age (how old they are), continuity (how uninterrupted their usage is), and density (how deeply they have been adopted across geographic space and levels of government).<sup>51</sup> Establishments are therefore created by certain types of traditions: those that are authoritative and essential for the polity's existence. And establishments of religion are those practices that the Constitution forbids. To figure out just what these impermissible departures might be is to be thrust into a historical inquiry about the traditions determining the permissible political establishment. For example, to determine whether the practice of legislative prayer is an unconstitutional establishment of religion, the traditionalist interpreter examines whether as a historical matter the practice of legislative prayer was an accepted and enduring feature of the American political establishment. An enduring practice like legislative prayer is presumptively far likelier than an innovation of practice to fit within the permissible political establishment.<sup>52</sup> If the practice does not fit, and if it can also be characterized as "religious,"<sup>53</sup> then it is an unconstitutional establishment of religion.

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50. Indeed, I can think of no other constitutionally protected right whose core is more contested than the freedom of religion. Even substantive due process rights look rock solid by comparison.
  51. For elaboration of these elements of traditionalism, see DeGirolami, *Traditionalism Rising*, *supra* note 2.
  52. For a methodological approach similar to what I am describing, see *Town of Greece v. Galloway*, 572 U.S. 565 (2014). Determining whether a particular practice fits within a tradition is a complex matter that depends upon how the tradition is drawn and the political virtues it is thought to serve. For discussion of these issues, see DeGirolami, *Traditionalism Rising*, *supra* note 2.
  53. As I have suggested, this is no easy matter in light of the doctrinal distortions of the legal meaning of religion.

In sum, the Establishment Clause is particularly amenable to traditionalist interpretation because political establishments—a broad category that includes those establishments of religion prohibited by the First Amendment—are constituted by the concrete, authoritative, and enduring political practices that define and bind the polity. It would be going too far to say that the text of the Establishment Clause is uniquely traditionalist since other constitutional provisions and doctrines are also highly susceptible to traditionalist interpretation.<sup>54</sup> Nevertheless, the distinctive orientation of the Establishment Clause toward traditionalism—toward a constitutionalism of things and the civic point of those things—raises the question whether different parts of the Constitution are more open to some interpretive theories than others. Compare, for example, the Equal Protection Clause of the Fourteenth Amendment. There are likely several reasons that Justice Scalia once remarked that the Equal Protection Clause “might be thought to have some counterhistorical content,”<sup>55</sup> but one of them is surely the text itself, which speaks about a concept in the “equal protection of the laws” rather than a thing.<sup>56</sup> Abstract concepts referenced in the text are amenable to abstract, conceptual interpretation, and this is perhaps one reason that traditionalism has had less traction for the Equal Protection Clause than for other constitutional domains.

More broadly, different textual referents may lend themselves better (and worse) to different interpretive theories. Vincent Phillip Muñoz has recently argued that the constitutional text sometimes speaks in terms of rules, sometimes of standards, and sometimes of principles.<sup>57</sup> Though his textual categories are incomplete, inasmuch as (for example) he omits textual references to concrete things, the basic insight that the nature of the text will orient or even direct an interpreter toward an interpretive method is plausible. Take another pair of examples: interpreting the meaning of “the privileges or immunities of citizens”<sup>58</sup>

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54. See DeGirolami, *Traditions*, *supra* note 2, for some of these.

55. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 38 (1991) (Scalia, J., concurring).

56. John Harrison and Christopher R. Green have each advanced a reading of the Equal Protection Clause as protecting against a state’s failure to protect people from violations of the law. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *YALE L.J.* 1385, 1433–50 (1992); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 *GEO. MASON U. C.R.L.J.* 1, 1 (2008); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 *GEO. MASON U. C.R.L.J.* 219, 219–23 (2009). The Equal Protection Clause, on this view, still was given content by certain specific government practices (or failures of practice), but the Clause itself is defined by the concept of what the law’s “protection” demands.

57. VINCENT PHILLIP MUÑOZ, *RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES* 121–23 (2022).

58. U.S. CONST. amend. XIV.



is a different thing, and lends itself more easily to different interpretive methods, than interpreting the text “cruel and unusual punishments.”<sup>59</sup> The latter naturally leads an interpreter to consider the types of concrete penal practices that are customary or “usual”<sup>60</sup> (so as to distinguish the prohibited “unusual”), just in the same way that “establishment” leads an interpreter to consider the types of foundational political practices that are permitted (so as to distinguish prohibited “establishments of religion”). By contrast, the former is not necessarily so clearly grounded in customary practice.<sup>61</sup> This need not mean that traditionalism (or any other constitutional theory) is entirely at sea when confronted with text that is not naturally oriented toward its constituent elements; even “equal protection of the laws” or “the privileges or immunities of citizens” can be understood by recourse to a pattern of enduring practices, for example. Still, these reflections on the innate traditionalism of the text of the Establishment Clause suggest that the aptness of any interpretive theory is at least in part determined by the type of constitutional text to which it is being applied.

## II. THE CHARACTER OF TRADITIONALISM

A second question about traditionalism is whether it is more a mood or disposition of character than a proper constitutional theory that stands on its own and rivals other recognized constitutional theories. Originalism,<sup>62</sup> say, or Ronald

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59. U.S. CONST. amend. VIII.

60. For helpful discussion of this highly traditionalist dimension of the Eighth Amendment, see John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. L. REV. 1739, 1745 (2008) (“[T]he best way to prevent cruel governmental innovation is to compare new punishment practices to traditional practices that enjoy long usage.”).

61. The text of the Free Exercise Clause is an interesting case in this respect. On the one hand, it refers to activities — “exercises” — that suggest concrete practices; on the other, it is at least a matter of dispute whether the practices of free exercise need be as enduring as the practices of establishment to be effective. For a recent article contending that traditionalist interpretation is essential to and can clarify the meaning of the Free Exercise Clause, see William J. Haun, *Keeping Our Balance: Why the Free Exercise Clause Needs Text, History, and Tradition*, 46 HARV. J.L. & PUB. POL’Y 419 (2023).

62. There are many varieties of originalism, some of them incompatible with one another, so it might not be precise to describe originalism as “a” theory. Nevertheless, Lawrence B. Solum has posited a “core or focal content” of originalism in two propositions: (1) “the linguistic meaning of each provision was fixed at the time that provision was adopted” (the “fixation thesis”); and (2) “our constitutional practice both is (albeit imperfectly) and should be committed to the principle that the original meaning of the Constitution constrains judicial practice” (the “constraint principle”). Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12, 12, 36 (Grant Huscroft & Bradley Miller eds., 2011) (emphasis omitted).

Dworkin's moral reading of the Constitution,<sup>63</sup> Richard A. Posner's constitutional pragmatism,<sup>64</sup> David A. Strauss's common law constitutionalism,<sup>65</sup> Adrian Vermeule's common good constitutionalism,<sup>66</sup> and so on. Traditionalism, at least as I have explained and defended it, is as coherent a theory of constitutional meaning and constitutional law as any of these, something that its use in Establishment Clause cases illustrates vividly.

But traditionalism's special salience for the Establishment Clause also highlights something else: it is *more* than a method of interpretation. Critics of traditionalism are, in a sense, right that traditionalism reflects an affective or emotional disposition toward constitutional questions. Traditions are drawn by judges retrospectively, looking back over the historical sweep of a practice when confronted with a challenge in a new case.<sup>67</sup> In interpreting traditionally, judges therefore become aware both of a shared inheritance in a pattern of political and legal practice and of the problems with, or challenges to, that inheritance they must now address in order to sustain the practice in its best form. Sometimes the tradition will be discarded, since its authority is only presumptive, not conclusive, but more often it will be either enlarged or narrowed to account for the new phenomenon. But whatever the case, this double awareness generated by traditionalist methodology habituates judges to think in preservationist and custodial terms, asking them to extend and renew long-lived practices in an ongoing argument about the political virtues they serve.<sup>68</sup> This is how judges connect our constitutional past with its present. This is how they help to bridge the distance of the centuries and refresh the lasting patterns of practice for modern circumstances. The traditions that the judges both reflect and shape in their opinions

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63. See, e.g., RONALD DWORIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

64. See, e.g., RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003). For extended discussion of pragmatism as a theory of constitutional interpretation, see Marc O. DeGirolami & Kevin C. Walsh, *Judge Posner, Judge Wilkinson, and Judicial Critique of Constitutional Theory*, 90 NOTRE DAME L. REV. 633 (2014).

65. See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

66. See ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* (2022).

67. For discussion of what I have called the "retrospective application" of traditionalism (in contrast with an "expected application" originalism), see DeGirolami, *First Amendment Traditionalism*, *supra* note 2, at 1673-78.

68. Cf. ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL INQUIRY: ENCYCLOPEDIA, GENEALOGY, AND TRADITION* 61-67 (1990) (arguing that standards of achievement within any craft activity, like law, are justified internally and historically, linking past and future, drawing on traditions of practice to "interpret and reinterpret" those selfsame traditions). Much of my argument for traditionalism in constitutional law draws from MacIntyre's understanding of the functions performed by traditions in moral philosophy in this work, as well as in ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (3d ed. 2007) and in ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988).

are those that they find have endured across time and space in the American people's experience. Looking backward to move forward.

*A. Is Traditionalism a Constitutional Theory?*

Some scholars claim that traditions, and the uses to which they might be put in a general approach to constitutional interpretation, are too elusive, various, or malleable to count for anything like a unified constitutional theory.<sup>69</sup> Others say that the capacity of judges to manipulate historical patterns of practice to reach their desired results renders traditionalism unpredictable or perhaps even empty.<sup>70</sup> Even some political thinkers partial to the concept of tradition well outside American constitutional law have sometimes assumed an antitheoretical posture in favor of customs, dispositions, and moods. Edmund Burke, for example, is often associated with criticism of the abstractions of theory disconnected from ordinary experience, the claims of what he called “prejudice” (and other likeminded writers have called “prescription”)<sup>71</sup> and the inheritance of tradition.<sup>72</sup> So, too, are Michael Oakeshott and Roger Scruton, who both elevated the claims of custom and tradition over those of an airy “rationalism in politics.”<sup>73</sup> There seems to be agreement among those both hostile and favorable to traditionalism that it is not suitable as a theory — indeed, that it is not a theory at all — but is instead at most an outlook or disposition.

Without wading too deeply into abstruse debates about just what it takes to qualify as a constitutional theory, or any theory, we might say that theories are simply sets of ideas that describe or guide a practice — in the case of constitutional

69. See, e.g., Andrew Koppelman, *The Use and Abuse of Tradition: A Comment on DeGirolami's Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES (forthcoming 2023).

70. Mark Tushnet, *Traditionalism and Anti-Noveltly as Modes of Constitutional Interpretation: The Case of Tax Exemption for Churches*, BALKINIZATION (Oct. 27, 2019, 11:04 PM), <https://balkin.blogspot.com/2019/10/traditionalism-and-anti-novelty-as.html> [<https://perma.cc/P63B-QHV9>]; Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOKLYN L. REV. 797 (2023).

71. See, e.g., RUSSELL KIRK, *THE CONSERVATIVE MIND FROM BURKE TO ELIOT* 33 (1978).

72. See, e.g., Edmund Burke, *An Appeal from the New to the Old Whigs*, in FURTHER REFLECTIONS ON THE REVOLUTION IN FRANCE 73 (Liberty Fund ed., 2012); Edmund Burke, *Reflections on the Revolution in France*, 2 SELECTED WORKS OF EDMUND BURKE 85 (Liberty Fund ed., 1999). For discussion of Edmund Burke's position on theory, see generally Harvey C. Mansfield, Jr., *Introduction* to SELECTED LETTERS OF EDMUND BURKE 4 (1984); and J.G.A. Pocock, *Introduction* to EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, at xxxvi (Hackett Pub. Co. 1987) (1790).

73. Michael Oakeshott, *Rationalism in Politics*, in RATIONALISM IN POLITICS AND OTHER ESSAYS 5 (1991); see also ROGER SCRUTON, *CONSERVATISM: AN INVITATION TO THE GREAT TRADITION* 14 (2017) (“[W]e rational beings need customs and institutions that are founded in something other than reason, if we are to use our reason to good effect.”).

theory, the practice of determining constitutional meaning and the practice of judging constitutional cases.<sup>74</sup> Theories aim to impose some order on an unruly set of facts, decisions, or other disorganized phenomena in the world. The ordering done by constitutional theory, in the sense in which I am using it, may be explanatory, describing practices of interpretation and adjudication, or normative, directing those practices in various ways toward various ends, or both.<sup>75</sup>

To count as a theory of constitutional meaning and law, a constitutional theory should possess several methodological features.<sup>76</sup> It should be systematic, meaning that it should provide a framework of rules grounded in moral or political considerations for resolving disputes about the meaning or the law of the Constitution. It should be general—that is, applicable to all legal phenomena with which it is confronted, rather than selectively or strategically applied on the basis of criteria not grounded in the theory for the purpose of reaching predetermined ends.<sup>77</sup> Its application should be reasonably predictable in any given situation, not in the sense that specific outcomes are foreordained or reached mechanically, but instead that the method should lead reliably to a range of possible outcomes guided by the system of general rules that constitute the theory. There may be disagreements within that range, and that is well, since theories are not rigid decision procedures. But if the results they generate cannot be discerned or explained, even in retrospect, by any rational means, then they fail this requirement of theory.

Traditionalism, at least as I have explained and defended it, satisfies these methodological criteria of a constitutional theory, something the Supreme Court’s Establishment Clause cases illustrate as clearly as any other doctrinal

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74. See BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 116–17 (1985) (“Theory looks characteristically for considerations that are very general and have as little distinctive content as possible, because it is trying to systematize and because it wants to represent as many reasons as possible as applications of other reasons.”); see also Jeffrie G. Murphy, *Kant on Theory and Practice*, in *THEORY AND PRACTICE: NOMOS XXXVII* 47, 49 (1995) (“[A] moral theory is adequate only to the degree that it provides a rational reconstruction—in terms of general principles—of those practical judgments that constitute our ordinary moral consciousness.”).

75. See Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 538–41 (1999) (noting the “prescriptive” and “descriptive” features of constitutional theory); David A. Strauss, *What Is Constitutional Theory?*, 87 CALIF. L. REV. 581, 582 (1999); Andrew Coan, *The Foundations of Constitutional Theory*, 2017 WISC. L. REV. 833 (2017).

76. For some discussion of the nature of constitutional theory in general, see sources cited *supra* note 75.

77. This is not to say that constitutional theories are unconcerned with ends or results. But the more the theory is applied nongenerally, the more it risks the accusation that something else, rather than the theory itself, is controlling the practice of constitutional interpretation and adjudication. See Strauss, *supra* note 75, at 582.

area.<sup>78</sup> On issues ranging from legislative prayer<sup>79</sup> to state-sponsored religious displays,<sup>80</sup> public-school prayer,<sup>81</sup> internal-church governance,<sup>82</sup> and government funding of religious institutions,<sup>83</sup> the Court has prioritized political and cultural practices (including those of government regulation) over abstract or principle-dominated tests as the determinants of meaning and law. It has focused on the endurance of those practices on several distinct temporal and spatial axes, inclusive of the Founding but also of pre- and post-Founding practice.<sup>84</sup> It has distinguished outlier practices, which are excluded from the relevant tradition by failing one or more traditionalist elements.<sup>85</sup> It has given traditions of

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78. It is unnecessary to claim that the Supreme Court has adopted traditionalism comprehensively or to the exclusion of all other approaches, even for the Establishment Clause. It has not adopted any method in such a total fashion (nor is it likely to). Nor is it necessary to argue that even where the Court has applied traditionalism, it has done so in a theoretically pure or ideal way. To count as a theory, all that is required is that the basic elements making up an approach to determining constitutional meaning and law, as applied ideally, would satisfy the conditions stated. Indeed, whether the Court continues to apply traditionalism in this or that case, in this or that term, matters very little to the question of whether traditionalism qualifies as a theory of constitutional meaning and law.
79. *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Marsh v. Chambers*, 473 U.S. 783 (1983).
80. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019); *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (“The city, like the Congresses and Presidents, however, has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.”).
81. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).
82. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). The Court described the ministerial-exception doctrine that it recognized in *Hosanna-Tabor* as depending upon both free exercise and establishment grounds.
83. *Carson v. Makin*, 142 S. Ct. 1987 (2022).
84. Reliance on postratification practice is one of the features that distinguishes traditionalism from (many varieties of) originalism. Some originalists do espouse what they call “liquidation” of textual meaning, which can include certain types of postratification practice to fix that meaning, but even here, there are substantial differences in the quality of postratification practice that traditionalists accept and the reasons they do so. See, e.g., William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 1 (2019). For further discussion of the differences between traditionalism and liquidated originalism, see DeGirolami, *Traditionalism Rising*, *supra* note 2.
85. See, e.g., *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2257–58 (2020) (describing the practice of state-financed scholarships for the training of clergy struck down in *Locke v. Davey*, 540 U.S. 712 (2004), as an outlier in the sense that the state’s specific interests in prohibiting that practice could not justify more sweeping prohibitions on state funding for religious schools). For critical discussion of the concept of an outlier in the Second Amendment context, emphasizing that the exercise of constructing outliers is “replete with discretion,” see Darrell A.H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49, 52. But all viable constitutional theories incorporate considerable judicial discretion, and so it may be that the real question is not whether they do so, but how or with what object in mind.

practice at least presumptive weight in establishing criteria of constitutional validity.

The extent to which the Court has applied these elements of traditionalism systematically, generally, and reasonably predictably may be and is debated.<sup>86</sup> It is still early days for the theory as intentionally applied in judicial decisions. But making allowances for the comparative newness of traditionalism as a theory of constitutional interpretation (at least insofar as the Court now applies it self-consciously), and for the fact that theories as applied in the real world only rarely assume their purest expression,<sup>87</sup> its application in these Establishment Clause cases suggests that it is at least as systematic, general, and predictable as its rivals.<sup>88</sup> It is at least as good at “fitting” and explaining much of the constitutional law we now have as some competitors that make similar claims.<sup>89</sup> The objection that traditionalism should not count as a theory of constitutional meaning or law because it fails on the metrics of systematicity, generality, predictability, or something else might be met by the question: compared to what? Few accepted

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86. See, e.g., *Kennedy*, 142 S. Ct. at 2450 (Sotomayor, J., dissenting) (criticizing the majority for failing to conduct the type of traditionalist inquiry that it professed to adopt and arguing that the “Court’s history-and-tradition test offers essentially no guidance for school administrators . . . . Today’s opinion provides little in the way of answers . . . .”). One way of interpreting Justice Sotomayor’s position is that the Court did not sufficiently explain or follow through on the new method it said it was applying.
87. See Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs*, Bruen, and *Kennedy: The Role of History and Tradition*, 118 NW. L. REV. (forthcoming 2023) (manuscript at 11) (“It is not clear whether Professor DeGirolami’s understanding of traditionalism captures the notion of tradition that is operating in Supreme Court decisions like *Dobbs*, *Bruen*, and *Kennedy*. But it has the virtue of providing a clear articulation of the concept of tradition. This concept can then be used as a standard against which we can evaluate the use of tradition in constitutional discourse.”).
88. The easiest comparative case is to “pragmatic” constitutional theories, one of whose defining features is their malleability in reaching desired ends. See, e.g., POSNER, *supra* note 64. So, too, for interpretive approaches that champion high principle, and which often involve interminable, inconclusive, and indeterminate debates about what abstractions such as “equality” or “freedom” might require in any given case. For some of these in the Religion Clause context, see *supra* note 39. But even on some sophisticated accounts of originalism, it is wrong to think of originalism as a “decision procedure” or a highly predictable answer-generating mechanism, and better to conceive of it as setting a “standard” for what counts as a correct answer in constitutional law. See Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 778, 781 (2022). As Stephen E. Sachs puts it, “[t]he theory’s conclusions might be uncertain, the historians might often disagree, the judges might balk at wading through the materials, and so on, but the standard is the standard.” Sachs, *supra*, at 790. Much the same may be said for traditionalism.
89. See DeGirolami, *First Amendment Traditionalism*, *supra* note 2, at 1657 (“Traditionalism may be more ‘our law’ than originalism in some areas within the First Amendment and outside it.”).

constitutional theories offer more satisfying answers on these issues than does traditionalism, and many offer fewer.

As for the more expressly normative elements of a constitutional theory—the moral or political reasons for adopting it—traditionalism has plausible justificatory force as well. Moral or political justifications for a constitutional theory may be undertaken at different levels of abstraction, from claims about why the theory might be justified for any polity, to arguments that it is especially worthwhile or attractive for a particular polity in light of its other regime commitments. In other work, I have begun to develop some of these justifications. One justification concerns the value and necessary role of practices in determining the virtues of constitutional governance and law.<sup>90</sup> A second concerns what I have described as the “democratic-populist” bona fides of enduring political practices in rendering constitutional adjudication legitimate—that in a democracy, “people who engage in practices consistently and over many years in the belief that they are constitutional have endowed those practices with political legitimacy” that is at least presumptively determinative.<sup>91</sup> As I have discussed elsewhere, a third normative commitment involves the recognition that the preservation of our practices of law “was an aim or objective of our predecessors, as it is one of ours—and a particularly powerful aim, since a society’s enduring constitutional practices are essential ingredients of the meaning of the activities of governance through which the members of that society understand and define their political community.”<sup>92</sup>

This last justification has special salience, it seems to me, in understanding what makes the enduring traditions of political establishment so central to a political community. But the larger point is that traditionalism can hold its own against other constitutional theories that are motivated by different (albeit sometimes overlapping) normative justifications, though individual interpreters are likely to be moved by some justifications more than others. In sum, whether traditionalism is deemed an explanatory or normative constitutional theory (or both), it can compete head-to-head with other approaches.

### B. *But Is It More than a Constitutional Theory?*

Yet when critics claim that traditionalism is not a proper constitutional theory, it may be that they are actually arguing that it is something *other* or perhaps *more* than just that. That traditionalism is a matter of the heart as well as the head. Here, they may have a point. In a penetrating article, J. Joel Alicea contends that constitutional theories are made up of two essential components:

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90. DeGirolami, *Traditionalism Rising*, *supra* note 2, at 38.

91. DeGirolami, *First Amendment Traditionalism*, *supra* note 2, at 1653.

92. See DeGirolami, *Traditionalism Rising*, *supra* note 2, at 35.

methodology and justification.<sup>93</sup> In discussing the second element, Alicea writes: “Justifications ultimately rest on normative arguments . . . [and a] complete constitutional theory must therefore explain why the Constitution is *legitimate*: why we *should* adhere to the Constitution.”<sup>94</sup>

To be sure, those justifications going to the question of the legitimacy of a theory depend in part upon developing reasons that are morally and politically attractive or sound. But they also depend crucially upon something else. Alicea points out that in devising justifications for the legitimacy of their preferred theories, most theorists (originalist and otherwise) overlook arguments that derive from what he calls “emotion.”<sup>95</sup> By this he means those qualities of legitimacy dependent on affection, habituation, or the recognition and development of a common, political character.<sup>96</sup> He writes:

[T]here is a disconnect between the conversation occurring within constitutional theory (in which scholars offer all manner of abstract theories of constitutional legitimacy of their own invention) and the reality of our constitutional culture (in which the American people are *disposed*, by both reason and emotion, toward a particular conception of constitutional legitimacy). Constitutional theorists are, in effect . . . ignoring the role of affections in binding a people to their constitution and assuming that a theory of constitutional legitimacy can be sustained through argument alone.<sup>97</sup>

The claim is that the morally binding power of any constitutional theory rests not only (and perhaps not even primarily) on its abstracted intellectual appeal to a narrow and rather rarefied subfraction of the American populace, but also (and perhaps much more centrally) on the extent to which it captures something real or true about the broader constitutional culture in which it is situated and to which it is being applied. This is not merely a matter of a judge accurately reflecting that culture in an opinion, though it is that in part. Judges will also need to extend those affections and dispositions into new factual domains, to meet new challenges. They will have to engage in an ongoing, intergenerational argument about how these affections and dispositions, manifested in the people’s practices, link the people’s constitutional past to their constitutional present. In the effort to apply this type of interpretive method, a judge’s own character is shaped, molded in this double way: both preserving and extending.

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93. J. Joel Alicea, *The Role of Emotion in Constitutional Theory*, 97 NOTRE DAME L. REV. 1145 (2022).

94. *Id.* at 1184.

95. *Id.* at 1185.

96. *Id.*

97. *Id.* at 1189 (emphasis added).



Alicea's argument concerning the necessary element of "emotion" in constitutional theory illustrates just how traditionalism is dispositional as well as theoretical, and in this, it may differ from other constitutional theories. Traditionalism disposes judges toward a certain kind of character in evaluating constitutional conflict. That character is preservationist and custodial in dual ways: it looks to the past in identifying enduring patterns of practice, and it looks to the present in shaping (by extending or curtailing) those patterns of practice to meet new challenges. This twin orientation requires judges to evaluate what the point or purpose of the pattern of practice might be, what political virtues it promotes when undertaken well, and what political vices it is susceptible to suffering when undertaken badly. This is the "cold" side of traditionalism's justificatory force, its rational side, but it is grounded and channeled by traditionalism's "hot" or dispositional side. The side of habitus or character. In other work, I have described this justification for traditionalism as concerning the relationship of virtues and enduring practices, arguing that there are features of constitutional justice that cannot be identified or specified apart from the practices that determine our constitutional law.<sup>98</sup> Traditions are enduring practices through which people acquire certain legal and political excellences (virtues), and through which certain legal and political excellences are manifested in community. And traditionalism, as a constitutional theory, presupposes certain virtues of judging and inculcates certain virtues in the judge. The traditionalist judge is both formed by traditionalism and comes to traditionalist interpretation well-formed.

To make this more concrete, consider, as an example, one of the most commonplace of free-speech practices: leafleting, the distribution of papers or literature advocating a particular position or point of view. Leafleting has been practiced by the American people in countless settings, in countless manners, for the communication of countless messages, consistently and continuously throughout their history.<sup>99</sup> And the practice of leafleting has also been pervasively regulated by governments, sometimes properly and sometimes not so, to account for competing social and political concerns.<sup>100</sup> For traditionalist interpreters, the

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98. See DeGirolami, *Traditionalism Rising*, *supra* note 2, at Section IV.B.2.x.

99. Some of the earliest Supreme Court free-speech cases concern leafleting and the in-person distribution of literature. See, e.g., *Abrams v. United States*, 250 U.S. 616 (1919) (discussing the distribution of leaflets); *Gitlow v. New York*, 268 U.S. 652 (1925) (same); *Schneider v. New Jersey*, 308 U.S. 147 (1939) (same).

100. See generally the cases cited *supra* note 99 (balancing competing communal and individual interests); see also *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (discussing a city's regulation of the distribution of leaflets); *Talley v. California*, 362 U.S. 60 (1960) (same); *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (discussing a city's regulation of signs on private property); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (discussing a state's regulation of the distribution of leaflets).

aim is to determine which new specifications of this enduring pattern of practice, and which new specifications of its regulation, properly fall within the nature and purposes of the tradition of leafletting. So, for example, leafletting in a public park during the afternoon as visitors walk by a specific location will implicate different concerns than leafletting on the doorstep of a private home at three in the morning with a bullhorn, and both will in turn differ from the warring concerns involved in online or virtual speech in which citizens press their concerns on one another and the state's interests in the regulation of that type of speech. As one Supreme Court opinion put it, the "right to distribute literature" and the "right to receive it" must be considered in concert with the "peace, good order, and comfort of the community."<sup>101</sup>

But for the traditionalist judge, it is the pattern of past practices of leafletting that generates insight about the virtues of constitutional citizenship in the practice to be preserved, and the vices to be regulated by appropriate regulation. And, in fact, the Supreme Court has frequently interpreted traditionally in this very area, recognizing in its "forum doctrine" that much depends on the distinction between the "traditional public forum" and other locations in determining or specifying the appropriate scope for these speech practices:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.<sup>102</sup>

By contrast, certain types of locations, serving certain types of civic or communal functions and purposes, are not, by tradition and "time out of mind," places for leafletting and other similar speech practices. It is for just this reason that the government retains a strong interest in regulating them. As Justice Scalia once put it in a case in part concerning the regulation of leafletting at the polls:

If the category of "traditional public forum" is to be a tool of analysis . . . it must remain faithful to its name and derive its content from *tradition*. Because restrictions on speech around polling places on election

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101. *Martin v. Struthers*, 319 U.S. 141, 143 (1943).

102. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939); *see also Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983) (describing places "which by long tradition or by government fiat have been devoted to assembly and debate").

day are as venerable a part of the American tradition as the secret ballot, [the law] does not restrict speech in a traditional public forum . . . .<sup>103</sup>

It is in this way that new challenges are met, as the pattern of practice is extended by traditionalist interpreters, not by reference to an abstraction cooked up by the theorist or judge and deracinated from the tradition, but instead the other way round. From the bottom up, so that, as John Henry Cardinal Newman once put it, what is new flows out from what is old, “ris[ing] out of an existing state of things, and for a time savour[ing] of the soil.”<sup>104</sup> And this is also the way that what Alicea described as the crucial (but often missing) “affective” qualities of a constitutional theory’s legitimacy<sup>105</sup> are combined with its other properties in generating the theory’s justificatory force – the “hot side” of the theory penetrating and influencing its “cold side.” Judges are engaged in an ongoing argument about the nature of the constitutional polity – its structure and the quality of its protections for individuals and groups – whose source is not what they or other clever theorists imagine or invent, but *what citizens and their governments do* and what they have long done.

It should now be plain why the affective or characterological elements of traditionalism are especially salient in the interpretation of the Establishment Clause. Establishment Clause cases necessarily concern, as I have argued above, the basic institutions and practices of the political establishment, the foundational commitments of the polity – the most fundamental, common things that bind the American people as citizens to their government. The dually preservative or custodial quality of traditionalism is in consequence at its most potent in the type of extended, intergenerational arguments about the practices of the establishment and the impermissible deviations from them. Compare, by contrast, the Free Exercise Clause of the First Amendment. While it is certainly possible to interpret it traditionally, the Free Exercise Clause does not as centrally involve the bedrock practices of the political regime. That is because the establishment in this sense, as I have argued elsewhere, has political priority as a conceptual and historical matter to the “accommodations” for free exercise that are made to it.<sup>106</sup> The basic political settlements of the polity necessarily precede any exemptions to them.

It follows that traditionalist interpretation of the Establishment Clause implicates the vital, dispositional components of constitutional theory in a more

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103. *Burson v. Freeman*, 504 U.S. 191, 214 (1992) (Scalia, J., concurring in the judgment); *accord id.* at 196-97 (plurality opinion).

104. JOHN HENRY CARDINAL NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE 40 (Longmans, Green & Co. 1909) (1878).

105. See Alicea, *supra* note 93, at 1189.

106. DeGirolami, *supra* note 28, at 759.

thoroughgoing fashion than does interpretation of some other features of the constitutional text. This renders it a stronger, more complete, theory than other possible rivals. For it also follows that abstractedly rationalistic constitutional theories that do not account for the establishment's core affective properties, let alone more radical constitutional theories that aim to strip away or sever the affective connections of the American people to their most fundamental political practices—the practices of the establishment—are themselves working hard against the textual grain and lack a convincing account of their theories' popular legitimacy. In few domains are their theories less well suited to capture the essential, dispositional component of constitutional theory than in the interpretation of the Establishment Clause—to capture, that is, the affective or emotional features that connect and unite a people as a political community. If there were people who did not feel affection for what they value or were not afraid of losing it, they would, as John Kekes once put it, “not be recognizably human”—and they would certainly not be the kind of people that could organize themselves into an enduring constitutional polity.<sup>107</sup> Traditionalism accounts for the reality (as many rival theories do not) that the people infuse their Constitution with the commitments of “encumbered” selves—stabilized and anchored by loyalties, affections, and attachments—that are most clearly manifested not in what they say, but in how they practice their lives.<sup>108</sup>

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In this Essay, I have used the term “politics” in its classical sense, as what reflects the “common thing”<sup>109</sup> of the people, but it may be advisable to conclude with a word on politics in its more ordinary or everyday sense. Just what the traditionalist shift portends for concrete results in future Establishment Clause cases is uncertain. When it comes to the probable political (in the second sense) valences of traditionalist Establishment Clause decisions, several commentators assume that these will be uniformly politically or religiously conservative: for example, the Supreme Court has been accused of ushering in an era of “Christian nationalism” by interpreting the Establishment Clause traditionally,<sup>110</sup> or at least

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107. JOHN KEKES, *A CASE FOR CONSERVATISM* 5-6 (1998).

108. Michael Sandel, *The Procedural Republic and the Unencumbered Self*, in 12 *POL. THEORY* 81, 81, 87 (1984) (“What is the political philosophy implicit in our practices and institutions? . . . What is denied to the unencumbered self is the possibility of membership in any community bound by moral ties antecedent to choice.”).

109. See MANENT, *supra* note 28, at 64.

110. See Caroline Mala Corbin, *Christian Legislative Prayers and Christian Nationalism*, 76 *WASH. & LEE L. REV.* 453, 454-55 (2019).

of facilitating religiously conservative outcomes.<sup>111</sup> Just as the *Lemon* and endorsement tests led to reliably politically progressive outcomes, critics believe that the opposite will now be true.

This assumption, however, is (for the moment, at least) unwarranted. Traditionalism does not ordain religiously conservative outcomes, so much as outcomes in which practices of present-day Americans may be persuasively tied or connected to the enduring traditions of past Americans. True, traditionalism is preservative or custodial, and it gives presumptive weight to the historical endurance of a pattern of practice. True also, by recognizing the traditions of the past, it gives due weight to the practices of prior generations. But not undue weight, since it also incorporates contemporary practices that reflect the traditions of newer generations of Americans. And traditionalism does not dictate substantive political results. A practice of legislative prayer today, for example, or of school prayer, the display of religious monuments, funding schemes for religious institutions, and others, need not be Christian or conservative (though it certainly may be) in order to be included by a traditionalist interpreter within existing patterns of longstanding practice.

In fact, it may well be that the likeliest result of the Court's move to Establishment Clause traditionalism is not artificially unified political outcomes, but naturally divided ones.<sup>112</sup> Traditionalist Establishment Clause decisions may carry different political valences when the practices being evaluated arise in, say, Brooklyn, New York, on the one hand, or Midland, Texas, on the other. In this way, traditionalist interpretation of the Establishment Clause might be likely to reflect broader national political fractures,<sup>113</sup> rather than imposing (as did the *Lemon* and endorsement tests) a fabricated political unity on the entire nation. The concrete, authoritative, and enduring bonds of establishment sometimes take hold at subnational levels, as some of the examples discussed above suggest.<sup>114</sup> Traditionalism may be able to reattach what are now fraying and even ruptured civic bonds more effectively than its rivals, by doing its affective,

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111. See Michelle Boorstein, *Under Right-Leaning Supreme Court, the Church-State Wall Is Crumbling*, WASH. POST (July 17, 2022, 6:00 AM EDT), <https://www.washingtonpost.com/religion/2022/07/17/supreme-court-church-state-religion-coach> [<https://perma.cc/MKW5-5648>]; Richard Schragger & Micah Schwartzman, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299, 2302, 2304 (2023).

112. In this way, traditionalism may be susceptible to what Jeremy K. Kessler and David E. Pozen have called the “life cycle” of many other constitutional theories that do not foreground substantive political outcomes and can therefore become “adulterated.” See Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1835 (2016). But it may also be that traditionalism's characterological features can protect it against this process.

113. For further reflections on these fracturing dynamics, see generally DeGirolami, *supra* note 26.

114. See *supra* notes 25-31 and accompanying text.

orthodoxy-entrenching work at the level of state, or perhaps local, rather than national, American communities.

## CONCLUSION

Suppose one tried to express, in a short and simple statement, the single, central problem of American politics today. Regrettably, the pool of possibilities is deep. But one plausible choice surely would be the increasing alienation of Americans from their political and cultural institutions. More and more, Americans do not trust their institutions, including their institutions of law, or the people who run them. There is a growing sense that American constitutional law no longer belongs to its citizens, that it no longer promotes civic flourishing, and that it is disconnected from the concerns and hopes of everyday Americans. The problem is one of lack of trust and civic fracture more broadly, but it has special salience for the Constitution as the foundational American law. To begin to address it in this particular area would require an approach to constitutional interpretation and adjudication that takes seriously what binds the American polity, what gives legitimacy to its institutions of constitutional governance, and what generates trust and even affection among citizens.

Traditionalism might provide such an approach, and its function in determining both legitimate political establishments and prohibited establishments of religion shows how. In attempting to re-establish the connection between people's ordinary and enduring practices and the meaning of their basic charter of governance, traditionalism cannot conclusively resolve the problem of national civic fracture. No constitutional theory can do that. But it perhaps might do something more modest: begin, bit by bit and operating at the local level, to repair the glaring and intensifying mistrust Americans now have of their legal institutions. Of these, none is more fundamental than the American constitutional establishment, of which the Establishment Clause is only one part. And none is more urgently in need of restorative repair.

This Essay has argued that the Establishment Clause is an especially tractable area for traditionalist interpretation for two mutually supporting reasons. First, because political establishments are made up of a community's most foundational and enduring patterns of practice; and second, because the powerful characterological or dispositional qualities cultivated by traditionalist interpretation are illustrated most vividly when the object being interpreted is the nature of the political establishment. Traditionalism takes seriously the "We" of "We the People," and perhaps nowhere more so than in this constitutional domain, one that goes to the heart of whatever it is that American citizens continue to share as a political community. Whether traditionalism has the resources to meet the

difficult, deepening pathologies and shattering fractures that afflict American political life, however, remains an uncertain, and even a doubtful, question.

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