2020

First Amendment Traditionalism

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ABSTRACT

Traditionalist constitutional interpretation takes political and cultural practices of long age and duration as constituting the presumptive meaning of the text. This Essay probes traditionalism's conceptual and normative foundations. It focuses on the Supreme Court's traditionalist interpretation of the First Amendment to understand the distinctive justifications for traditionalism and the relationship between traditionalism and originalism. The first part of the Essay identifies and describes traditionalism in some of the Court's Speech and Religion Clause jurisprudence, highlighting its salience in the Court's recent Establishment Clause doctrine.

Part II develops two justifications for traditionalism: "interpretive" and "democratic-populist." The interpretive justification is that enduring practices presumptively inform the meaning of the words that they instantiate. Generally speaking, we do what we mean, and we mean what we do. The democratic-populist justification is that in a democracy, people who engage in practices consistently and over many years in the belief that those practices are constitutional have endowed those practices with political legitimacy. Courts owe the people's enduring practices substantial deference as presumptively constitutional. The populist element in this justification is that traditionalism is a defensive interpretive method against what abstract principle in the hands of elite actors has wrought: intolerance, the corrosion of lived experience, and the distortion of text to mirror a particular class of contemporary moral and political views.

In Part III, this Essay compares traditionalism with originalism, reaching two conclusions. First, traditionalism's reliance on practices as presumptively constitutive of constitutional meaning is most distant from originalist theories that rely on abstract principle as constituting the meaning of text and that reject practice-based evidence as the equivalent of irrelevant "expected applications." It is closest to varieties of originalism that read text concretely. Yet traditionalist judges are not engaged in making guesses about "expected applications," but in making decisions about retrospective applications—drawing on old and enduring practices either to include within, or exclude from, a tradition the specific practice under review. Second, the Essay investigates the connection between so-called "original law" theories of originalism and traditionalism. Original law theorists argue that originalism is "our law" as a sociological and

cultural fact. But traditionalism may be more "our law" than originalism in some areas within the First Amendment and outside it. If the positivist defense of originalism truly counts as a justification for any theory of constitutional interpretation (an issue on which this Essay takes no position), then it may support traditionalism as much as originalism.

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INTRODUCTION

Traditionalist constitutional interpretation takes political and cultural practices of long age and duration as constituting the presumptive meaning of the text. In other work, I have described traditionalism, its influence across the domains of constitutional law, and possible explanations for and limitations of the method.[1] Traditionalism is, in fact, pervasive across the Supreme Court's constitutional doctrine.

This Essay probes traditionalism's conceptual and normative foundations. It focuses on the Supreme Court's traditionalist interpretation of the First Amendment in order to understand the distinctive justifications for traditionalism in constitutional law and the similarities and differences between traditionalism and originalism. The first part of the Essay identifies and describes traditionalism in some of the Court's Speech and Religion Clause jurisprudence. The Essay highlights traditionalism's recent salience in Establishment Clause doctrine, where it is gradually but steadily becoming the Court's preferred method in certain areas.

In Part II, the Essay uses this doctrinal deposit to discuss two justifications for traditionalism: "interpretive" and "democratic-populist." The interpretive justification is that while enduring practices may sometimes diverge from the meaning of text, they are a primary constituent of textual meaning. That is, enduring practices presumptively inform the meaning of the words that they instantiate. Generally speaking, we do what we mean, and we mean what we do. Indeed, we could not have a clear notion about what many words mean—and especially about how to interpret their meaning when it is unclear—without attending to the longstanding practices that illustrate their meaning. True, textual meanings and the practices

1. *See* Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123 (2020) [hereinafter DeGirolami, *Traditions*].

instantiating them are not the same thing. It is possible for there to be a mismatch between our practices and the meaning of the words we believe illustrate them. But the presumptive state of affairs is that the text and the practices instantiating it do match, in constitutional law no less than in other areas such as contract law, with its doctrine of "practical construction."[2] If lawmaking is a rational activity, there is a presumptive concordance between our laws and our actions and practices in relation to them—between what we mean and what we do.

The democratic-populist justification is 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. Practices that do not endure, or that have never existed, lack that type of democratic legitimacy. While courts may, on traditionalist premises, strike down longstanding practices as unconstitutional, they owe the people's enduring practices substantial respect and deference as presumptively constitutionally legitimate. Enduring cultural and political practices reflect the people's judgments about what is consistent with their fundamental law. The populist element in this justification is that traditionalism is a defensive interpretive method against what abstract principle, in the hands of elite actors, has wrought on the Constitution. Traditionalism is motivated, in part, by the fear of the intolerance, of the corrosion of lived experience, and of the distortion of text to mirror a particular class of contemporary moral and political views, that constitutional interpretation dependent on abstract principle can unleash. It is an interpretive method for those who cherish embedded political and cultural ways of doing and being.

In Part III, this Essay compares traditionalism and originalism, reaching two conclusions. First, traditionalism's reliance on practices as presumptively constitutive of constitutional meaning departs from some, but not all, varieties of originalism. It is most distant from originalist theories that rely on abstract principle as constituting the meaning of text and that reject practice-based evidence as the equivalent of irrelevant "expected applications." It is closest to varieties of originalism that read text concretely. It differs from, but is compatible with, original meaning theories that take practices and "expected applications" to be "evidence" of meaning, or to be among the raw materials in the "construction zone." But traditions and the enduring practices that constitute them are not the same as "expected applications," though they are related to them. Traditionalist judges are engaged not in making guesses about "expected applications," but in making decisions about "retrospective applications"— drawing on old and

2. For further discussion, see *infra* Part II.A.

enduring practices either to include the specific practice under review as within the tradition, or to exclude it as outside the tradition.

Second, the Essay investigates the connection between so-called "original law" theories of originalism and traditionalism. Original law theorists defend originalism from a positivist, rather than a normative or conceptual, point of view. They argue that originalism is "our law" as a sociological and cultural fact, as a matter of our extant legal practice. But this positivist defense of originalism actually also supports traditionalist interpretation, at least in part. Traditionalism may be more "our law" than originalism in some areas within the First Amendment and outside it. This Essay does not adopt the positivist justification as an independent defense of traditionalism, resting on its conceptual and normative defenses in Part II. Rather, it explores the structure of the new positivist justification for originalism, arguing that if it truly counts as a justification for any theory of constitutional interpretation, then it may support traditionalism as much as originalism.

I. THE TRADITIONS OF FIRST AMENDMENT LAW

No part of the Constitution has been interpreted traditionally by the Supreme Court as frequently as the First Amendment, and no part of the First Amendment more so than the Speech and Religion Clauses. In Speech Clause jurisprudence, traditionalism figures prominently in the doctrine of content-based exclusions from free speech protection,[3] public forum doctrine,[4] government speech,[5] and other areas.[6] As for the Religion Clauses, the Court has interpreted traditionally more frequently in its establishment cases than in its free exercise cases[7]—for example, when

3. *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 795–96 (2011); United States v. Stevens, 559 U.S. 460, 469 (2010).

4. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939); *see also* Burson v. Freeman, 504 U.S. 191, 196–97 (1992) (plurality opinion); *id.* at 214–15 (Scalia, J., concurring in the judgment); Perry Educ. Ass'n v. Perry Local 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").

5. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 210–12 (2015); Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009).

6. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (political pamphleteering); Rutan v. Republican Party of Ill., 497 U.S. 62, 95–113 (1990) (Scalia, J., dissenting); Elrod v. Burns, 427 U.S. 347, 353–57 (1976) (political patronage).

7. There are some cases at least partially about the Free Exercise Clause that have adopted traditionalist methods, however. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 182–85 (2012).

considering state-sponsored religious displays,[8] legislative prayer,[9] tax exemptions,[10] and more.

This rapid doctrinal canvas already highlights the first crucial feature of traditionalist interpretation: a focus on political or cultural practices as constituents of textual meaning. Traditionalism is not focused on judicial precedents as constituents of meaning. It is not common law constitutionalism.[11] As Justice Scalia once remarked, the common law "is not 'customary law,' or a reflection of the people's practices, but is rather law developed by the judges."[12] Traditionalism, by contrast, does take concrete political and cultural practices to be ingredients of the meaning of the constitutional text or the text of a doctrinal rule. For example, the Court has held that it will not find new substantive categorical exceptions to free speech protection "without any long-settled tradition of subjecting that speech to regulation" and it has insisted on a careful and narrow description of the specific political practice at issue even when it considers expanding the doctrine of categorical exceptions.[13]

Second, traditionalist interpretation also emphasizes the age and endurance of practices. Age and endurance are what makes a practice a tradition. A practice that is both old and enduring—one that people have engaged in consistently and in concentrated fashion before, during, and after the ratification of a particular textual provision—is presumed by the traditionalist interpreter to be consistent with the meaning of the constitutional text or rule that it instantiates. Where practices are less old, less continuous, or less dense (continuity and density being the two elements of endurance), they bear decreasing interpretive authority on traditionalist premises. Imagine a ski slope: it may be smooth with good snow for skiing from beginning to the end; or sparse, with interspersed snowy and bare sections. Sections of the slope that are smooth may be especially so—densely packed with snow—or they may be coated only with a thin, icy layer. The longer (age) and more continuously smooth (endurance) the

8. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2086–89 (2019); Lynch v. Donnelly, 465 U.S. 668, 671–86 (1984).

9. *See* Town of Greece v. Galloway, 572 U.S. 565, 577 (2014); Marsh v. Chambers, 463 U.S. 783, 786 (1983). For further discussion of *American Legion* and *Town of Greece*, see *infra* notes 16–29 and accompanying text.

10. *See* Walz v. Tax Comm'n, 397 U.S. 664, 684–85 (1970) (Brennan, J., concurring) (drawing the historical lineage of the practice of tax exemption to the Jefferson administration and Madison's tenure in the Virginia Assembly); *see also* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792 (1973).

11. *Cf., e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

12. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 4 (Amy Gutmann ed., 1997).

13. United States v. Stevens, 559 U.S. 460, 469 (2010).

slope, the better for skiing.[14] The slope becomes smoother because of the quantity and density of the snow lying beneath it.

Third, and finally, the strong presumption in favor of even old and enduring practices may be overcome in two ways: either by directly conflicting text or by a very powerful moral principle that runs against the tradition.[15] The presumption of constitutionality for enduring practices is strong, but defeasible, reflecting one feature of traditionalism's dynamism. Thus, traditionalist interpretation takes (1) practices; (2) of long age and endurance; (3) to be powerfully presumptive constituents of textual meaning.

Two relatively recent Establishment Clause cases involving the concrete practices of legislative prayer and state-sponsored religious displays are helpful in identifying traditionalism and exploring certain open questions about it. In *Town of Greece v. Galloway*, the Supreme Court upheld the practice of legislative prayer given by members of local congregations in a small, upstate New York municipality.[16] The Court concluded that legislative prayer existed continuously over three distinct periods: during the colonial period, at the ratification of the Bill of Rights, and afterward.[17] It emphasized the age and endurance of the practice, continuing in the federal and state governments, as a "majority of the other States" maintained the "same, consistent practice."[18] Legislative prayer, the Court said, is "part of our heritage and tradition, part of our expressive idiom."[19] Thus, the Court's method in *Town of Greece* was quintessentially traditionalist: it took the age and endurance of a concrete practice as constitutive of the meaning of the Establishment Clause, at least presumptively.[20]

The Court's most recent Establishment Clause decision, *American Legion v. American Humanist Association*, also reflects traditionalist themes. The case concerned the constitutionality of a thirty-two-foot cross that local residents in Prince George's County, Maryland, had dedicated in 1919 to honor the county's fallen soldiers in World War I.[21] In upholding the cross against an Establishment Clause challenge, a majority of the Court

14. I set to the side the thrill-seeking skier who derives perverse pleasure from icy and rocky terrain.

15. The preceding two paragraphs condense the explanation of traditionalism developed at greater length in DeGirolami, *Traditions*, *supra* note 1.

16. Town of Greece v. Galloway, 572 U.S. 565, 576 (2014).

17. *Id.* at 575–76.

18. *Id.* at 576.

19. *Id.* at 587.

20. A legislative prayer practice that "denigrate[s] nonbelievers or religious minorities, threaten[s] damnation, or preach[es] conversion" either falls out of the tradition or, even if it falls within the tradition, might be held unconstitutional as running directly contrary to a powerful moral imperative. *Id.* at 583.

21. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2076–78 (2019).

held that "monuments, symbols, or practices that were first established long ago" can be imbued with multiple purposes and meanings.[22] "The passage of time," the Court said, "gives rise to a strong presumption of constitutionality."[23] The plurality opinion as well as Justice Gorsuch's concurrence (which Justice Thomas joined) would have gone further, adopting an approach for state-sponsored religious displays that took a monument's participation within a tradition long followed in American government as evidence of its constitutionality. Or, as Gorsuch put it, "a practice consistent with our nation's traditions is just as permissible whether undertaken today or 94 years ago."[24]

American Legion is a fragmented and perplexing decision, in part because though a majority of the justices expressed some support for an Establishment Clause methodology that looks to history and tradition, they could not reach consensus either about the method's details or its justifications. The plurality emphasized the age of the specific monument, symbol, or practice being reviewed.[25] Justices Kavanaugh and Thomas would have combined an inquiry about coercion with history and tradition to conclude that state-sponsored religious monuments and symbols are not coercive and therefore constitutional.[26] Justice Gorsuch argued that what matters is not a particular monument's age, but whether the monument—old or new—fits within a broader tradition of enduring practice.[27]

Judging from *Town of Greece* and *American Legion*, the justices are haltingly but steadily moving toward a more fully articulated account of traditionalism, though they have taken some errant turns. The plurality acknowledges that a monument's age correlates with its constitutionality, even describing a "presumption" of constitutionality for monuments, symbols, and practices of sufficient antiquity (capturing the traditionalist elements of age and presumptive constitutionality).[28] But it focuses on objects rather than ongoing practices and it does not account for endurance in addition to age. Justice Gorsuch rightly focuses on practices rather than the objects that happen to be in front of the Court, and his is therefore the richer account of traditionalism, but he omits the features of endurance and presumptive but defeasible constitutionality that are necessary for a more completely developed account.[29] Though the justices are beginning to piece

22. *Id.* at 2082.
23. *Id.* at 2085.
24. *Id.* at 2102 (Gorsuch, J., concurring in the judgment); *see also id.* at 2092 (Kavanaugh, J., concurring) (describing a new "history and tradition" approach adopted by the Court).
25. *Id.* at 2087–89 (plurality opinion).
26. *Id.* at 2093 (Kavanaugh, J., concurring); *id.* at 2096–97 (Thomas, J., concurring in the judgment).
27. *Id.* at 2102–03 (Gorsuch, J., concurring in the judgment).
28. *Id.* at 2082 (plurality opinion).
29. *Id.* at 2101–03 (Gorsuch, J., concurring in the judgment).

together a traditionalist methodology, they have not articulated any explanations or justifications for traditionalism.

II. JUSTIFICATIONS FOR TRADITIONALISM

This section devises two justifications for traditionalism—one conceptual and one normative—which it calls "interpretive" and "democratic-populist." These justifications are not exhaustive. There may be other reasons to adopt traditionalist interpretation. They are also independent of one another. Traditionalist interpreters may embrace both or only one of them. But they reflect two prominent and distinctive explanations for adopting traditionalism in at least some circumstances. The first involves a conceptual claim about the nature of textual interpretation as a presumptively rational activity, while the second sets out a normative argument about the democratic authority of enduring practices in a constitutional republic.

A. Interpretive: We Do What We Mean, and We Mean What We Do

The interpretive justification for traditionalism is that enduring practices are constituents of textual meaning—whether constitutional text or the text of a doctrinal rule. That is, practices are one of the crucial (though not the only) ingredients of meaning. There certainly may be occasions where, for various reasons that can include mistake, oversight, or bad faith, our practices can deviate from the meaning of the words that they are thought to instantiate. In the main, however, we do what we mean, and we mean what we do. Generally speaking, our practices inform the meaning of the words they illustrate and concretize. In the case of clear text, recourse to practices is often unnecessary, though even here it may be probative of meaning. But interpreting unclear text requires a knowledge of the constituents, or ingredients,[30] of its meaning.[31]

Consider the following faintly absurd illustration. Suppose a parent announces the rule, "You must have good manners at the dinner table," to a young child. There are some words in the rule—"dinner" or "table," for example—that are clear enough that they probably will need no

30. *See* Steven D. Smith, *That Old-Time Originalism*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 223 (Grant Huscroft & Bradley W. Miller eds., 2011).

31. As explained further below, the argument that practices are constituents of meaning is distinct from the claim that "expected applications" are constituents of meaning. Practices are patterns of concrete actions and behaviors, while "expected applications," as one theorist has put it, are meanings that are "intended or expected by the framers and adopters of the constitutional text." Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295 (2007). Nevertheless, there are connections between certain types of intentionalist originalism and traditionalism that are discussed in Part III.

interpretation. Even so, a knowledge of past practice might be helpful to the child in understanding their meaning: "dinner" is only clear because it refers and has always referred to the practice of eating a meal in the evening hours. If "dinner" were associated with a different practice, it would mean something else.[32] But the meaning of the phrase "good manners" is unclear and presents a starker interpretive problem. The parent could try to clarify by recurring to another abstraction—for example, telling the child that "good manners" is the same thing as "polite," "proper," or "respectful" behavior. Yet these explanations would only push back the interpretive problem by one step, introducing other unclear phrases requiring their own interpretation.

The interpretive justification for traditionalism is that the interpretation of unclear words requires recourse to past practices, because practices are constituents of meaning. The child can effectively interpret the meaning of "good manners" because she knows (or is quickly apprised) that some practices—eating with her hands, putting her feet on the table, shoveling unwanted food on the floor for the dog to eat—have been established as "bad manners," while others—wiping her face with a napkin rather than her sleeve, using utensils, chewing with her mouth closed—have been established as "good manners." The practices before and after the rule is announced, instantiating good and bad manners, concretize and reinforce the meaning of the rule. And the longer and more consistently the practices of "good manners" have been reinforced (before, during, and after the rule's announcement), the more authority they will come to possess as correct instantiations of the rule.[33]

True, the rule is not synonymous with the practices constituting it. The parent might forget on occasion to apply the rule or overlook it for some reason, and in consequence the child might engage in a practice she believes to be "good manners," perhaps over a long period, only to find out later that the practice actually is not "good manners." True also, an enduring practice is not *conclusively* constitutive of the meaning of the text it is thought to illustrate. Babbling incessantly might be "good manners" when the child is very young but might cease to be "good manners" as the child develops and other behavioral codes supervene. But enduring practices are at least *presumptively* reliable guides for the meaning of the words they instantiate.

One can go further. Practices are the primary constituents of textual meaning, the principal ways in which we come to know what text means.

32. There may be some cultures in which "dinner" refers to the midday meal, for example.

33. This account bears some resemblance to the description of practices in ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 191–203 (1981), but it differs inasmuch as it relies on practices to inform the meaning of the words they instantiate, while for MacIntyre, pursuing the "internal goods" of practices is the way in which the virtues are cultivated.

Indeed, consider the alternative: a world in which our practices ordinarily conflict with the words we think they illustrate would be irrational in the extreme as well as generally unbearable. The child either would have no idea at all what the meaning of the rule might be in practice or might even adopt some sort of perverse meta-rule that "good manners" must mean, as a general matter, behaving as badly as possible while eating. We cannot have a clear idea about the meaning of words without attending to the practices that illustrate them, because in the ordinary course, what we mean and what we do are mutually reinforcing.[34] To interpret words requires recurring to the practices that concretize their meaning in the world. The recurrence to practices is ineluctable, even in cases where the interpreter rejects or replaces an old and enduring pattern of practice—that is, a tradition—with another. Traditions instruct, and what is learned from them over long periods of time either confirms or modifies what we believe is the meaning of the words they illustrate.

This justification for traditionalism is reflected in some of what the Supreme Court has said about interpretation in its First Amendment doctrine. For example, in *Burson v. Freeman*, the plurality opinion upheld state restrictions on vote solicitation and the distribution of campaign material within one hundred feet of the polling place.[35] Justice Scalia's concurring opinion, which was necessary to the judgment, explained just what was "traditional" about the "traditional public forum":

> 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 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 . . . .[36]

The ancient and enduring tradition of government restrictions on speech in polling places, and streets and sidewalks adjacent to them, rendered these locations nonpublic forums. Statutes restricting such speech had been in use "[e]ver since the widespread adoption of the secret ballot in the late 19th century" and "[b]y 1900, at least 34 of the 45 States . . . had enacted such restrictions."[37]

Scalia's decisive concurrence in the judgment in *Burson* helpfully isolates the interpretive justification for traditionalism. The enduring

34. *See* EDWARD SHILS, TRADITION 198 (1981) ("One of the main reasons why what is given by the past is so widely accepted is that it permits life to move along lines set and anticipated from past experience . . . .").

35. Burson v. Freeman, 504 U.S. 191, 193–95 (1992) (plurality opinion).

36. *Id.* at 214 (Scalia, J., concurring in the judgment).

37. *Id.* at 214–15.

practices of state regulation around the polling place are constituents of the phrase "traditional public forum." Identifying and tracing the legacy of such practices, Scalia argued, was a superior method for understanding the meaning of "traditional public forum" than recurring to the Court's "time, place, and manner" test because the latter was simply a truncated abstraction of the traditions of government regulation of speech around the polling place:

> This unquestionable tradition could be accommodated, I suppose, by holding laws . . . to be covered by our doctrine of permissible "time, place, and manner" restrictions upon public forum speech—which doctrine is itself no more than a reflection of our traditions. [But that] . . . would require some expansion of (or a unique exception to) the "time, place, and manner" doctrine . . . . It is doctrinally less confusing to acknowledge that the environs of a polling place, on election day, are simply not a "traditional public forum" . . . .[38]

Scalia's point is that interpreting phrases whose meaning is unclear ("traditional public forum") by recurring to other phrases whose meaning is unclear ("'time, place, and manner' restrictions") is less useful than examining the history of the concrete practices of state regulation of speech around the polling place.[39] Ancient and enduring practices—those that have been carried on for many years, continuously, and in concentrated fashion—are constituents of the meaning of the "traditional public forum," and consequently of the scope of this feature of the freedom of speech.

Or consider the Court's justification for its methodology in *Town of Greece v. Galloway*.[40] The practice of legislative prayer endured in concentrated ways over the colonial period, the ratification of the Establishment Clause, and thereafter.[41] The First Congress—the same Congress that approved the language of the Establishment Clause—engaged in the practice and subsequent Congresses have ever since.[42] And a "majority of the other States" also maintained the "same, consistent practice."[43] This enduring pattern of practice is "part of our heritage and tradition," the Court said.[44] Yet it did not clearly explain why "our heritage and tradition" represents a plausible way to interpret the meaning of the Establishment Clause. That is, what is it about "tradition" that informs textual meaning?

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38. *Id.* at 216 (citation omitted).
39. *Id.*
40. Town of Greece v. Galloway, 572 U.S. 565 (2014).
41. *Id.* at 572–73.
42. *Id.* at 572.
43. *Id.* at 576.
44. *Id.* at 587.

> The closest the Court came to a justification was this comment:
>
> [I]t is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.[45]

In other words, an abstract test defining the Establishment Clause was "not necessary" because the Court had a more elemental interpretive unit ready to hand: a practice of the age and endurance of legislative prayer. And practices of similar age and endurance are likewise presumptively constitutive of textual meaning—one of the primary building blocks that generate the meaning of an unclear phrase that remains authoritative in the absence of some powerful countervailing factor.[46]

Other legal disciplines incorporate the same interpretive insight. Contract law, for example, recognizes the doctrine of "practical construction," which holds that courts may recur to the parties' course of conduct or ongoing pattern of behavior under the terms of an agreement to interpret its meaning.[47] A "course of performance accepted . . . is given great weight in the interpretation of the agreement."[48] In some cases, courts have held that such "practical construction" can even alter the meaning of a contract that the court would have given it as an original matter and without such an enduring pattern of practice.[49] But the basic point is that other areas of the law affirm the role of enduring practices in constituting textual meaning.[50] Of course, there are salient differences between the interpretation of laws—constitutional or statutory—and contracts, one of which is the prominent role of intentionalism in the latter.[51] Yet if anything, the role and importance of enduring practices is greater for interpreting

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45. *Id.* at 577.

46. In *Town of Greece*, as explained earlier, evidence that the legislative prayer was engaged in to "denigrate" or "proselytize" might have overcome the presumption in favor of the tradition. *Id.* at 583. Even in that case, however, the rejection of the practice before the Court would have taken the existing traditional deposit as its interpretive point of departure.

47. RESTATEMENT (SECOND) OF CONTRACTS § 202(4)–(5) (AM. LAW INST. 1981).

48. *Id.* § 202(4).

49. *See* City of New York v. N.Y.C. Ry. Co., 86 N.E. 565, 567 (N.Y. 1908) ("When the parties to a contract of doubtful meaning . . . enforce it for a long time by a consistent and uniform course of conduct, so as to give it a practical meaning, the courts will treat it as having that meaning, even if as an original proposition they might have given it a different one.").

50. *See, e.g.*, White v. Commonwealth, 6 Binn. 179, 184 (Pa. 1813) ("A construction thus commenced and thus continued is entitled to the highest respect. The imperfection of language causes much uncertainty in writings which have been drawn up with the greatest deliberation.").

51. *See generally* Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1181–88 (1998) (explaining some of the differences between contracts and statutes for interpretive purposes).

constitutions and statutes than for contracts.[52] Enduring practices stabilize meaning over time and they also provide notice to third parties about the meaning of the law, both of which are far less necessary in contract interpretation than in constitutional law.

To be sure, many questions remain: How narrowly or broadly can a court draw any given practice to construct a tradition? What criteria does it use to exclude new practices as not conforming to the tradition, or to include new practices as more broadly within "the tradition" long followed?[53] How old and enduring must a practice be to qualify as a constituent of meaning, and at what point does its interpretive power wane or give out? And perhaps most vexingly: When is the presumptively constitutive quality of traditions, strong as it is, defeated by other factors—clear text to the contrary, for example, or an overriding moral principle? Even in the comparatively unusual circumstances wherein a tradition is defeated, the strength and endurance of the tradition will itself inform judgments about whether to retain it. These complications aside, cases like *Burson* and *Town of Greece* illustrate and adopt the interpretive justification for traditionalism: that when a practice is old and enduring, it is presumptively a constituent of the meaning of the text that it instantiates.

B. Democratic-Populist: The People's Enduring Decisions

The second justification for traditionalism combines democratic and populist elements. By contrast with the descriptive, conceptual nature of the interpretive justification for traditionalism, the democratic-populist justification carries a normative charge. It involves a set of claims about the legitimacy and authority of democratic decisions by non-elite actors with constitutional dimensions, and what is required for the Court to contravene them.

In a democracy, traditions often represent the people's decisions about what accords with their foundational charter of governance. Longstanding practices, particularly when they are government practices, reflect choices supported by democratic approval, acceptance, or at the very least political inertia sufficient to fix them in place. The older and more enduring the tradition—the more continuous and the more frequently it is reiterated and re-entrenched—the greater democratic authority it enjoys. Even on traditionalist premises, arguments to defeat such traditions or to strike them

52. There are analogues in other disciplines. For example, the law of treaties treats "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" as constitutive of the meaning of the treaty. *See* Vienna Convention on the Law of Treaties art. 31(3)(b), *opened for signature* May 23, 1969, 1155 U.N.T.S. 332.

53. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2102 (2019) (Gorsuch, J., concurring in the judgment) (quoting Town of Greece v. Galloway, 572 U.S. 565, 577 (2014)).

down as unconstitutional are admissible, but the democratic authority of enduring traditions is a presumptive reason to reject such claims.

When the Supreme Court, whose democratic accountability is far less direct than that of its co-equal branches and state and local governments, affirms a tradition, it also affirms a set of enduring democratic decisions and judgments. When the Court upsets a tradition, it is often acting anti-democratically. So, for example, Professor Michael McConnell has argued that the Court's reliance on the people's "settled judgments" about what does and does not comport with the Constitution allows the Court to "keep faith with the democratic postulates of our system" while also exercising an anti-majoritarian function where government bodies veer wildly from traditional practices.[54] To repudiate "settled judgments" with democratic authority breaks that faith and denies that authority; it therefore requires an especially compelling justification for doing so. Similarly, Professor Thomas Merrill once justified what he termed "conventionalism" in constitutional interpretation—which focuses in part on "the evolved practice of different branches of governments" and the "practice of private citizens"—on the basis that it constrained the anti-democratic element in judicial review and promoted popular sovereignty.[55]

Justices on the Court sometimes have had this justification for traditionalism in mind, as when Justice Scalia defends traditionalism because it "intrudes much less upon the democratic process" than its competitors.[56] So, too, has the Court in several of its First Amendment decisions justified traditionalism by invoking the "judgment [of] the American people" about the scope of free speech protection in the absence of an enduring tradition of government regulation,[57] or holding that the First Amendment is not ordinarily triggered by longstanding practices of government speech because "it is the democratic electoral process that first and foremost provides a check on government speech."[58]

Several Establishment Clause decisions further crystallize the democratic feature of this justification for traditionalism as well. In *Lynch v. Donnelly*, for example, the Court explained its decision to uphold a municipality's longstanding practice of exhibiting a religious display during

54. Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 685.

55. Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 511–12, 522 (1996). Merrill's conventionalism is distinct from traditionalism because the former emphasizes the interpretive force of current or contemporary practices.

56. McDonald v. City of Chicago, 561 U.S. 742, 804 (2010) (Scalia, J., concurring). Scalia discusses both originalism and traditionalism in his *McDonald* concurrence, but his remarks about democratic legitimacy concern the force of post-enactment practices and patterns of regulation.

57. Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 792 (2011) (alteration in original) (quoting United States v. Stevens, 559 U.S. 460, 470 (2015)).

58. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015).

the Christmas season on the ground that "[t]he city, like the Congresses and Presidents . . . has principally taken note of a significant historical religious event long celebrated in the Western World."[59] The enduring decisions about religious displays acknowledging the Christmas holiday "by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries" imbued the practice in Pawtucket, Rhode Island, with powerful democratic authority that the Court was unwilling to disturb.[60] Likewise, in *American Legion*, the majority spoke about the "historical importance" that an old monument—in this case a World War I-era cross—acquired with the passage of time, "remind[ing] the people of Bladensburg and surrounding areas of the deeds of their predecessors and of the sacrifices they made in a war fought in the name of democracy."[61] To strike down the monument as a violation of the Constitution, the majority suggests, would be tantamount to striking a blow against what had become an enduring symbol of democratic self-government as well as the county's democratic decision to maintain the monument. It would also dishonor the memory of those who had died to defend the American democratic ideal.

Yet the Court's respectful appreciation in *American Legion* for "the community that erected the monument nearly a century ago and has maintained it ever since," for the decisions of the "relatives, friends, and neighbors of the fallen soldiers," and for the communal meaning that the cross had acquired over time and that had united the residents of the county in "grief and patriotism," all suggest something more than a simple presumption in favor of democratic choices.[62] That something more is an element of populism, one that appears in many other traditionalist decisions and is often fused with the democratic justification.

When the Court interprets traditionally, it relies on old and enduring practices at least in part because of its apprehensions about what constitutional interpretation in the hands of elite actors, perhaps including itself, has done to constitutional law. It looks to concrete practices, rather than abstract principles, because interpretation grounded in abstract principle has frequently tended to uproot and displace certain enduring ways of life, and to substitute and entrench a particular set of elite cultural and political preferences. The populist element of traditionalism is a response or reaction to certain perceived disfunctions in the dominant governing consensus. And when the Court interprets traditionally, it is participating in that response. It is concerned with preserving and maintaining various non-elite ways of doing and being in the world against interpretive approaches—

59. Lynch v. Donnelly, 465 U.S. 668, 680 (1984).
60. *Id.* at 686.
61. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2089 (2019).
62. *Id.* at 2089–90.

generally grounded in abstract ideals or principles—that would damage or even destroy them.

Several scholars have observed that judges are highly responsive to and often influenced by elite values and opinions. Professors Neal Devins and Lawrence Baum, for example, have argued that Supreme Court justices are "elites who seek to win favor with other elites"—that is, the intellectual and cultural class that formed the justices' habits, dispositions, and sensibilities and with whom they continue to interact both professionally and personally.[63] The Court is often predisposed toward, and prepared to channel, a set of principles and views that represent a very particular stratum of cultural and political opinion that comprehends public intellectuals, law professors and other academics, the upper reaches of the legal profession, prominent journalists, powerful political networks, and the like. Judges' cultural perspectives, particularly on social questions, are often shaped by the academic institutions that conferred their degrees. Technological advances and "virtual briefing" practices, as Professors Jeffrey L. Fisher and Allison Orr Larsen have explained, have amplified the federal courts' access to elite opinion as well as their tendencies to favor it,[64] but the general phenomenon is not uniquely contemporary.

When judges strike down particular traditions as unconstitutional—whether the traditions are political, religious, cultural, social, or some combination of these—they are wont to do so on the basis that a principle of overriding importance requires that result. Equality, liberty, dignity, neutrality, rationality—these are only some of the most frequently invoked abstract principles that have been used by the Supreme Court, in some of the most culturally fraught constitutional contests of the last century, to strike down a set of enduring practices as violating the nation's fundamental law. Yet why, one might ask, should a tradition that cannot be justified on thoughtful, rational, and principled grounds ever survive?

The traditionalist response to this challenge, reflecting a populist justification, is that "thoughtful" interpretation in constitutional law has generally meant interpretation that favors and entrenches the values, principles, and predilections of the educational and cultural elites in American society. "[T]he thoughtful part of the Nation," as a plurality of the Court once put it in *Planned Parenthood v. Casey*, is the part that embraces "applications of constitutional principle to facts as they had not been seen by the Court before."[65] It is the part of the nation, as the Court

63. NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT, at xi (2019).

64. Jeffrey L. Fisher & Allison Orr Larsen, *Virtual Briefing at the Supreme Court*, 105 CORNELL L. REV. 85 (2019).

65. Planned Parenthood v. Casey, 505 U.S. 833, 864 (1992) (plurality opinion).

said in *Obergefell v. Hodges*, that influences the Court to perceive "new insights" about the Constitution derived from "legal principles" that include "new dimensions of freedom" and "unjustified inequality within our most fundamental institutions."[66] "All the world is 'concepts,'" as Yuval Levin, quoting *Casey*, described this perspective,[67] and the application by the Court of these new principles and concepts often serves precisely to displace and dismantle traditional practices and replace them with elite cultural preferences. It is as if the business of constitutional judging involved little more than a conversation between judges, elite lawyers, and law professors, and the Court had no need to give reasons for its decisions that are seen as credible by those that do not share the underlying commitments of elite actors.

The populist element of the democratic-populist justification suggests that traditionalism is generally a constitutional approach more suited to the non-elites of American society—those whose longstanding practices, and the cultural, communal, and political commitments they instantiate, may not conform to the ongoing "thoughtful," principle-driven re-imagination of the Constitution to reflect and impose elite opinion as a national mandate. As Professor Harold Berman once put it in discussing the historical school associated with the nineteenth-century German jurist Friedrich Karl von Savigny, the law should be closely connected with "the ideas and norms reflected in a people's historically developing traditions, including its legal tradition."[68] Judges may well appreciate this justification for traditionalism even if they might not necessarily affirm these traditions for themselves in their own lives.

Once again, some of the Court's First Amendment cases are useful in pinpointing this justification. In *Town of Greece v. Galloway*, the Court upheld a small, lower-middle-class municipality's[69] enduring practice of offering a prayer "intended to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures" against the claim that it violated the Establishment Clause's abstract

66. Obergefell v. Hodges, 135 S. Ct. 2584, 2596, 2603, 2606 (2015).

67. Yuval Levin, *Taking the Long Way: Disciplines of the Soul Are the Basis of a Liberal Society*, FIRST THINGS MAG. (Oct. 2014), https://www.firstthings.com/article/2014/10/taking-the-long-way [http://perma.cc/XY9J-7AL2].

68. Harold J. Berman, *The Historical Foundations of Law*, 54 EMORY L.J. 13, 16 (2005). For further reflections on the German historical school and its several insights for the American law of religious liberty today, see MARC O. DEGIROLAMI, *Part II: Tragedy and History*, *in* THE TRAGEDY OF RELIGIOUS FREEDOM 55 (2013).

69. The Town of Greece's population is just over 95,000 people whose median household income is $58,000. For demographic information about the Town of Greece, see U.S. CENSUS BUREAU, https://www.census.gov/search-results.html?q=town+of+greece%2C+ny&page=1&stateGeo=none&searchtype=web&cssp=SERP&_charset_=UTF-8.

principle of religious neutrality.[70] As Justice Alito put it in his *Town of Greece* concurrence, the Town's "informal, imprecise way" of selecting guest chaplains is "typical of the way in which many things are done in small and medium-sized units of local government," and when these towns seek "in good faith to emulate the congressional practice" of legislative prayer, the Court should not disrupt those practices simply because they do not conform to the justices' own preferences and values.[71] To impose those preferences would render "local government . . . a religion-free zone," and in consequence destroy the enduring "historic practice," which was, in fact, what the Second Circuit had suggested would be its own preferred outcome when it struck down the practice.[72]

Traditionalist justices sometimes say that they are interested in what they claim to be distinctively American popular traditions as embodied in old and enduring American practices, but what they sometimes seem to mean is the practices of non-elite Americans. As the Court emphasized in *Pleasant Grove City v. Summum*, a government speech case arising in another small, blue-collar town[73] that concerns the expressive function of physical monuments for local governments, traditionalist interpretation protects "American" traditions, stretching back to the founding and before, that reflect the "history" and "local culture" of particular communities—not the broad and uniform principles of elites, either here or abroad, that would destroy such traditions.[74] Likewise, Justice Scalia stressed the "long usage of *our* people" in his decisive *Burson* concurrence as of particular importance for traditionalism, but what he seems to have intended is that traditionalism preserves the enduring practices of American localities and small governments in managing their electoral processes for the protection of democratic republican ideals.[75]

It should be emphasized that like traditionalism's interpretive justification, the democratic-populist justification is presumptive only, not conclusive. A tradition that flatly contradicts constitutional text will not survive, no matter how much it may reflect enduring democratic or populist choices. Likewise, there are times where a tradition violates a moral or political principle of great power that defeats it—and rightly so. In these situations, its democratic and populist bona fides fail as a defense against its

70. Town of Greece v. Galloway, 572 U.S. 565, 570 (2014).

71. *Id.* at 597 (Alito, J., concurring).

72. *Id.*

73. *See QuickFacts: Pleasant Grove City, Utah*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/pleasantgrovecityutah/PST045218 [http://perma.cc/DA7E-R889] (approximate population 38,428 and approximate median income $70,000).

74. Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009).

75. Burson v. Freeman, 504 U.S. 191, 216 (Scalia, J., concurring in the judgment) (emphasis added).

constitutionality. To give perhaps the best-known and most notorious example in all of constitutional law, the practice of segregating railroad cars on the basis of race was once defended by the Court as one of the "established usages, customs, and traditions of the people," even though the actual age and endurance of the practice of segregation by race in railroad cars was, in fact, actually relatively recent at the time.[76] Yet the moral principle of racial equality, as an interpretation of the meaning of the Equal Protection Clause, together with other sociological and psychological considerations, were sufficiently compelling to reject that ostensible tradition.[77] The Court has made analogous points in First Amendment contexts, and even on traditionalist premises, there are ways to vindicate a variety of interpretive and political interests that may run counter to old and enduring practices.[78] Nevertheless, for traditionalists, these situations are not the presumptive state of affairs. Rather, traditionalism takes the age and endurance of practices to bear the hallmarks of presumptive democratic authority, and it accords such practices the respect that the people's decisions ordinarily deserve in a democratic republic.

III. COMPARING TRADITIONALISM AND ORIGINALISM

This part compares traditionalism with originalism, once again relying on some of the First Amendment doctrine discussed earlier to sharpen certain points of contrast. The comparison is worth undertaking both because originalism is one of the dominant theories of constitutional interpretation today and because there are important similarities and differences between the methods. Both show some respect for (or at least do not show an open hostility toward) the authority and wisdom of the past, though for somewhat different reasons. Both rely on historical evidence for understanding the meaning of constitutional text, though each gives different weight to historical evidence before, during, and after ratification of the meaning of particular constitutional provisions, and each emphasizes different features of history.[79]

This Essay cannot canvas the relationship between originalism and traditionalism comprehensively, so it instead focuses on two particularly salient issues: first, the ways in which theories of original meaning and original intention overlap and depart from traditionalism with respect to the interpretation of unclear text; second, the extent to which a recent positivist,

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76. Plessy v. Ferguson, 163 U.S. 537, 550 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954); *cf.* R.R. Co. v. Brown, 84 U.S. 445 (1873) (interpreting a federal statute preceding the adoption of the Fourteenth Amendment to forbid racially segregated railway cars).

77. *See Brown*, 347 U.S. at 495.

78. For discussion, see DeGirolami, *Traditions*, *supra* note 1, at 1130, 1168–70.

79. On the axes of weight given to different types of historical evidence, see *id.* at 1167–68.

legalist development in the defense of originalism may support traditionalism.

A. Traditions and Retrospective Applications

Originalism is an umbrella category under which many varieties exist, some of which are closer to and some more distant from traditionalism.[80] Original public meaning theorists, as distinguished from intentionalist originalists, are all interested in the meaning of the constitutional text communicated to the public at the time of its enactment. But public meaning originalists disagree among themselves about how to derive the meaning of text when it is unclear[81] (or about the "meaning of meaning" in such cases),[82] and it is this issue that provides a first profitable point of contact and comparison with traditionalism.

Some public meaning originalists derive meaning when interpreting unclear text by employing what they call "the method of text and principle,"[83] in which the abstract "principles" that are "embodied" in the text are taken to be its meaning for purposes of new applications.[84] Some originalists in this general methodological line read unclear text with a "presumption of liberty,"[85] but other abstract values such as equality, nondiscrimination, neutrality, the principles espoused by various progressive (or, for that matter, conservative) "social movements,"[86] and others would also fit within this variety of original meaning. Other original meaning theorists speak of a difference between interpretation and construction, the latter of which concerns the effect given to the meaning of words, a particularly vexing issue when that meaning is unclear.[87] These theorists have described a "construction zone" which "becomes the focus of

80. For discussion, see Marc O. DeGirolami, *The Vanity of Dogmatizing*, 27 CONST. COMMENT. 201 (2010) (book review).

81. I am using the phrase "unclear" as a catchall term for text that is ambiguous, vague, or otherwise under-determinate.

82. *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 20–21 (2015).

83. Balkin, *supra* note 31, at 295.

84. Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 498, 502 (2007).

85. *See* Steven G. Calabresi, *On Originalism and Liberty*, 2015 CATO SUP. CT. REV. 17, 39 (2016) (stating that the Constitution's original meaning is "very libertarian so long as one insists that laws regulating rights must be 'just' and that they must serve 'the general good of the whole' people"); *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 118–21 (2004).

86. Balkin, *supra* note 31, at 299–308.

87. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 456 (2018).

explicit attention when the meaning of the constitutional text is unclear, or the implications of that meaning are contested."[88] Some take a comparatively ecumenical or at least noncommittal view of the "normative concerns" that might be used to derive meaning in such circumstances,[89] while others emphasize the "original function," "spirit," "point," or "purpose" that the text was thought to serve.[90] Still other public meaning originalists focus on "original methods," the interpretive rules in place at the time of a particular provision's ratification.[91] These theorists reject exercises in constitutional construction in cases where the applicable rules or methods cannot settle an interpretive issue.[92]

This is an extremely compressed account of only a limited number of some prominent accounts of original public meaning on one particular issue—the procedure for interpreting unclear constitutional text. But it is sufficient to identify one important point on which these theories intersect with traditionalism: their view of the effect of enduring legal practices on meaning. No original meaning theory gives primacy to ancient and enduring practices as constituents of meaning, so that none is synonymous with traditionalism on that point at least. Indeed, very few original meaning theories specifically discuss the interpretive force of old and enduring practices at all. Nevertheless, one can see these theories on a continuum from those that elevate particular abstract principles (such as freedom or equality) as the exclusive touchstones for constitutional interpretation of unclear provisions, to those that are more ecumenical or noncommittal about what falls into the "construction zone," to those that reject principled or "spirited" interpretation when fixed interpretive rules or conventions run out. Original meaning theories that look to abstract principles to interpret unclear text are likely to admit and exclude very different applications than traditionalist interpretation, since "principled" interpreters will be guided not by enduring practices but by their sense of what allegiance to their favored principles—or to the ones that they purport to locate in the Constitution—demands. Original meaning theories that look to concrete rules or methods of interpretation extant at the period of a textual

88. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 469 (2013).

89. *See id.* at 469–72.

90. *See* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 500 (2013) (for "point" and "purpose"). Just precisely what the difference is between a "principle" and a "spirit" or overarching "purpose" is not entirely clear.

91. *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009) [hereinafter McGinnis & Rappaport, *Original Methods*].

92. McGinnis & Rappaport, *Original Methods*, *supra* note 91, at 783–84.

provision's ratification are likely to align more closely with concrete and enduring practices extending before, during, and after ratification.

A related, unresolved issue between original meaning and original intentions theorists concerning the role of future, concrete applications of a constitutional provision may shed even more light. Some theorists who look to original intentions do so because they believe that the concrete intentions of the authors or ratifiers of constitutional text about its application constitute the meaning of that text.[93] If the authors or ratifiers of a text affirmatively did not believe—or, indeed, would be horrified at the prospect—that it would apply to a specific issue, then it seems to these theorists perverse and objectionable from a democratic perspective for a court today to authorize that application.[94] Original meaning theorists have taken a variety of positions on the interpretive force of so-called "original expected applications."[95] Advocates of the "method of text and principle" reject expected applications outright, since what matters for them is whether the abstract principle said to embody the text may be extended by modern courts to encompass new applications, whether or not envisioned, endorsed, or repudiated by the authors and ratifiers.[96] Other original meaning theorists say that they "do not recommend relying entirely" on expected applications, because the authors or ratifiers may have been mistaken even if they had conceived a particular application.[97] But a substantial number take the view that expected applications may be "evidence" or "probative" of textual meaning, though always inconclusive evidence.[98] For example, Professors McGinnis and Rappaport argue that it is, in the main, highly improbable that meaning and expected application will diverge, and that such expectations will "often be . . . the best evidence of what that meaning is."[99] Professor Solum writes in a similar and helpfully precise vein:

> If the meaning of a given string of constitutional text (or clause C1) is ambiguous and could have two senses (S1 and S2), and constitutional actors at a time, T2, that is proximate to framing and ratification of C1, acted in a way that provides evidence that they believed the meaning was S1 and not S2, then those actions are

93. *See, e.g.*, Smith, *supra* note 30.

94. *Id.*

95. This phrase "expectation originalism" was first used, so far as I have been able to trace it, by Ronald Dworkin in 1997 in critiquing Antonin Scalia's lead essay in *A Matter of Interpretation*. *See* Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION, *supra* note 12, at 115, 119.

96. Balkin, *supra* note 31, at 295.

97. Barnett & Bernick, *supra* note 90, at 46.

98. Keith Whittington may be in this group, though he has some highly critical remarks about expected applications. *See* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 382–86 (2013).

99. John O. McGinnis & Michael B. Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378 (2007).

> evidence that the meaning was in fact S1. On the other hand, if T2 is not proximate in time to the framing of ratification of C1, then its evidentiary value is diminished. And even early historical practice provides evidence that must be evaluated and weighed against other evidence: early historical practice might reflect mistaken beliefs about original meaning or a deliberate circumvention of the true meaning for various reasons.[100]

Expected applications are not the same thing as the enduring practices that constitute the meaning of text on traditionalist premises. Expected applications are concrete intentions about the future application of text to some specific issue or question, while enduring practices are ancient, continuous, and concentrated actions, customs, or patterns of conduct undertaken almost always, as I have argued,[101] in the belief that they comport with the meaning of the words they instantiate, thereby becoming ingredients of that meaning and reinforcing it. Nevertheless, there is a connection between old and enduring practices and expected applications. Old and enduring practices give the traditionalist interpreter presumptive confidence that a particular application is, or is not, warranted; an application squarely within the tradition is constitutional; one squarely outside the tradition is not. But enduring practices also allow the traditionalist interpreter to extrapolate the meaning of text going forward—that is, when the issue before a court involves a similar, but not identical, practice whose fit within the tradition is uncertain. Elsewhere, I have described an analogous traditionalist technique as the "narrowing" or "broadening" of a tradition either to exclude or include the particular practice under review as within the tradition.[102]

For example, in *Town of Greece v. Galloway*, Justice Kagan argued in dissent that the tradition of legislative prayer recognized by *Marsh v. Chambers* and extending back to the founding did not encompass a small-town meeting attended by members of the public as petitioners,[103] while Justice Kennedy and, later, other judges, argued for broadening constructions of the tradition of legislative prayer that encompassed the practice used by the Town.[104] Likewise, Justice Brennan once argued that

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100. Lawrence B. Solum, Themes from Fallon on Constitutional Theory 22 (Dec. 5, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3374241 [https://perma.cc/A2GQ-LDYR].

101. *See supra* Part II.A.

102. *See* DeGirolami, *Traditions*, *supra* note 1.

103. Town of Greece v. Galloway, 572 U.S. 565, 616 (2014) (Kagan, J., dissenting) ("The practice at issue here differs from the one sustained in *Marsh* . . . ."). In this part of her dissent, at least, Justice Kagan was evaluating the case from within a traditionalist methodology.

104. *See* Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist., 910 F.3d 1297, 1303 (9th Cir. 2018) (O'Scannlain, J., respecting denial of rehearing en banc) (quoting *Town of Greece*,

the tradition of state-sponsored religious symbols, if any exists, should be drawn narrowly, and that it must include evidence of the specific practice before the Court from the time of textual ratification: "at the time of the adoption of . . . the Bill of Rights, there was no settled pattern of celebrating Christmas, either as a purely religious holiday or as a public event."[105] Other justices in these and other First Amendment controversies have opted for broader characterizations to encompass the practices the Court was examining as within the applicable tradition.[106]

The technique of broadening and narrowing a tradition is not so much an exercise in divining the expected applications of the founders or ratifiers of a textual provision, so much as one in retrospective application—taking an existing tradition that clearly is, or is not, an illustration of constitutional text and discerning whether it encompasses a practice that does not fit within the focal or central examples of the tradition but nevertheless may lie within it.[107] Professor Solum comes closest in the paragraph above[108] to clarifying one originalist response to the interpretive relevance of past practices along these lines: while he acknowledges the evidentiary value of past practices for textual meaning where the practices are "proximate to framing and ratification," there are two salient differences with traditionalism.[109]

First, Solum only grants past practices "evidentiary" force as compared with the constitutive force they have for traditionalists. As a practical matter, this may not make a significant difference, but it does matter conceptually. Original meaning theorists do not recur to practices as the primary interpretive unit. They instead prefer to talk about "meaning" without giving practices any interpretive lexical priority or presumptive weight. Not all original meaning theorists rely on practices as "evidence" of meaning, but even those that do will not start and generally end with practices. Practices are simply one component of a basketful of original meaning "evidence" that are not given any presumptive interpretive authority. Second, for Solum, proximity to framing and ratification is the key factor in measuring the interpretive force of past practices,[110] while age

572 U.S. at 577) (arguing against a standard requiring a tradition that is identical with the "precise practice at issue").

105. Lynch v. Donnelly, 465 U.S. 668, 720 (1984) (Brennan, J., dissenting).

106. *See, e.g.*, *id.* at 686 (majority opinion). For another dispute about narrowing and broadening the tradition of substantive-based exclusions from free speech protection, see United States v. Stevens, 559 U.S. 460, 468 (2010).

107. On the claim that these sorts of techniques might render a focus on tradition overly manipulable, see Chad Flanders, *A Half-Hearted Defense of the Categorical Approach*, 95 WASH. U. L. REV. 1389, 1400 (2018) ("I do not think that tradition is *infinitely* malleable. . . . Tradition seems more constraining than a direct appeal to values . . . .").

108. *See* Solum, *supra* note 100.

109. *Id.* at 22.

110. *Id.*

and endurance before, during, and after framing and ratification (or, metaphorically, a long and smooth ski slope throughout) are paramount for traditionalists.[111]

Traditionalism is therefore closest to those originalist theories that read the text concretely—as tethered closely to those ancient and enduring practices that were and are thought to instantiate the meaning of unclear text—even as it differs from even those originalist theories as to the evidentiary power of traditions for the meaning of the Constitution. As was seen in Part II.B, traditionalism's emphasis on enduring practices is justified by democratic-populist reasons and the constraining features of such reasons on the scope of judicial discretion. Here, too, the connection with originalism is complex. While early accounts of originalism—including public meaning originalism—emphasized the beneficently constraining quality of originalism on judges,[112] these justifications have been complicated, if not altogether dismissed, in more recent originalist defenses.[113] Many originalists today are not motivated to adopt originalism for its capacity to protect and promote democratic governance. On this point, as well as on the more general suggestion that "methodologies don't constrain . . . constitutions constrain,"[114] there may be significant differences between traditionalism and originalism, since judicial constraint in the service of democratic-populist ends is an important reason to adopt traditionalism in the first place.

B. Is Traditionalism Our Law (of the First Amendment)?

In his insightful division between "positivist," "natural law," and "historical" schools of jurisprudence, the legal historian Harold Berman once characterized originalism as positivist in orientation—as deriving its authority from "a body of rules laid down . . . and enforced by the supreme lawmaking authority"[115]—while historical approaches focus on the "legal history[] of the nation" and its transmission in practices over time as an ongoing "tradition."[116] Though Berman may have been right to suggest some fundamental perspectival differences among the schools, there are nevertheless historical elements, and even natural law varieties, of

111. *See* DeGirolami, *Traditions*, *supra* note 1.

112. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

113. *See, e.g.*, William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213 (2017).

114. *Id.* at 2218.

115. Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1653 (1994).

116. Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CALIF. L. REV. 779, 793 (1988); *see also* Berman, *supra* note 115.

originalism,[117] as well as positivist elements of traditionalism, so that each may partake of the overarching jurisprudential disposition of the other to some extent.

The positivist elements of both originalism and traditionalism represent another fruitful point of comparison between them. Over a series of papers, Professors William Baude and Stephen Sachs have defended public meaning originalism on a positivist, rather than a normative or conceptual, basis. Baude, for example, has claimed that originalism is "our law"—that "our current constitutional practices demonstrate a commitment to inclusive originalism"[118] or that the "social facts" of our existing interpretive practices support originalism, or at least originalism understood in a broad and "inclusive" fashion.[119] Originalism is "our official story," Baude and Sachs argue, as a day-to-day matter about what our constitutional law actually is and what our legal practice reflects.[120] Baude defends the claim that originalism is "our law" against objections that in fact there are many non-originalist features of constitutional interpretation and adjudication (precedent that does not conform to original meaning, for example) by adopting an "inclusive" account of originalism: original meaning is the "ultimate criterion" but it may "incorporate" or "permit" other interpretive or adjudicative techniques consistent with itself.[121] Nevertheless, "the most serious challenge to our view," Baude and Sachs write, "ought to be an empirical one: whether originalism is or isn't the official story of our law."[122]

Traditionalism offers Baude and Sachs this sort of empirical, practice-based challenge, and it draws evidentiary power in part from First Amendment doctrine and what the Supreme Court says and does (or says that it is doing). In certain doctrinal areas, and particularly in certain pockets of First Amendment law, what the Supreme Court says that it is doing—the "official story of our law" that it tells, applies, and transmits intergenerationally[123]—when it interprets the meaning and limits of the Speech and Religion Clauses is traditionalist, not originalist. As discussed

117. The historical elements of originalism are clear and have already been discussed. For natural law-infused accounts of originalism, see, for example, LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019); Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97 (2016).

118. William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2349 (2015).

119. William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457, 1491 (2019).

120. *Id.* at 1489.

121. Baude, *supra* note 118, at 2355–61.

122. Baude & Sachs, *supra* note 119, at 1459.

123. *See* Martin Krygier, *Law as Tradition*, 5 LAW & PHIL. 237, 250 (1986) ("Traditions depend on real or imagined *continuities* between past and present. These continuities may be formalized and institutionalized as they are in the institutions of law and religion . . . .").

in Part I and at greater length elsewhere,[124] the Court's doctrine in the areas of content-based exclusions from free speech protection, public forum doctrine, government speech, legislative prayer, state-sponsored religious displays, tax exemptions, and others is traditionalist, not originalist. And the First Amendment is not the only area where the Court's constitutional methodology is and has long been traditionalist.[125] Frequently, the Court is explicit that it is looking to "tradition" or "our heritage" or taking account of "American practices" to resolve disputes in these areas.[126]

Conversely, the Court has only very rarely, if ever, adverted to originalism as its default methodology in these substantive areas. More importantly, apart from what the Court says, it does not engage in the sort of originalist analysis that it uses in other cases where it has expressly adopted (and, often enough, expressly named) originalism.[127] In many ways, the positivist defense of originalism mounted by Baude and Sachs is a much more natural conceptual fit for traditionalism: the interpretive "social practices"[128] the justices use are, perhaps not surprisingly, to investigate the age and endurance of other social and political practices in determining the Constitution's meaning. It's social practices all around. But that point aside, on the empirical question of what "our official story" is when it comes to constitutional interpretation: (1) what the justices do; (2) what the justices say they are doing; and (3) what the justices do not say they are doing—all three of these pieces of empirical data often point much more directly toward traditionalism than originalism. Not always, of course, but at least as often as they indicate that "our story" and our fundamental criteria for interpretive authority are originalist. The only additional bit of evidence a traditionalist might desire would be an explicit declaration in no uncertain terms by the Court that it is *not* adopting originalism in these cases.

Professors Baude and Sachs might respond to this traditionalist challenge in a few ways. They might say that their inclusive originalism is capacious enough to encompass or incorporate traditionalism. That is, the Hartian rule of recognition[129]—the ultimate rule specifying what counts as law at all, or the "rule that determines which rules are binding"[130]—remains originalism,

124. DeGirolami, *Traditions*, *supra* note 1.

125. *See id.* (documenting traditionalism across the constitutional domains, in areas including inherent executive authority, executive appointments and removals, the Speech or Debate Clause, the Pocket Veto and Presentment issues, and several constitutional amendments).

126. *See id.* at 1176–78.

127. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008). In *Heller*, the Court used both originalist and traditionalist method. *See* DeGirolami, *Traditions*, *supra* note 1, at 1149–50.

128. Baude & Sachs, *supra* note 119, at 1463.

129. *See* H. L. A. HART, THE CONCEPT OF LAW 100–10 (2d ed. 1994).

130. Scott J. Shapiro, *What Is the Rule of Recognition (and Does It Exist)?*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 235, 237 (Matthew D. Adler & Kenneth Einar Himma eds.,

and traditionalism is simply one technique among others that the Court sometimes uses that is consistent with originalism. Thus, for example, Professor Baude's study of the "liquidation" of textual meaning over time, which is similar in some, but not all, respects to traditionalism, may fit within a larger positivist originalist architecture.[131] The "first layer of legal citations"[132] that may actually appear in the Court's opinions does not really matter so much as the underlying and often unstated theoretical assumptions and commitments. Baude and Sachs might also suggest that one way to test whether originalism encompasses and incorporates traditionalism is to imagine a case where they conflict—where a tradition has arisen and endured that was not consistent with the best view of the meaning of a textual provision at the founding. Baude and Sachs might contend that in such unusual cases, the original public meaning defeats the tradition, as even traditionalists appear to admit in conceding that the presumption in favor of a tradition may be overcome by directly contrary text. Finally, Baude and Sachs might say that though traditionalism reflects the Court's actual doctrinal practice in some areas, and even its self-consciously adopted methodology, constitutional doctrine reflects only one piece of sociological evidence about what "our law" actually is; other evidence, such as the justices' expressed views in other public contexts—Justice Kagan's comment that "we are all originalists,"[133] for example, or Justice Alito's comment that he is "a practical originalist"[134]—is more strongly supportive of originalism than traditionalism.

These points can be answered, however. First, while the idea of an "inclusive originalism" that can "incorporate" other non-originalist methods and techniques is coherent, as originalism becomes increasingly inclusive, the concrete evidence for originalism as the rule of recognition becomes increasingly thin. Indeed, perhaps it eventually becomes so thin that its coherence begins to dissolve as one starts to wonder exactly what sort of evidence of legal practices Baude and Sachs have in mind and just how it constitutes "better evidence" about what is "our law" than what the Court

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2008). For purposes of this Essay, I take Baude and Sachs's characterization of Hart's and other legal positivists' arguments about the rule of recognition at face value.

131. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019). But Baude notes that liquidation may be useful not only for originalists but also for other interpretive approaches. *Id.* at 35–47.

132. Baude & Sachs, *supra* note 119, at 1480.

133. *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan).

134. Baude, *supra* note 118, at 2352–53 (quoting Matthew Walther, *Sam Alito: A Civil Man*, AM. SPECTATOR (May 2014), https://spectator.org/articles/58731/sam-alito-civil-man [https://perma.cc/79PM-JETQ]).

says and does in its constitutional doctrine. At the very least, it becomes harder to test the thesis as it becomes more theoretical and impractical.

The point is not so much about whether the Court invokes originalism as a veneer or pretense for some other actual practice that it uses to resolve cases, as Professor Mikolaj Barczentewicz has argued in criticizing the Baude and Sachs view.[135] Nor is it that there are other plausible candidates for what "our law" is from an external point of view—the point of view of legal sociologists or legal theorists attempting to describe what the Supreme Court does rather than what it thinks it is doing.[136] Rather, it is that *both* as a matter of the "official story" and as a matter of the "practical" or "actual story"—*both* from the internal point of view of the relevant legal actors[137] and from the external, factual, point of view—the Court often invokes traditionalism, and not originalism, to explain its interpretive approach. The Court's higher-order justification (or "what we tell ourselves, not just what we do on the ground")[138] as well as what the Court actually does "on the ground" frequently point squarely in traditionalism's direction. Thus, the advantage of taking traditionalism, rather than originalism, to be "our law" in such cases is that it places the argument about what "our law" is within the core of our constitutional system's actual, self-reflective doctrine and practice, rather than in the realm of a theory about what "our law" might be that becomes harder to falsify just exactly in proportion to its increasing inclusivity.

Second, however, Baude and Sachs may have a stronger response in proposing a thought experiment about what would happen in a case of direct conflict between the original meaning of text and an old and enduring tradition thought to instantiate that text. If traditionalists themselves concede that traditions and the text that they constitute could conflict, and that in such cases of conflict, the presumption in favor of the tradition may be defeated, then isn't originalism really "our law"? While the point is powerful, its strength diminishes once one sees its practical and empirical limits. For reasons I have discussed earlier in justifying traditionalism conceptually and interpretively—that is, that in the main, what we do and what we mean coalesce—situations of direct and clear conflict between the meaning of the constitutional text and the traditions instantiating it are

135. Mikolaj Barczentewicz, *The Illuminati Problem and Rules of Recognition*, 38 OXFORD J. LEGAL STUD. 500, 503–04 (2018).

136. *See* Baude & Sachs, *supra* note 118, at 1487–90.

137. *See* HART, *supra* note 128, at 98 (describing the internal point of view as concerning the rules that people use to "apprais[e] . . . their own and others' behaviour" and that are acknowledged as legitimate).

138. Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2265 (2014).

extremely infrequent.[139] What is far more frequent is that the Court recurs to traditions once it finds some quantum of under-determinacy or lack of clarity in the meaning of the text. And the more willing the Court is to identify a lack of clarity, the more readily it will rely on traditions as constitutive of textual meaning.[140]

For example, in *NLRB v. Noel Canning*, which concerned the meaning of the Recess Appointments Clause, Justice Scalia argued in his concurrence in the judgment that traditionalist interpretation is unavailing in the face of plain meaning directly to the contrary, for "[p]ast practice does not, by itself, create power."[141] And yet in practice, the *Noel Canning* majority's willingness to use its considerable discretion to find textual ambiguity permitted it to move seamlessly to the old and enduring traditions that ultimately disposed of the case.[142] What is "our law" in *Noel Canning*: the surface-level statement that clear text prevails, or the actual resolution of the case using traditionalist methods? If anything, as discussed earlier, certain First Amendment cases demonstrate that the absence of evidence of the specific practice being reviewed in the founding generation is insufficient to defeat a tradition, provided the practice before the court may be characterized, using a process of retrospective application, as broadly within the tradition.[143] Cases like *Lynch v. Donnelley* and *Town of Greece v. Galloway*[144] therefore suggest that a tradition can survive even when it does not have strong original meaning support. Lack of evidence of original meaning is not the same thing as a direct conflict with original meaning, of course, but it remains to be seen what the Court would do if it actually did ever confront a case where original meaning and traditionalist meaning directly conflicted. Until it does, and we obtain some evidence for what the social facts of adjudication are in such cases, the question of originalism or traditionalism's interpretive mastery over the other is unknown.

What is known, however, is that the "official story" told by Professors Baude and Sachs, one that "trace[s] developments from the Founding" and that they say "isn't very controversial"[145] as an account of "our law," does not fully capture the methodology the Court uses when it interprets traditionally. The Court certainly includes founding-era evidence but its

139. *See supra* Part II.A.

140. *See, e.g.*, NLRB v. Noel Canning, 573 U.S. 513 (2014).

141. *Id.* at 573 (Scalia, J., concurring in the judgment) (alteration in original) (quoting Medellin v. Texas, 552 U.S. 491, 532 (2008)).

142. *See id.* at 523–33 (majority opinion); *see also* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2135–36 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (arguing that there is an analogous threshold issue in determining whether a statute is ambiguous, and therefore allows courts to consult "ambiguity-dependent" interpretive canons).

143. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 720 (1984) (Brennan, J., dissenting).

144. Town of Greece v. Galloway, 572 U.S. 565 (2014).

145. Baude & Sachs, *supra* note 119, at 1482.

most traditionalist decisions often explore and rely on colonial and pre-colonial historical precedents. Similarly, the Court often depends at least as heavily on post-ratification developments as on founding-era history when it traces the lineage and endurance of a tradition of practice. One might even say that to the extent the Court has adopted originalism in these cases, it is precisely because founding-era evidence of historical practice is only one piece, albeit a powerful piece, of reliable evidence within the Court's larger traditionalist frame.

Finally, with respect to other sources of evidence for "our official story" beyond constitutional doctrine, traditionalists can point to similar dicta or extra-judicial statements, including by some of the judges Baude and Sachs mention, that seem to support traditionalism at least as much as originalism as the rule of recognition. Justice Kagan recently said in her *American Legion* concurrence that "I too 'look[] to history for guidance,'" though she declined to issue a broader statement about the role of history and tradition in Establishment Clause doctrine.[146] Justice Kavanaugh embraced a "history and tradition test" in his *American Legion* concurrence,[147] and he has expressly supported the role of traditionalism in constitutional interpretation elsewhere.[148] Neither of these justices spoke about originalism in their remarks. Justice Gorsuch has likewise frequently supported traditionalism in constitutional interpretation and elsewhere,[149] and, as Professor Christopher Green puts it, "it is clear that he would interpret much of the Constitution in light of tradition."[150] These justices are not alone; indeed, this list does not include Justice Scalia, arguably the most traditionalist justice ever to sit on the Court, and there are many others that could have been included.[151] If extra-doctrinal sources count as evidence for the "our law" claim, then one certainly can find plenty of statements at least as supportive of traditionalism as originalism. And yet, doctrinal statements

146. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring in part) (alteration in original) (quoting *id.* at 2087 (Alito, J., plurality)).

147. *Id.* at 2092 (Kavanaugh, J., concurring).

148. *See, e.g.*, Heller v. District of Columbia, 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); Brett M. Kavanaugh, Keynote Address, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1919 (2017) (observing that "[r]equiring judges to focus on history and tradition" might make evaluation of certain legal questions clearer).

149. *See, e.g.*, NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA 19–47, 49 (2006) (emphasizing the importance of practices that are "deeply entrenched and regularly employed in American law").

150. Christopher R. Green, *Justice Gorsuch and Moral Reality*, 70 ALA. L. REV. 635, 642, 648 (2019); *see also id.* at 642 (listing and discussing the Due Process Clause, the Necessary and Proper Clause, and the Fourth Amendment as doctrinal areas where Justice Gorsuch has expressed a preference for traditionalist interpretation).

151. *See* DeGirolami, *Traditions*, *supra* note 1, at 1143–44, 1154–56, 1176 (discussing Justice Scalia).

and methods ought to carry special force as evidence of the law of the Constitution. If what we are interested in is "our official story" of constitutional law, what the Court does, says, says that it is doing, and does not say that it is doing, should all count as powerful empirical data supporting a positivist theory of our law.

This Essay does not claim that the positivist defense of originalism provides a third justification for traditionalism supplementing the interpretive and normative justifications discussed in Part II. To do that, it would have to embrace the "our law" claim as a true justification for any interpretive theory, but there are powerful reasons to doubt that it is. Professors Jeffrey Pojanowski and Kevin Walsh, for example, have posed important questions about why anybody should adhere to the originalist rule of recognition identified by Professors Baude and Sachs, as well as just whose internal point of view matters in locating that rule.[152] This Essay takes no position on those important, highly theoretical questions, and it prescinds from any overly ambitious claims about traditionalism as actually being "our law" to the exclusion of anything else, since the evidence merely points to its being "our law" some of the time (though, it must be said, in increasing degrees). The point is instead to test Baude and Sachs's "descriptive doctrinal sociology"[153] and to show a positivist point of contact between originalism and traditionalism. *If* one were inclined to find the positivist account of originalism persuasive, then one should find it at least as, if not more, persuasive for traditionalism.

CONCLUSION

The Supreme Court has long used traditionalism to resolve controversies across the domains of constitutional law. This Essay has identified and described traditionalist constitutional interpretation in the Court's First Amendment doctrine, justified it on interpretive and democratic-populist grounds, and reached two conclusions about traditionalism's relationship to originalism. Many questions remain about traditionalism in constitutional interpretation, including why it seems to be more powerful as the Court's preferred method in some textual and doctrinal pockets than in others, how judges go about drawing traditions narrowly or broadly, and at what point the strong presumption in favor of a tradition begins to weaken or give out altogether. Yet it seems probable that traditionalism's influence will strengthen in the coming years, particularly in the Court's First Amendment jurisprudence. If it does, then the Court will have to (1) iron out various internal differences among the justices about the method; and (2) grapple

152. Pojanowski & Walsh, *supra* note 117, at 108–16.
153. *Id.* at 107.

with traditionalism's fundamental justifications and its relationship to originalism. This Essay represents some small, but steady, steps toward these ends.