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Separation as a Tradition

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SEPARATION AS A TRADITION

Tradition is the living faith of the dead, traditionalism is the dead faith of the living.[1]

They . . . mix[] with it that dogmatic temper which, by absolute distinctions and unconditional 'thou shalt nots,' changes a growing, elastic, and continuous life into a superstitious system of relics and dead bones.[2]

My deeper concern with the Court's current inclination to extract a few homespun absolutes from the complexities of a pluralistic tradition is derived from the conviction that in these matters the living practices of the American people bespeak our basic constitutional commitment more accurately than do the dogmatic pronouncements of the justices. . . . [T]he justices may waste the nation's inheritance if they constantly dip into principle.[3]

Steven D. Smith[4]

From the Republic's beginnings and before, religious freedom has been closely associated with "separation"; but what does "separation" mean? Answers to that question, which we might describe as a "first order" question, have changed significantly over the decades and centuries, as Professor

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[1] Jaroslav Pelikan, The Vindication of Tradition 65 (1984).

[2] William James, The Moral Philosopher and the Moral Life, in William James, The Will to Believe and other essays in popular philosophy 184, 209 (1897).

[3] Mark DeWolfe Howe, The Garden and the Wilderness 174 (1965).

[4] Robert and Marion Short Professor, Notre Dame Law School. I thank Chris Anderson, Rick Garnett, Andy Koppleman, Bob Nagel, Michael Perry, and Jim Ryan for helpful comments on earlier drafts. Questions and criticisms at the "Separationism" conference itself provoked further reflections-in-progress which, as is usual with me, are for the most part ongoing and not assimilated into this essay.

Hamburger's new book[5] abundantly demonstrates; and that process of change gives rise to a second-order question: How should we regard this ongoing alteration in our self-understanding with respect to what nearly everyone acknowledges as a central constitutional commitment? What sort of process is going on?

Do the changes in our understanding of religious freedom and separation reflect the progressive elaboration of a core idea or "principle" (or perhaps a family of principles[6]) that over time we have come to understand more completely? Or perhaps the faithful adaptation of such a principle to the changing circumstances of American society? At the other "unprincipled" extreme, are the changes simply reflections of shifting interests, or of the fluctuating alignments of political forces? Perhaps there is some middle position, in which our changing understandings of separation and religious freedom are neither merely "political" nor simply the progressive or adaptive application of a core principle. But what might that intermediate possibility be?

In this essay I focus on this second-order question and consider three different answers, which I call the "developmental," the "political," and the "traditionalist" answers. The "developmental" interpretation is powerfully congenial to a community that is founded on (or that believes itself to be founded on) enduring truths. In such a community, doctrinal changes may threaten the community's self-understanding, as well as the legitimacy of the authorities that articulate these changes. But the threat is reduced if the changes are viewed as mere "developments"– more accurate or elaborate

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[5] Philip Hamburger, Separation of Church and State (forthcoming).

[6] See John Witte, Jr., Religion and the American Constitutional Experiment 37-55 (2000) (arguing that American religious freedom should be understood in terms of six principles, not one).

articulations, or new applications-- of the same essential ideas or principles that have been embraced all along. Conversely, an organization formed merely for the promotion of the interests of its members-- a trade association, perhaps, or a regional alliance of nations-- may have less reason to insist that changes in its platform or agenda reflect the development of constant principles; so a candid and economical account might simply describe changes as the product of shifting interests, or perhaps of fluctuations in the balance of power.

The third, middle-ground position– or what I am calling the "traditionalist" interpretation-- is more difficult to describe, and much of this essay consists of a series of attempts to give such a description; but I will suggest for now that the traditionalist interpretation understands change as a deliberative and ethical process though *not* as the logical unfolding of constant and articulable principles, and also as a process that is deeply but–the qualification is crucial--not *merely* "political" or "pragmatic." One attraction of a middle-ground account is that it might serve to avoid the unfortunate dynamic by which smug or idealistic descriptions of a process (of constitutional interpretation, for example) as "principled" become strained or implausible, leading to the disillusioned conclusion that "it's all just politics." Traditionalism, I want to argue, offers a different and less cynical alternative.

Before presenting these three accounts, I want to try to fend off some likely confusions by offering a few disclaimers and clarifications. People use a term like "tradition" in different ways, and it may be helpful to notice at the outset some meanings that are sometimes associated with the term but that I do *not* intend by it. First, "traditional" is often viewed today as the opposite of "progressive," so traditionalism comes to connote something like a hostility to change, or a proclivity for clinging to the past "for its own sake." Although some proponents of traditionalism may embrace this

characterization,[7] I think it is unfortunate and unnecessary. A traditionalist *will* be distinguishable, I think, by a sort of healthy, heart-felt respect for accumulated wisdom and long-standing practices; but she need not be opposed to change, and she certainly need not adopt, as some sort of consciously-held goal, the preservation of the past "for its own sake." Indeed, I am not sure that this is even an intelligible position.[8] To put the point differently, the traditionalist (like other people) aims to discern and do the right or best thing, and she also thinks (*unlike* some other people) that tradition will provide significant assistance in this task. But she does not set out with the goal of adhering to tradition: that sort of undertaking would reflect the sort of perverse "traditionalism" that Jaroslav Pelikan criticizes as "the dead faith of the living."[9] In understanding traditionalism in this more forward-looking sense, by the way, I don't think my stance is idiosyncratic. Pelikan stresses the dynamic and creative and "living" quality of tradition; so do thoughtful proponents of tradition such as Alasdair MacIntyre and, following him, Jefferson Powell.[10]

Second, in constitutional law, talk of "tradition" is often prompted by a familiar concern often expressed something like this: Why are courts entitled to recognize and enforce rights not discernibly enumerated in the text of the Constitution, and where do those rights come from? "Tradition" has been one common answer to these concerns– the right to buy and use contraceptives, for example, may be

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[7] See, e.g., Anthony Kronman, Precedent and Tradition, 99 Yale L.J. 1029, 1036, 1039, 1042 (1990).

[8] See Steven D. Smith, The Pursuit of Pragmatism, 100 Yale L. J. 409, 420-24 (1990).

[9] See note 1.

[10] See generally Pelikan, supra note 1; Alasdair MacIntyre, Whose Justice? Which Rationality? 354-56 (1988); H. Jefferson Powell, The Moral Tradition of American Constitutionalism 20-21, 29 (1993).

said to come from the "traditions and collective conscience" of our people[11]– and that answer in turn provokes some well-worn but still cogent questions: In a complex, multicultural society, *which traditions* count? *How* (or at what "level of abstraction") do we assign meaning to traditions? And how do we distinguish *good* traditions (like privacy, perhaps) from *bad* traditions (like racism)?

These skeptical questions are typically offered to undermine "tradition" as a source of "unenumerated," judicially-enforceable rights: John Ely's colorful discussion in *Democracy and Distrust* is a good example.[12] But I mention this familiar debate, which along with *Pierce*[13] and *Michael H. v. Gerald D.*[14] and *Troxel*[15] and so forth almost automatically comes to the mind of the constitutional lawyer when the word "tradition" is used, in order to say that this is *not* the debate I am trying to join. So if you are dubious about "tradition," and if by this you mean that you think "tradition" by itself is too indeterminate or morally ambiguous to serve as a justification for the judicial construction of rights not readily found in the Constitution, I am delighted to leave that opinion undisturbed: I may even try to reinforce it.[16]

My own discussion of "tradition" is inspired by a different kind of question– by, as I have already said, the second-order question about the nature of constitutional change regarding the meaning

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[11] Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring).

[12] John Hart Ely, Democracy and Distrust 60-63 (1980).

[13] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[14] 491 U.S. 110 (1989).

[15] Troxel v. Granville, 530 U.S. 57 (2000).

[16] See supra notes 161-165 and accompanying text.

of church-state separation. And I believe that this question is merely one variation on larger question– one to which "tradition" has often seemed relevant, and which has therefore prompted a good deal of reflection that bears on our more specific topic. It may not be overly grand, borrowing a phrase from Dostoyevski, to say that the larger question asks about the relation between "the passing earthly show and the eternal verity."[17]

Even with respect to this larger question, proponents of "tradition" can intend very different things. One sort of traditionalist– Hume might be an example-- doubts that there *is* any "eternal verity," or at least any that is accessible to us. In this situation he may embrace "tradition" as a way to stabilize and secure, and perhaps give a measure of dignity to, the "passing earthly show"-- or to stave off, as Alexander Bickel (who I suspect was also of this mind), said, "a continual round of chaos and tyranny."[18] Or someone who doubts the existence of any eternal verity might resort to tradition as a sort of strategy for elevating the passing earthly show into a passable substitute. It is hard to be sure, but I think that Anthony Kronman's thoughtful essay on "Precedent and Tradition"[19] might be read in this way.

Kronman, like Bickel, claims to be following Burke, but in fact Burke seems to have been more

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[17] Fyodor Dostoevski, The Brothers Karamazov 281 (Manuel Komroff ed., Constance Garnett tr. 1999) (first published 1881).

[18] See generally Alexander M. Bickel, The Morality of Consent 3-30 (1975). Bickel explained that his favored orientation, or what he called "the Whig model," "rests on a mature skepticism" and "partakes, in substantial measure, of the relativism that pervades Justice Oliver Wendell Holmes's theory of the First Amendment, although not to its ultimate exaggeration." Id. at 4 (footnote omitted). Rejecting "metaphysics" and "organized religion" as sources of values, Bickel argued that "visions of good and evil" must be found "where Burke told us to look, in the experience of the past, in our tradition, in the secular religion of the American republic." Id. at 23-24. And he suggested that the alternative to this cherishing of the past might be "a continual round of chaos and tyranny." Id. at 22.

[19] Kronman, supra note 7.

sanguine about the "eternal verity." Jeffrey Stout provides a helpful summary. "Moral thinking, for Burke, is an essentially practical affair," Stout explains,

> properly guided by experience, detailed knowledge of an evolving way of life, and practical wisdom, not by an ethical theory. The project of theory, of trying to approximate the form and content of the higher law by constructing a deductive system of moral truth, is in Burke's eyes intrinsically biased toward simplicity. It is therefore likely to distort and diminish the complicated moral traditions we use to make sense of ourselves and each other in day-to-day life. Wedded to power, the project of theory can only do violence to such traditions and to the people who depend on them (namely, all of us). As a theist (of sorts), *Burke believes that there is a higher law*, and he does not hesitate to refer to it when highly certain of a particular moral judgment . . . . He would not presume, however, to capture that law in a theory.[20]

This Burkean orientation-- one that accepts the existence and authority of overarching truths but distrusts our ability to grasp those truths through detached reason or to articulate them in an orderly theory-- is what I have in mind in this essay; and I think that Burke's authority gives more than sufficient warrant to call this orientation a form of "traditionalism." I hope to convince you that this sort of traditionalism provides, not a perfect account by any means, but a better account of what religious freedom and church-state separation have meant in this country than either the developmental or political accounts can.

The discussion will proceed in four sections. The first and second sections present the developmental and political accounts, respectively, and discuss the virtues and shortcomings of those accounts in the area of religious freedom. Section three offers a somewhat more detailed discussion of tradition, and of the "traditionalist" interpretation of constitutional change. The last section considers the

[20] Jeffrey Stout, Truth, Natural Law, and Ethical Theory, in Natural Law Theory: Contemporary Essays 71, 83 (Robert P. George ed. 1992) (emphasis added). I have emphasized the sentence that describes an essential component of Burke's position which is often overlooked in contemporary treatments of tradition or of Burke (and which Stout himself seems to forget during the course of his essay).

application of this interpretation to American religious freedom and the idea of separation.

I. The Development Account

Complex communities that last for more than a moment rarely remain static, either in the ways they live or in the ways they believe and talk. Some communities–fundamentalist groups, the Amish, Orthodox Christianity–may place more emphasis on constancy, and may come closer to achieving it, than others. But all communities struggle with the problem of change–and of giving an account of the changes that occur. For many communities, the developmental interpretation offers an attractive account.

A. The Logic of Development

The development account arises most naturally in a community constituted by an articulable truth–or by a commitment to what it regards as an "eternal verity." Thus, the Christian churches have persisted over the centuries in part on the basis of a shared commitment to truths expressed in the standard creeds. The United States, likewise, was "brought forth," as Lincoln put it in the Gettysburg Address, on the basis of dedication to a "proposition." Such constitutive truths can be a community's reason for being; they provide the justification for its existence–and for the authority of the persons or institutions charged with maintaining, expounding, and implementing those truths.

Not every problem that arises in the day-to-day existence of the community will be resolvable, however, simply by the invocation of raw constitutive truths; so over time a body of lower-level or ancillary truths is likely to emerge. Hence, the catechumen who reads the New Testament and

memorizes the Apostles' Creed will barely have scratched the surface of Christian belief, just as the law student who carefully studies the text of the Constitution will have only a rudimentary (and significantly inaccurate) understanding of constitutional law. Moreover, a body of ancillary truths is likely to look quite different at one point in time than it looked decades or centuries earlier; and it may also seem to stand in tension with (if not in outright contradiction to) the more central, constituting truths. Thus, Reformation- era Protestants argued that many of the teachings of the Christian tradition were not to be found in the New Testament or the writings of the Church fathers; and Catholic respondents as well as the Reformers' descendants have been saying similar things about the Reformers' own teachings ever since. Likewise, the opinion in *Dred Scott*[21] seems wildly incongruent with the solemn pronouncements of the Declaration of Independence; and the right announced in *Roe v. Wade*[22] is hard to locate in the due process clause–or the equal protection clause, or the ninth amendment, or any of the other textual corners in which supporters have gone searching for it.[23] The problem is familiar; all communities of any significant tenure encounter it.

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[21] Dred Scott v. Sanford, 60 U.S. 393 (1851).

[22] 410 U.S. 113 (1973).

[23] Cf. Richard A. Posner, Overcoming Law 180-81 (1995):
Roe v. Wade has been the Wandering Jew of constitutional law. It started life in the due process clause, but that made it a substantive due process case and invited a rain of arrows. Laurence Tribe first moved it to the establishment clause of the First Amendment, then recanted. Dworkin now picks up the torch, but relies upon the free exercise and establishment clauses in combination. Feminists have tried to squeeze *Roe v. Wade* into the equal protection clause. Others have tried to move it inside the Ninth Amendment. . . .; still others (including Tribe) inside the Thirteenth Amendment, which forbids involuntary servitude. I await the day when someone shovels it into the takings clause, or the republican form of government clause (out of which an adventurous judge could excogitate the entire Bill of Rights and the Fourteenth Amendment), or the privileges and immunities clause of the Fourteenth Amendment. It is not, as Dworkin suggests, a matter of the more the merrier; it is a desperate search for an adequate textual home, and it has failed.

The development account addresses this concern by asserting that changes in the ancillary doctrine reflect the faithful elaboration and application of the core truths. Elaboration is necessary and proper for at least two reasons. First, human comprehension is finite. So the understanding of the core truths at any given point in time will be incomplete, obscure, and even perhaps, at least in some details, mistaken. It is natural that over time the community may come to understand its constitutive truths more fully; and more complete and accurate understanding will call for restatement of the truths and their corollaries. Second, as the world changes and as new questions arise, it is natural that the ancillary doctrines–which exist, after all, to give practical force and fullness of meaning to the core truths–may need to be amended and supplemented in order to address the specific new questions that arise.[24]

In his treatment of the development of Christian doctrine, John Henry Newman gave the classic account. As against the received understanding, endorsed by apologists such as Bossuet, that Christian doctrine must be always and everywhere the same[25]-- Newman conceded that Christianity (and Catholic Christianity in particular) of the nineteenth century looked very different than the Christianity of the New Testament or the early church fathers. The passage of centuries had indeed revealed "certain apparent inconsistencies and alterations in its doctrine and worship, such as irresistibly attract the mind

[24] In this vein, even while arguing for greater emphasis on "the document" over "the doctrine," Akhil Amar hastens to acknowledge that "[a] documentarian judge does not begin and end with the document. Rather, she begins with the document and then ponders how best to translate its wisdom into workable in-court rules." Akhil Reed Amar, The Supreme Court, 1999 Term: Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26, 80 (2000).

[25] See Owen Chadwick, From Bossuet to Newman 5-6 (2d ed. 1987):

> Bossuet had declared the axiom that variation in religion is always a sign of error; that the Christian religion came from its Lord complete and perfect; that the true Church had maintained immutably, *must* have maintained immutably, the deposit of truth which had been given to it. He stated this axiom in its most absolute and provocative form: not because he intended to provoke, but because he believed that no one who contradicted the axiom could remain a Christian.

of all who inquire into it.'[26] But Newman argued that Catholic Christianity exhibited a "continuous identity of principles.'[27] More specifically, "modern Catholicism is nothing else but simply the legitimate growth and complement, that is, the natural and necessary development, of the doctrine of the early church . . . ."[28] Far from being an embarrassment, Newman argued, such development and apparent change was inevitable in teachings as profound and universally applicable as those contained in Christianity.[29]

In part the necessity of development was a consequence of the finitude of the human mind, which "cannot take an object in . . . simply and integrally" and is particularly limited in its capacity to grasp the kinds of ideas "which from their very depth and richness cannot be fully understood at once."[30] But development was also required to deal with the vast variations in human society that occur over time and space. Thus, "[p]rinciples require a very various application according as persons and circumstances vary, and must be thrown into new shapes according to the form of society which they are to influence."[31] Much of Newman's essay was devoted to a painstaking discussion of the indicia

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[26] John Henry Cardinal Newman, An Essay on the Development of Christian Doctrine 9 (6th ed. 1989).

[27] Id. at 326.

[28] Id. at 169.

[29] See, e.g., id. at 56 (describing ""these special ideas, which from their very depth and richness cannot be fully understood at once, but are more and more clearly expressed and taught the longer they last"), at 207 (arguing that "all great ideas are found, as time goes on, to involve much which was not seen at first to belong to them, and have developments, that is enlargements, applications, uses and fortunes, very various").

[30] Id. at 55, 56.

[31] Id. at 58. See also id. ("Again, if Christianity be an universal religion, suited not simply to one locality or period, but to all times and places, it cannot but vary in its relations and dealings towards the world around it . . . ."), at 56 (arguing that doctrine must develop in order to "keep[] pace with the ever-changing necessities of the world, multiform, prolific, and ever resourceful . . . ").

for distinguishing true developments from corruptions or perversions and to an attempt to demonstrate that institutions such as the papacy and doctrines such as purgatory and original sin were in fact developments rather than corruptions.[32]

Similar themes (usually presented in much less sophisticated form) pervade constitutional discourse-- and for understandable reasons. On the one hand, it is widely accepted that the supremacy of constitutional law both over common law and over the enactments of the elected branches of government–and hence the authority of courts to strike down those other forms of law--depend on constitutional law being grounded in "principles" that are in some sense connected to the Constitution.[33] On the other hand, the specific content of constitutional doctrines often seems far removed from the constitutional text. In addition, those doctrines have manifestly changed over time: a constitutional law treatise today looks very different than one from a half-century or a century ago. These changes are pleasingly accounted for, in the development genre, as elaborations of central, ongoing principles. Thus, theorists develop complicated explanations of how dramatically different "conceptions" can reflect a constant "concept,"[34] or of how "fidelity" to an original idea or principle demands "translation"

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[32] Though I am here placing Newman in the "developmental" camp, as the title of his *Essay on Development* itself suggests, Jaroslav Pelikan describes Newman as "the nineteenth century's principal exponent of the recovery of tradition." Pelikan, supra note 1 at 38. In part this characterization rests on other writings by Newman–in particular his earlier book *Arians of the Fourth Century.* More generally, though, Pelikan's learned and perceptive discussion tends to fuse what I am calling the "developmental" and "traditionalist" positions. For some purposes, this conflation seems appropriate: the positions have important similarities which for some purposes (in particular a defense against criticism based on the assumption of doctrinal immutability) are more important than their differences. For other purposes, however, the differences are real and important, as I hope to show in the course of this essay.

[33] The classic statement is Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 9 (1959).

[34] See Ronald Dworkin, Taking Rights Seriously 134-46 (1977).

to speak to a changed world.[35]

Whether addressed to a religious or political community, the crucial point in the development account is that despite the *appearance* of massive change, and despite the *reality* (in some respects) of change, the essential truths upon which the community is built are said to have remained constant. In this way, the community and the authority of its governing institutions remain secure.

B. Developmental Religious Freedom

Lawyers and scholars who debate issues of separation and religious freedom routinely work in the genre of development, explaining how a favored outcome on a controversial issue is a proper application or elaboration of the principle contained from the outset in the religion clauses (even if the specific outcome seems contrary to what was contemplated by those who adopted the clauses). Thus, advocates easily conclude that the establishment clause embodies a principle of separation that precludes official prayer--even though the First Congress that drafted and sponsored the clause instituted a practice of legislative prayer.[36] Either the world has changed, so that the same principle has a different application today, or else the framers failed to perceive the implications of the principle even for their own time.[37]

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[35] See Lawrence Lessig, Fidelity and Constraint, 65 Fordham L. Rev. 1365 (1997).

[36] See infra notes 182-195 and accompanying text. For a similar argument regarding school prayer, see School Dist. of Abington Township v. Schempp, 374 U.S. 203, 232-42 (1963) (Brennan, J., concurring).

[37] Cf. Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim about Original Intent, 27 W. & M. L. Rev. 875, 919 (1986) ("[T]he appeal to the Framers' *practice* of nonfinancial aid to religion is an appeal to unreflective bigotry. It does not show what the Framers meant by nonestablishment. . . . . I would apply uniformly the very *principle* the Framers considered and accepted . . . .") (emphasis added).

Developmental accounts can of course be either crude or sophisticated. Some advocates almost seem to think that quoting Madison's statement about "threepence" is enough to prove the unconstitutionality of any public funding of a religious institution, even under a "content neutral" program serving secular objectives and encompassing many secular institutions as well.[38] Other lawyers and scholars acknowledge that both the derivation of the proper principles from history or philosophy and the application of those principles to current concerns present complicated inquiries. Though varying dramatically in sophistication, however, most lawyerly arguments both in the courts and the law reviews reflect developmental assumptions.

A principal attraction of the development genre, as suggested, is that it secures legitimacy in a community founded on a commitment to constant, core principles or truths. An added attraction is that the development account humors our conceits about "progress"[39]: it allows us to assert a basic continuity with Western history generally, while at the same time claiming a kind of superiority and original achievement for our own constitutional regime. In this vein, Brian Tierney describes how the basic rationales underlying modern views of religious freedom were understood in the Middle Ages, and he explains the historical and intellectual obstacles that prevented even the best thinkers of that

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[38] See, e.g., Rosenberger v. Rector, University of Virginia, 515 U.S. 819, 873 (1995) (Souter, J., dissenting) ("The principle against direct funding with public money is patently violated by the contested use of today's student activity fee. Like today's taxes generally, the fee is Madison's threepence.").

[39] Newman suggested, for example, that Christian doctrine over the centuries had undergone not simply *change* or adaptation, but rather "*progressive* development." Newman, supra note 26 at 64 (emphasis added). But cf. Chadwick, supra note 25 at 97-98 ("Newman never believed in progress. . . . He believed in religious progress as little as he believed in secular progress, and that was not at all.").

period–Aquinas, for instance–from drawing the correct conclusions.[40] Tierney is sympathetically discerning in his treatment of our medieval forbears. But he also clearly indicates that we are right and they were wrong; and the implication is that if they had been just a little more intellectually courageous or astute they might have seen the cogency of our conclusions and the inadequacy of theirs–even for their own situation.[41] John Noonan and Edward Gaffney adopt a similar attitude.[42]

So the development account connects us (in a self-flattering way) with our past; it also shapes our discourse directed to the present, and the future. Hence, the leading alternatives in contemporary debates over school vouchers or faith-based initiatives are typically presented in developmental terms. In recent years, the most prominent candidates in those debates have been what we can call "no aid" separationism and "substantive neutrality." The first position insists that a principle of "no aid" separationism has been embraced from the time of Madison's *Memorial and Remonstrance* through *Everson v. Board of Education* and in a host of more recent opinions. There is, to be sure, quotable language that can be extracted from such authorities and deployed in support of this view. And the impermissibility of voucher programs and publicly-sponsored "faith-based initiatives" seems the natural

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[40] Brian Tierney, Religious Rights: An Historical Perspective, in Religious Human Rights in Global Perspective: Religious Perspectives 17 (John Witte, Jr. et al eds. 1996).

[41] See, e.g., id. at 33 ("Medieval people were so convinced of the truth of their religion that they could never see dissent from the accepted faith as arising simply from intellectual error, from a mistake in judgment. . . . Our task is surely to understand and explain as fully as possible; but we do not have to condone everything that we have tried to understand . . . .").

[42]See John T. Noonan, Jr. and Edward McGlynn Gaffney, Jr., Religious Freedom: History, Cases, and Other Materials 87 (2001) ("[T]here were venerable teachers– the Gospel itself, never a small authority– that pointed to more merciful and more magnanimous conclusions. Practice was decisive. In the world Thomas [Aquinas] knew, heretics were sent to the flames.").

application of that principle to current circumstances.[43]

Justice Souter's recent dissenting opinion in *Mitchell v. Helms* provides a nice illustration. The establishment clause at the time of its adoption embodied a "no aid" principle, Souter contends; that principle was recognized in *Everson*, and it has been consistently recognized ever since. "In all the years of its effort, the Court" has applied that principle, Souter stoutly maintains, "in *every case* . . .."[44] Appearances and common opinion notwithstanding, "[t]he substance of the law has . . . not changed since *Everson*." Souter concedes that "[e]mphasis on one sort of fact or another has varied depending on the perceived utility of the enquiry, but all that has been added is repeated explanation of relevant circumstances. . . ."[45] Nor is he embarrassed to make this claim in a dissenting opinion: despite their protestations to the contrary, even the Justices in the majority in fact accept the law as Souter states it and are merely "misappl[ying]" it.[46]

The alternative "substantive neutrality" position, represented by Justice Thomas's opinion in *Mitchell v. Helms*[47] and powerfully advocated in recent years by scholars such as Michael McConnell and Douglas Laycock, also fits easily into the development genre. Perhaps the most straightforward version argues that the true principle protected by the religion clauses is neither "no aid" nor "separation" *per se,* but rather something like "choice" or "voluntarism" or perhaps simply "religious

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[43] See, e.g., Laura S. Underkuffler, Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence, 75 Ind. L.J. 167 (2000).

[44] Mitchell v. Helms, 530 U.S. 793, 869 (2000) (Souter, J., dissenting) (emphasis added).

[45] Id. at 899.

[46] Id. at 911.

[47] 530 U.S. 793 (2000).

freedom": "separation" is only a subsidiary doctrine designed to give effect to that more fundamental value or principle. But under modern conditions, in which government routinely aids a host of interests and programs, "substantive neutrality" is a better device for serving that value than old-fashioned separation is.[48]

Laycock offers a somewhat more ingenious (and perhaps *too* clever[49]) version of the position.[50] He acknowledges that "separation" has been and continues to be an authoritative principle. But separation of *what*? Contrary to what most separationists have supposed, Laycock argues that the true principle demands separation not of *government* and *religion*–or even of *church* and *state per se*–but rather of *governmental influence* and *religious choice*.[51] If citizens or groups are excluded from government programs or benefits because of their religious character, they are in effect penalized for choosing to be religious[52]: under modern conditions, therefore, a "no aid" rule actually *violates* the separation principle by exerting influence over religious choice. Conversely, if government maintains "substantive neutrality," thus allowing all individuals or groups that otherwise qualify to participate in public benefits and programs without regard to religion, government remains "separated" from religious

[48] See, e.g., Michael W. McConnell, Governments, Families, and Power: A Defense of Educational Choice, 31 Conn. L. Rev. 847 (1999). See also Nicole Stelle Garnett and Richard W. Garnett, School Choice, The First Amendment, and Social Justice, 4 Tex. Rev. L. & Pol. 301 (2000).

[49] McConnell, while endorsing the substance of Laycock's position, points out (correctly, I believe) that his use of the term "separation" does not correspond to the way the term has typically been used in modern establishment clause jurisprudence. Michael W. McConnell, Neutrality, Separation and Accommodation: Tensions in American First Amendment Doctrine, in Law and Religion 63, 77 n. 1 (Rex. J. Ahdar ed. 2000).

[50] Douglas Laycock, The Underlying Unity of Separation and Neutrality, 46 Emory L.J. 43 (1997).

[51] See, e.g., id. at 69 ("Minimizing government influence is consistent with the central meaning of separation–it maximally separates government power and influence from religious belief and practice.")

[52] Id. at 71.

choices. In Laycock's view, therefore, substantive neutrality is not in tension with "separation"; rather it gives a correct understanding of what separation means.

C. The Strain of the Development Account

Arguments grounded in the development account are attractive, as we have seen, for a variety of reasons: they can serve to sustain a community's sense of identity and continuity and to support the legitimacy of the community's institutional authorities. These attractions may help to explain the acceptance, both in religious communities and in the American constitutional community, of development-genre arguments that might ordinarily seem far-fetched.[53] Nonetheless, development-based arguments can become strained beyond plausibility. It may be believable that a principle once thought to mean "red" now means "pink"-- or perhaps "orange," or even "purple." But when "white" becomes "black," even the most loyal devotees are likely to balk–and to protest that the underlying principle has not merely "developed": it has been amended, replaced, or even repudiated.

Thus, within religious communities critics may argue and even the faithful may concede that particular changes cannot credibly be explained as "developments."[54] Similarly, when religion clause

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[53] For a somewhat more extended discussion of the point, see Steven D. Smith, The Religion Clauses in Constitutional Scholarship, 74 Notre Dame L. Rev. 1033 (1999).

[54] For an especially thoughtful exploration, see John T. Noonan, Jr., Development in Moral Doctrine, in The Context of Casuistry 188 (James F. Keenan, S.J. & Thomas A Shannon eds. 1995). With specific reference to Catholic moral teachings on the subjects of usury, slavery, marriage, and religious freedom, Noonan describes the psychological imperatives that underlie the desire for continuity:

> There is a praiseworthy desire to maintain intellectual consistency. There is a longing in the human mind for repose, for fixed points of reference, for absolute certainty. There is alarm about the future: what else can change? There is the theological conviction that as God is unchanging, divine demands must also be unchanging. How could one have gone to hell yesterday for what today one would be held virtuous in doing? How could one have done virtuously yesterday what one would be damned for doing today? How could one once have been bound to a high and

doctrine comes to adopt a "no endorsement of religion" prohibition that implies that central expressions of American political thought having clear religious language--the national motto ("In God We Trust"), Lincoln's Second Inaugural Address, the Declaration of Independence (with its with its explicit invocations of deity), and even landmarks of religious freedom such as Jefferson's Virginia Statute ("Almighty God hath created the mind free")-- are at least in principle unconstitutional violations of religious freedom, we are entitled to feel skeptical about the claim that this doctrine is simply a faithful development of a principle that was already latent in the First Amendment from the outset.

But if the doctrine is not a development of the true or original principle, then what is it?

II. The Political Account

Probably the most natural answer is that what is being offered as an interpretation of an authoritative ongoing principle is in reality the imposition of the opinions or preferences of a particular interpreter-- or of someone *pretending* to interpret. So changes in doctrine would reflect not the elaboration of a principle, but rather changes in the opinions and preferences of judges, politicians, and citizens, or in the balance of power among these actors. In short, decisions and doctrines–and changes in doctrines–are not principled, but rather "political."

In constitutional discourse, this account does not and for understandable reasons probably

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> demanding standard that later is said to be unnecessary? How could one once have been permitted to engage in conduct that is later condemned as uncharitable? A mutation in morals bewilders.

Id. at 200. Nonetheless, Noonan concludes that doctrinal change does occur, and not merely as a result of logical development or deeper spiritual insight. "The human desire for repose is not to be satisfied in this life." Id.

never could provide the orthodox account of constitutional decisions and doctrines[55]; but it is a perfectly familiar oppositional theme. The debate between those who say constitutional law is principled interpretation and those who say it is politics in disguise is a perennial one.

A. The Politics of Separation

Nearly all participants in religion clause discourse invoke the political account at least occasionally–that is, when characterizing *positions they oppose*. Thus, strict separationists often account for recent tendencies away from a "no aid" position by pointing to political influences and preferences. Perhaps the "Religious Right" has become too powerful. Or the Justices most responsible for the change in direction–Thomas, Scalia, Rehnquist–are Republican appointees.[56] Conversely, others argue that the "separationist" decisions themselves were a politically-motivated imposition upon the Constitution.[57]

Occasionally a political interpretation is offered in a more even-handed and even laudatory

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[55] Usually the "political" characterization has a critical or subversive tone, but this is not inevitable: it is possible to argue that the work of courts is or should be political without thereby disparaging them. See, e.g., Louis Michael Seidman, Our Unsettled Constitution: A New Argument for Constitutionalism and Judicial Review (2001); Thomas W. Merrill, A Modest Proposal for a Political Court, 17 Harv. J.L. & Pub. Pol. 137 (1994). Nonetheless, this characterization places the courts' authority at risk, since it is not easy to say why courts should make political decisions contrary to those of the elected branches. Thus, Merrill acknowledges that "[a]s long as the Court can peddle the idea that its decisions are fully determined by law, . . . the Court will have every incentive to continue doing so, because its power as a political institution is greater when it claims that its decisions are fully determined by law." Id. at 146.

[56] See, e.g., Editorial, 54 Church and State 14 (230) (Nov. 2001):

> How did we get to this deplorable stage where the Supreme Court may be on the verge of approving direct tax aid to religious schools? It stems largely from the 1980s, when Presidents Ronald Reagan and George Bush stacked the court with ideologues opposed to church-state separation.

[57] See, e.g., David Barton, Original Intent: The Courts, the Constitution, and Religion 191-95 (1997).

way. Thus, John Courtney Murray argued strenuously against those whom he caustically described as "[t]heologians of the First Amendment, whether Protestant or secularist"–that is, against those who viewed the American law of church-state separation as a "more or less articulated political theory," a "religious philosophy," or a "piece of ecclesiology."[58] Contrary to prevailing views, Murray contended, the American arrangement was not an expression either of "secular liberalism" or of "Protestant religious tenets."[59] On the contrary, the First Amendment religion clauses were "the work of lawyers, not theologians or even of political theorists." Growing out of "the peculiar conditions of American society," the clauses reflected the "necessity or utility for the preservation of the public peace, under a given set of conditions."[60] In short, they were "articles of peace," not "articles of faith."[61] But Murray hastened to add that

> in regarding the religion clauses . . . as articles of peace and in placing the case for them on the primary grounds of their social necessity, one is not taking low ground. Such a case does not appeal to mean-spirited expediency nor does it imply a reluctant concession to *force majeure*. . . .[T]he appeal to social peace is an appeal to a high moral value. Behind the will to social peace there stands a divine and Christian imperative. This is the classic and Christian tradition.[62]

In earlier writings (of which I hereby repent, though only partially), I have likewise argued that the discourse of religious freedom not only *is* but *should be* "unprincipled." Religious freedom, I have

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[58] John Courtney Murray, S. J., We Hold These Truths 54, 51-52 (1960).

[59] Id. at 49.

[60] Id. at 56-57.

[61] Id. at 49, 60.

[62] Id. at 60. Murray's view that the religion clauses were based on "a divine and Christian imperative" but were not an expression of any "ultimate beliefs" was at least a complex position; particularly in the context of a book emphasizing that the American constitutional order was based on truths, it may not have been wholly consistent.

argued, is the accomplishment of a prudently administered *modus vivendi*–not of any faithful development of constant and articulable principles.[63]

More recently, John Jeffries and James Ryan have provided an unapologetically political account of establishment clause jurisprudence.[64] Though offering no normative prescriptions,[65] Jeffries and Ryan argue that the doctrine and decisions under the establishment clause have not been compelled by the Constitution itself–that is, by the text or the "original meaning" of either the First or Fourteenth Amendments[66]– and that "a more complete and coherent account of modern constitutional doctrine" in this area can be achieved by considering the decisions "*as if they were* products of political contests among various interest groups."[67]

Though Jeffries and Ryan go on to make a good case for this claim, their italicized "*as if*" calls attention to a serious question that the political account leaves unanswered. Normally such an "as if" accompanying an explanation is calculated to highlight a distinction between what we might call the *real* and a merely *apparent* explanation. If a biologist says, for example, that life forms look "as if" they had developed in accordance with some conscious, purposeful design, we expect him to go on to explain how these life forms were not *in fact* the result of any such conscious design.[68] Do Jeffries and Ryan

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[63] See, e.g., Steven D. Smith, Getting Over Equality 45-57, 62-82 (2001).

[64] John C. Jeffries, Jr. and James E. Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279 (2001).

[65] Id. at 368-69 (asserting that "[o]ur analysis . . . does not serve any normative agenda" and that "[o]ur analysis. . . is entirely positive").

[66] Id. at 281, 292-97.

[67] Id. at 280 (emphasis in original).

[68] See generally Richard Dawkins, The Blind Watchmaker (1986).

mean to draw a similar distinction-- to indicate that although modern establishment clause developments can be described "as if" they resulted from political interests and alignments, they have not *in fact* resulted from such forces? But on this point, Jeffries and Ryan seem undecided. They mean with the "as if" to call attention to a difference between the "external" account that they give of establishment clause developments and the more "internal" account that would reflect the perspective of the actual participants– namely, lawyers and judges. But Jeffries and Ryan do not say how these markedly different types of explanations relate to each other or whether one type of explanation is in fact more "real" or "true" than the other: their "as if" indicates their reticence to make any such claim.[69] This ambiguity points to a problem with the political account.

B. The Strain of the Political Account

Unlike development-based arguments, which must strain to show how decisions are not the product of current preferences or political factors but are dictated by some principle bestowed on us by the Constitution, political arguments and interpretations can contend for or explain decisions in the terms most immediately and plausibly relevant to them. Thus, by contrast to more orthodox religion clause discourse, which has become renowned for its artificiality, political-genre discourse has a refreshing honesty.

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[69] Jeffries and Ryan describe their "political" account as an "external" explanation of establishment clause decisions, and they assert that this "external" account is "richer and more informative" than accounts that primarily focus on the reasoning offered in the decisions. Supra note 64 at 369. However, they qualify this claim with the concession that "[r]easoning, doctrine, and precedent matter, and they have certainly figured in the history of the Establishment Clause." Id. Just how the "external" and "political" influences interact with "internal" factors such as legal reasoning presents a question that Jeffries and Ryan notice but say little about. See also infra note 71.

Or does it? While castigating conventional legal discourse for its "bad faith," Duncan Kennedy has warned that radical or critical discourse can itself be in "bad faith" by *overemphasizing* the indeterminacy and ideological character of law.[70] A similar caution might apply to a political account of religion clause discourse. After all, however confused and unprincipled and occasionally hypocritical that discourse might seem (thus inviting the cynical conclusion that "it's just politics"), the fact remains that issues of separation and religious freedom are decided not simply through the mobilization of political forces, the counting of votes, or the normal political processes of lobbying, logrolling, and compromising. ("We'll give you prayer at the football games if you'll take it out of the graduation ceremonies." "Not unless we get the 'moment of silence' in the home room classes." "The teachers won't actually use the word 'prayer'?" "No." "Okay. We've got a deal.") Instead, these issues are debated and, it seems, resolved largely through a discourse that at least appears to turn on the interpretation and application of principles, values, or higher and constitutive truths.

A proponent of the political account might respond, of course, that our seemingly normative discourse is merely cosmetic: in fact different persons and groups simply promote their interests by making arguments in the mandatory normative language of the law. But this response seems only half-plausible. In the first place, the very distinction between "principles" and "interests" is elusive in this context. For some parties, no doubt, there is a discernible difference between their perceived "interests" and the normative and legal arguments they make. But for other groups, the distinction

[70] Duncan Kennedy, A Critique of Adjudication (Fin de Siecle) 198 (1997) (observing that "the insistence that law is always and everywhere ideological" involves as much denial as more conventional discourse does, reflecting the fact that "[r]adicals have commitments to the presence of ideology in adjudication that it would be hard to give up").

seems illusory: "interests" and "principles" converge. The distinction seems especially problematic for groups organized precisely for the purpose of promoting some particular view of religious freedom or church-state relations. What are the "interests" of the American Civil Liberties Union, or Americans United for the Separation of Church and State, or the Rutherford Institute, apart from the principles or normative visions that these groups seek to promote? Moreover, even if the distinction is valid, and even if public debate carried on in normative terms is *sometimes* a facade behind which political agendas are advanced, still it seems implausible to suppose that vast numbers of lawyers, scholars, judges, legislators, and citizens generally could conspire to carry on such a charade so persistently: they must believe– many of them anyway– that there is something beyond raw politics in the public debate.[71]

In short, the public debate seems to have a dimension that goes beyond "politics" in the crass sense, and even beyond mere prudence. Unless we are prepared to dismiss this more ethical dimension as mere sham or self-deception, then it seems we need to go beyond the political account in order to understand how separation and religious freedom come to have a concrete–but ever changing–meaning in our society.

III. Recovering Tradition

My suggestion is that we can understand this phenomenon more accurately by conceiving of

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[71] Jeffries and Ryan are careful to acknowledge the point. See Jeffries and Ryan, supra note 64 at 280: [W]e do not claim that the justices thought of themselves as political actors, still less as representatives of religious interests, or that they consciously desired to conscript the Constitution to such ends. On the contrary, we believe that many justices would be shocked by this description of their work and would protest, in all sincerity, that they tried to elucidate, without favoritism or prejudice, the principles they understood to be enshrined in the First Amendment. We accept that representation completely.

American religious freedom neither as the developing articulation and application of timeless truths nor as a simple product of the shifting alignments of politics, but rather as a tradition. But "tradition" is a contested concept.[72] And the very notion of "tradition" has become obscure, and suspect, in influential intellectual quarters: it is scarcely an exaggeration to say that the modern age has not only been hostile to tradition but indeed has virtually *defined itself* as a revolt against tradition.[73] This anti-tradition animus is often, and correctly, associated with what we call "the Enlightenment"–"[t]radition," Donald Livingstone observes, "is the great horror of the Enlightenment"[74]-- but it is important to recognize that even before the Enlightenment, another major contributor to modernity–namely, the Protestant Reformation–had been similarly antagonistic to the notion of tradition.[75] So the modern intellectual climate's pervasive suspicion of tradition has more than one eminent forebear.

This inherited hostility, especially intense in academic environments,[76] presents tradition in

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[72] Cf. Terrence W. Tilley, Inventing Catholic Tradition 8 (2000) (describing "the tradition of arguing about what constitutes tradition!").

[73] See Kronman, supra note 7 at 1044 (observing that "the self-conscious rejection of all traditionalist thinking [is], in fact, one of the principal badges by which the champions of modernity have, from the beginning of their battle against unenlightened superstition, sought to distinguish themselves").

[74] Donald W. Livingstone, The Founding and the Enlightenment: Two Theories of Sovereignty, in Vital Remnants: America's Founding and the Western Tradition 243, 244 (Gary L. Gregg II ed. 1999).

[75] See Pelikan, supra note 1 at 9, 43-44.

[76] In recent years, however, some scholars (including legal scholars) have helpfully clarified the idea of tradition. Anthony Kronman has written insightfully on the importance of tradition in law. See, e.g,. Kronman, supra note 7. In an illuminating book H. Jefferson Powell draws on the work of the philosopher Alasdair MacIntyre to give an account of a tradition as a "practice"–a "'coherent and complex form of socially established cooperative human activity'"–that displays four characteristics: the practice is "historical in nature," it is "socially embodied," it is "fundamentally interpretive in nature," and it consists not of "immobile stability but rather of evolving arguments in conflict." Powell, supra note 10 at 33, 20, 24-27, 27, 29. See also Thomas W. Merrill, Bork vs. Burke, 19 Harv. J. L. Pub. Pol. 509 (1996); David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877 (1996). Michael McConnell has likewise emphasized the importance of tradition in constitutional law in several recent articles. See Michael W. McConnell, Tradition and Constitutionalism before the Constitution, 1998 U. Ill. L. Rev. 173 (1998) [hereinafter, McConnell, Tradition]; Michael W. McConnell, The Right to Die and the Jurisprudence of

distorted form, making it difficult for us not only to respect tradition but even to understand what "tradition" might mean. So we need to begin by trying to understand the modern mindset that conceives itself in opposition to tradition, and then to explain how this mindset gives us a distorted conception of what tradition is.

A. Modernity Contra Tradition

For present purposes, I think we can understand this mindset in terms of two central and closely-related qualities or commitments, which together blend an epistemic with an ethical dimension.

1. *Epistemic optimism*. The first of these qualities can be described as "epistemic optimism" or, as John Dewey put it, "a new morale of confidence, control, and security."[77] The partisans of modernity, whether religious or Enlightened, are not blind to human fallibility, of course. But they are confident that we human beings are able to grasp the truth– not infallibly or all at once, perhaps, but by-and-large and over time-- if only we will stick to the proper source or follow the right method. For

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Tradition, 1997 Utah L. Rev. 665 [hereinafter, McConnell, Jurisprudence]. In other contexts, however, and specifically with respect to religious freedom, McConnell displays a "principled" and "rationalist" orientation more congenial to the developmental position. See, e.g., McConnell, supra note 49 at 77 ("It is one thing to be attentive to the specific facts of each case in applying constitutional doctrine, but it is quite another to maintain that two ostensible constitutional principles are in direct conflict, and to refuse to choose between them. When A contradicts B, they cannot both be correct. If A appears to contradict B, it is the interpreter's responsibility to decide that A is correct and not B, that B is correct and not A, or (possibly) to find a synthesis of A and B that combines the best features of both. Simply to vacillate between them on the basis of 'the particular facts of each case' is an invitation to incoherence and ultimately to perceived illegitimacy.").

Accounts of tradition differ among themselves, and my own (incomplete) account may differ from the others cited above. In particular, I suspect there is a fundamental divide between traditionalists whose underlying presuppositions are fundamentally skeptical and those for whom tradition is a means of access to larger truths. See supra notes 18-20 and accompanying text. Nonetheless, there is considerable overlap permitting the following discussion to draw upon the works just cited at various points.

[77] John Dewey, What I Believe, in 1 The Essential Dewey 22, 23 (Larry A. Hickman & Thomas M. Alexander eds. 1998).

some, that source might be scripture– *sola Scriptura*: witness the prodigious self-assurance of Martin Luther, brandishing his Bible, in the face of an institutional authority speaking for centuries of Christian tradition.[78] Or the source might be "reason," properly conducted according to the methods articulated by the likes of Descartes or Locke. Or perhaps, as so many (including in law) have hoped, it is "science" or the "scientific method" that will deliver the reliable truths.

Whatever the source or method, the modern mind is confident that it has the means to discern the truth (even though the process of discernment may be arduous, and gradual). And this confidence supports not only a set of dry epistemological claims but an exuberant ethical stance as well: it tells us not only how and what to *believe* but, more importantly, how we must *live*. "Here I stand!" Martin Luther exclaims, "I can do no other." In a more rationalistic spirit, Kant agrees. "Enlightenment" means thinking for yourself; consequently, an "inability to make use of [your] own understanding without the guidance of another" is a form of "immaturity" reflective of "[l]aziness and cowardice."[79] Science, likewise, has not been viewed as a mere pursuit of the mind: for more than two centuries a host of thinkers, including legal thinkers, has embraced one or another version of the dream of a scientifically-governed society.[80]

2. *The ideal of detachment*. A closely related quality of the modern mindset–and one that

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[78] Cf. Heiko A. Oberman, Luther: Man between God and the Devil 299 (Eileen Walliser-Schwarzbart tr. 1993) ("Luther rarely used the commonly employed scholarly qualification 'if I am not mistaken'-- *ni fallor*– but made generous use of his favorite expression, 'certainly'–*immo*.").

[79] Immanuel Kant, An Answer to the Question: What is Enlightenment?, reprinted in What is Enlightenment? Eighteenth-Century Answers and Twentieth-Century Question 58 (James Schmidt ed. 1996).

[80] For a detailed if unsympathetic account of this ideal in its most robust period, see F. A. Hayek The Counter-Revolution of Science: Studies on the Abuse of Reason (1952).

likewise starts out as an epistemological claim and grows into an ethical commitment– might be called the "ideal of detachment." Modern epistemic self-confidence, just noted, is closely tied to the notion that the way to attain truth is to extricate ourselves from the corrupting influence of personal interests, local culture, and the scandalous particularities of custom and prejudice in order to attain a more detached or abstracted view of things. The persistent modern theme, as Ernest Gellner approvingly explains, holds that "liberation from error requires liberation from culture."[81] Thus, for Protestant reformers the Bible was a trustworthy source in part because it was outside the corruptions of Romish and heathen traditions. In philosophy, Descartes set the example: regarding the "old foundations" composed of the received opinions of antiquity and of the various academic disciplines, Descartes resolved to "try to get rid of them once and for all, in order to replace them later on, either with other ones that are better, or even with the same ones once I had reconciled them to the norms of reason."[82] The ideal of detachment was expressed in an arresting image: in his pursuit of truth Descartes aspired, he said, "to be *more a spectator than an actor* in all the comedies that are displayed there [in the world]."[83]

Abstract detachment was an ideal regulating not only the sources of truth or the methods of

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[81] Ernest Gellner, Reason and Culture 2 (1992).

[82] Rene Descartes, Discourse on Method, in Discourse on Method and Meditations on First Philosophy 1, 8 (Donald A. Cress tr., 4th ed. 1998) (first published 1637). "[I]n truly rationalist spirit," Gellner observes, Descartes "decided to declare independence of the accidental assemblage of beliefs, of all cultural accretion, and to set out independently on a re-exploration of the world." Gellner, supra note 81 at 18. See also Alister McGrath, The Genesis of Doctrine: A Study in the Foundation of Doctrinal Criticism 92 (1990) (describing "the grand retreat from history characteristic of the tradition of Descartes and Kant, in which an attempt is made to transcend the limitations of historical location by purifying thought of its historical contingencies").

[83] Descartes, supra note 82 at 16 (emphasis added).

seeking truth, but also the form of truth to be sought. For scientists, Michael Polanyi observes, the ideal has been to articulate something like the Copernican theory that "equally commends itself to the inhabitants of Earth, Mars, Venus, or Neptune, provided they share our intellectual values."[84] In a similar spirit, Carl Becker explained that when eighteenth-century thinkers turned to history and social science for guidance in constructing a new, more rational foundation for ethics and politics, what they searched for in the data was "[m]an *in general*"–something to be found only by "*abstracting from all men in all times and all places* those qualities which all men shared." Their objective was to "*disengage* from [the past] those ideas, customs, and institutions which are so widely distributed and so persistent in human experience that they may be regarded as embodying . . . 'constant and universal principles of human nature'."[85]

This commitment to abstraction and epistemic detachment persists even in modern partisans of reason who might disagree with virtually every specific claim, taken one-by-one, advanced by progenitors such as Descartes. Contemporary thinkers typically have little use for Descartes's foundationalism, his confidence in the possibility of certainty, his mind-body dualism, or his reliance on God as the guarantor of the trustworthiness of our knowledge. Nonetheless, Descartes's "spectator" ideal is readily discernibly in the epistemic goal-- a goal that is central, Gadamer observes, to "the model of the natural sciences"-- to "sever one's bond with life, to attain distance from one's own history."[86]

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[84] Michael Polanyi, Personal Knowledge 4 (1958).

[85] Carl Becker, The Heavenly City of the Eighteenth Century Philosophers 99, 98 (1932) (emphasis added)

[86] Hans-Georg Gadamer, Truth and Method 7 (2d rev. ed. 1999). Accord Polanyi, supra note 84 at vii, 4-9.

A similar ideal is apparent in contemporary political and moral discussions.[87] Let a controversial question of justice or political morality arise, and the contemporary thinker will instinctively argue by deploying devices like the "original position" and the "veil of ignorance,"[88] or by appealing to the conclusions we would ostensibly reach in an "ideal speech situation" (as opposed to our *actual* speech situations, which are presumptively tainted with error and self-interest)[89]. What are these common discursive techniques if not devices designed to achieve spectator-style detachment--by stripping us of our concrete interests and commitments and by removing us from our immersion in particular situations and traditions?[90] Anthony Kronman observes in this vein that both utilitarians and liberal rights advocates argue by abstracting away from the concrete particularities of life while purporting to adopt a "timeless point of view."[91]

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[87] Indeed, the influence of the ideal is not limited to areas typically associated with science and philosophy. Joseph Dunne describes the "behavioral objectives model" of teaching– a model "equipped with a conception of rational action whose credentials had already been established ([supporters] supposed) in the empirical sciences and in their applications in industry and other fields." Joseph Dunne, Back to the Rough Ground 7 (1993). In this model, teaching should aim to promote behavioral objectives that are "verifiable," and "[t]he verification being insisted on was of a kind that could be carried out by a *detached observer* who could not be assumed to have any familiarity with the teacher's situation or background." Id. at 3 (emphasis added). Thus,

> teaching is no longer seen as embedded in particular contexts or within cultural, linguistic, religious, or political *traditions* which may be at work in all kinds of tacit and nuanced ways in teachers and pupils as persons. Or, rather, it is suggested that everything essential in teaching can be *disembedded* from such contexts and traditions . . . .

Id. at 5 (emphasis added).

[88] See generally John Rawls, A Theory of Justice (1971). Though these metaphors are not as central to Rawls's more recent work, they arguably underlie its continuing influence; and other thinkers continue to appeal to the notions. See, e.g., C. Edwin Baker, Injustice and the Normative Nature of Meaning, 60 Mary. L. Rev. 578, 579-83 (2001).

[89] For one recent use of the Habermas's "ideal speech situation" as an argumentative device, see Deborah Hellman, The Expressive Dimension of Equal Protection, 85 Minn. L. Rev. 1, 23 (2000).

[90] Cf. George Parkin Grant, English-Speaking Justice 19 (1974) ("In the original position we all would choose fairly because we would be abstracted from knowing the detailed facts about our condition in the real world.").

[91] Kronman, supra note 7 at 1039-40.

3. *Enlightened dichotomies*. By aspiring to distance understanding or cognition from actual practices, the ideal of detachment sponsors a series of distinctions or polarities that have come to pervade our discourse. In their academic and hence secular versions,[92] these dichotomies typically pit "reason" against some item on a long list of opposing terms: "reason" versus . . . "custom," or "culture," "authority," "intuition," "emotion,"[93] "faith," or "prejudice." The terms reflect a commonly perceived divide between "theory" and "practice"-- another standard dichotomy. These dichotomies and the commitments that support them in turn generate an overall image of the way life is supposed to be lived. The basic theme is that the items in the second column (custom, culture, emotion, and so forth) are to be brought into subjection to those in the first column (reason, theory). Practice should be made to conform to the prescriptions of theory. "Custom" should be brought before the bar of "reason" and, where found wanting, sentenced and reformed accordingly. Vittorio Hosle explains the aspiration, which he connects with Kant, to "bring the Enlightenment into its truth: no external validity claims are accepted; every authority has to justify itself before reason."[94]

4. *The modern conception of tradition*. These dominant commitments and the associated

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[92] The preceding discussion suggests that there is a similarity between modern secular rationalism and modern religious fundamentalism: in different ways, both positions reflect the modern combination of epistemic self-confidence based on a privileged method of discerning truth and the ideal of detachment. In this sense, secular rationalism and religious fundamentalism are not so much ancient, implacable foes as feuding siblings sired by modernity. So the occasional reference to "secular fundamentalism" is more than a catchy criticism. See Paul F. Campos, Secular Fundamentalism, in Paul F. Campos et al., Against the Law (1996). Since religious fundamentalism has little hold in the legal culture or the academy, however, this paper will concentrate on the rationalist version of the modern, anti-traditionalist mentality.

[93] Cf. Lynne Henderson, The Dialogue of Heart and Head, 10 Card. L. Rev. 123, 123-24 (1988) ("And it is not only the law that abhors emotion– philosophy, science, and Western culture have explicitly condemned it since the Enlightenment. As a result, people cursed with both hearts and brains are often faced with an either/or: either they suppress their hearts or they suppress their brains.").

[94] Vittorio Hosle, Objective Idealism, Ethics, and Politics 41 (1998).

dichotomies in turn generate a particular view of tradition. "Tradition," in this understanding, is another term in the second column in the standard dichotomies: it is simply "practice" or "custom," viewed in an extended time frame. As such, tradition is different than–and indeed something to be contrasted with–"reason," theory, truth. At its best, therefore, "tradition" is raw material that desperately needs to be judged and disciplined by the detached understanding. More often, as Kronman observes, tradition is equated with "unenlightened superstition" or "meaningless debris"[95] or, as Holmes famously put it, "blind imitation of the past."[96] Robert Nagel notes the influence of this attitude in adjudication: "courts often operate under the assumption that beliefs that originate in tradition . . . are impermissible bases for public policy, unless they can be justified by some rational standard extrinsic to the tradition."[97]

Once again, this suspicion of tradition has both a Protestant and an Enlightenment pedigree. Jaroslav Pelikan explains that Martin Luther viewed human tradition "contemptuously" and that Thomas Jefferson saw tradition as "chiefly a hindrance."

> Each in his own way, Jefferson and Luther was summoning their contemporaries to move beyond tradition or behind tradition to authenticity: Tradition was relative and had been conditioned by its history, Truth was absolute and had been preserved from historical corruption.[98]

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[95] Kronman, supra note 7 at 1044, 1056.

[96] Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). The association is probably most powerful, and most damning, when it is casually made, as if the matter were self-evident. Thus, the editor's introduction to a book on *Reason and Culture* warms up with what are apparently regarded as truisms:

> Ignorance has many forms, and all of them are dangerous. In the nineteenth and twentieth centuries our chief effort has been to free ourselves from *tradition and superstition* in large questions . . . .

R. I. Moore, Editor's Preface to Ernest Gellner, Reason and Culture ix (1992) (emphasis added).

[97] Robert F. Nagel, Constitutional Cultures 116-17 (1989).

[98] Pelikan, supra note 1 at 43, 44.

B. Rehabilitating Tradition

If the familiar modern mindset produces a distorted conception of "tradition," as I have asserted, then what would a more accurate depiction look like? We can develop a clearer picture by contrasting the traditionalist orientation with the modern one on all of the points just discussed. Instead of *optimism* traditionalism displays, if not pessimism, at least *epistemic modesty*. Rather than *detachment*, traditionalism embraces an *ideal of embodiment*. Consequently, tradition does not celebrate the standard "theory–practice" dichotomies, but rather resists or seeks to dissolve them.

This is a summary statement in need of elaboration. As discussed, the modern, rationalist mind is characterized by epistemic self-confidence-- a confidence often associated with belief in some reliable method of discerning truth. By contrast, the traditionalist mind is less sanguine on both points. This is emphatically not to say that traditionalism is given to skepticism in any strong form, or to "relativism" in the popular sense: the point is crucial– and a common source of misunderstanding– so we will return to it shortly. Though not deeply or ultimately skeptical, however, the traditionalist understands that human cognition is severely limited, and fallible[99]; and he doubts that these defects are to be overcome simply by formulating and following some particular method of discerning truth. Consequently, the traditionalist favors using (though always cautiously, and with reservations) *all* of the

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[99] Cf. McConnell, Jurisprudence, supra note 76 at 684 (arguing that "[t]he voice of tradition is thus the voice of humility"). See also Strauss, supra note 76 at 891 ("[T]he traditionalism that is central to common law constitutionalism is based on humility and, related, a distrust of the capacity of people to make abstract judgments not grounded in experience."). In a similar vein, Thomas Merrill argues that what he calls "conventionalism" is properly "skeptical about the power of human reason to reorder society in accordance with some overarching rational plan." Merrill, supra note 76 at 519.

resources that hold out some promise of illumination or insight[100]-- reason, intuition, and faith; science, philosophy, scripture, and poetry-- and he particularly emphasizes the value of listening deferentially to the teachings that have filtered down through the centuries and that reflect a sort of time-tested distillation of these various sources.[101]

Deference, to be sure, is not veneration, much less abject submission. So if the rationalist objects with Descartes that received beliefs have often proven to be mistaken, the traditionalist will quickly and heartily agree[102]-- but will then quietly point out that our own judgments formed in defiance of tradition and in an effort at independent thought turn out to be mistaken at least as often. After all, who today thinks that Descartes's project succeeded?

Similarly, the traditionalist doubts that our propensity to err can be remedied by detaching ourselves from what we understand most intimately-- our own culture, language, particular beliefs– in a vain effort to gain a "God's eye" view of things. We will be better served, she thinks, by acknowledging that we are, inevitably, immersed in our local situation and by trying to see as much and as clearly as we can from that perspective–understanding at all times that it *is* a local framework within which we understand.[103] In this respect, the traditionalist can claim the support of a variety of

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[100] Cf. Nagel, supra note 97 at 109-10 (arguing that "rationalism . . . does not exhaust the available methods of moral and intellectual inquiry. It is not the same as insight, creativity, wisdom, vision, instinct, or empathy.").

[101] Cf. Strauss, supra note 76 at 892 (describing tradition as "the accumulated wisdom of many generations").

[102] Cf. McConnell, Jurisprudence, supra note 76 at 683 ("To be sure, there can be bad, evil, or counterproductive traditions.").

[103] In this sense, it might be said that traditionalism *is* relativistic; but it need not be relativistic in the sense that those with moral commitments–a group that includes, I suspect, nearly all of us–sometimes find alarming.

movements in twentieth century thought associated in different ways with thinkers like Wittgenstein, Gadamer, Kuhn, Polanyi, and the American pragmatists (although, as we will see, traditionalism emphatically does *not* embrace the relativist implications associated, rightly or wrongly, with some of those thinkers). So instead of "detachment," the traditionalist orientation proclaims an ideal of "embodied" or "embedded" understanding– an ideal, like that of detachment, in which the epistemic and ethical dimensions blend inextricably. The goal, as Michael Polanyi argued, should be a "fusion of the personal and the objective"; the personal dimension should be viewed not as an imperfection in, but rather as a vital component of, our knowing.[104]

This animating vision means that traditionalism should reject the description given of it by modern rationalism. It should not (though those who speak for tradition sometimes do[105]) acquiesce in being placed in the second column of the standard dichotomies, and then steel itself for the defense of that column against the onslaught of "reason." Instead, traditionalism should resist or deny the dichotomies altogether. Jaroslav Pelikan observes that tradition "refuses to choose between the false alternatives of universal and particular, knowing that . . . a living tradition, must be both."[106] In a similar

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[104] Polanyi, supra note 84 at viii.

[105] In an otherwise illuminating and perceptive essay, for example, Dean Kronman not only concedes but insists on a stark distinction between culture and thought: in thinking, Kronman argues, we leave culture behind and engage in something that is not even distinctively human. Kronman, supra note 7 at 1058-64. A similar acquiescence is arguably implied in the common interpretation of Burke, even by friends of "tradition," as a relativist or an opponent of "reason." For example, Professor Powell follows Alasdair MacIntyre in reporting that Edmund Burke drew a "dichotomy between rationality and tradition" and engaged in "the deprecation of reason." Powell, supra note 10 at 23. But cf. Pelikan, supra note 1at 72 (asserting that "tradition must be the object of thought no less than the object of faith").

[106] Pelikan, supra note 1 at 57. See also id. at 26:

> Newman was undertaking the vindication of tradition, by using history to transcend antitheses and to hold together principles that polemics on all sides had set into opposition. The recovery of tradition enabled him to say "both/and" rather than "either/or."

spirit, T. S. Eliot declared that tradition is known through a "historical sense, which is a sense of the timeless as well as of the temporal and of the timeless and temporal together."[107]

To be sure, in limited contexts the familiar distinctions between, say, "reason" and "intuition," or "theory" and "practice," or the timeless and the time-bound, may be helpful in making a local, limited point. But the traditionalist will be quick to point out that we mislead ourselves if we think that these distinctions describe the real world in any very deep or enduring sense. In reality, "reason" (along with the universal truths proclaimed by "reason") will always be embodied in local practice and convention and will be mixed with "intuition," "faith," and feeling.[108]

Its rejection of the dichotomies is crucial, because this point helps distinguish traditionalism as I am depicting it from skeptical or relativistic positions sometimes associated with terms like "contextualism," "pragmatism," or "perspectivism." In their skeptical versions, these positions may fall under the sway of the Enlightened dichotomies and, unable to locate themselves in the first column of detached reason or theory, resign themselves to a place in the second column. They thus accept the

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[107] T. S. Eliot, Tradition and the Individual Talent, in Selected Prose of T. S. Eliot 37, 38 (Frank Kermode ed. 1975).

[108] The rationalist separation of "reason" or intellect from our other capacities and functions–perception, imagination, intuition, emotion-- does not square well with our experience, which does not disclose any such nicely discriminated faculties. For instance, what exactly is the faculty or operation by which we know that the sum of *2 plus 2* is *4*? Is the operation that allows us to *calculate the sum* the same faculty that causes to *feel certain* that the answer is correct (so that this becomes the standard example of something that *has to be* true)? And is this faculty the same one which makes us feel certain that the tree outside our window is real (and to chuckle if someone objects by pointing out, as Descartes did, that in dreams we are deceived in these matters), or is it the same faculty that leads us to feel certain that it is "wrong" to inflict severe pain gratuitously? This "moral" judgment may seem as beyond doubt as our judgment that the tree by our window is real, but it also has something of the character of a "feeling" or "emotion," as emotivist moral theorists point out. Should we then place "reason," "intuition," "perception," and "emotion" into distinct categories? And if so, how (and why) should we draw the lines, and how (and why) should we assign different epistemic credentials to each? What about my felt certainty that I love my wife–is this an "intuition," an inner "perception," or an emotion? (Or is love itself an "emotion"–even though the dimension of "feeling" experienced in an enduring, loving relationship typically seems to fluctuate over time–while awareness of that love is something else–maybe an intuition, or a perception?)

dispiriting conclusion that we can never really have any access to truth in a strong sense, or to "Truth," or perhaps to "reality": the lower case "truths" available to us have merely a constructed or instrumental or pragmatic character.[109] Traditionalism of the kind I am proposing views this concession as a sad and unnecessary surrender induced by a set of false dichotomies that were themselves based on a misconceived notion of the sort of knowledge to which we might sensibly aspire.

It is true, the traditionalist orientation holds, that we cannot know Truth in a way that is both comprehensive and certain by virtue of being disembodied or immune to the limitations of mortality. Truths can only present themselves to us where and as we are. Consequently, as William James argued, "instead of being deducible all at once from abstract principles, [ethical science] must simply bide its time, and be ready to revise its conclusions from day to day."[110] But it hardly follows, as James explained,[111] that what presents itself, and what we incompletely apprehend from our finite perspective, is not real, honest-to-goodness truth: the scare quotation marks are unnecessary. Tradition points us, Jaroslav Pelikan explains, "to a universal truth" but one "that is available only in a particular

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[109] John Henry Schlegel provides a characteristic expression of this modern attitude. "As best I can tell there is no truth," Schlegel reports, "only an absence of lies."

> Though there are dozens of ways to recount the story that reaches this conclusion, I would begin with the observation that the Reformation killed the truth of revelation mediated by the Church Universal. The Enlightenment killed the Reformation's understanding of truth as revelation directly accessible to the believer. And the horrors associated with World War II killed the Enlightenment's notion of truth as revelation accessible through reason alone. There is no longer (nor ever was there) a transcendental, transpersonal, transhistorical basis for our value judgments. We make them all up.

John Henry Schlegel, No Lever and No Place to Stand (A Response to Christopher Shannon), 8 Yale J. L. & Human. 513, 514 (1996). Schlegel argues that even "without the aid of Truth" we can still ask more "modest questions" about which ideas or values are "useful"; these "modest questions" are the only ones we need concern ourselves with. Id. at 514-515.

[110] James, supra note 2 at 208.

[111] Id. at 184-85, 199.

embodiment, as life itself is available to each of us only in a particular set of parents."[112]

Consequently, traditionalism incorporates the insights of perspectivism and pragmatism without succumbing to the demoralized skepticism and relativism that sometimes accompany them. Indeed, despite her epistemic modesty, the traditionalist may be *less* susceptible to those infirmities than is the rationalist who, having neatly and optimistically distinguished between truths reliably established by "reason" and all other opinions that are not so privileged and hence are presumptively worthless or unreliable–"built on nothing but sand and mud," as Descartes put it[113]-- easily becomes disillusioned when his favored method does not pay out as expected; he may thereby lapse into a sort of general agnosticism.[114]

Nor does the traditionalist view the inseparability of these terms as another instance of the incorrigible corruption of an impure world. On the contrary, the inevitable blending of these elements is something to be celebrated, not lamented. Just as the severing of body from soul is a familiar way of conceiving of "death," so the separation of theory from practice, or of reason from custom and feeling

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[112] Pelikan, supra note 1 at 56. Cf. McGrath, supra note 82 at 93 (arguing that "in its defensible forms, historicism neither presupposes not implies that recognition of the historical location of a specific Christian doctrine, nor the phenomenon of doctrine in general, constitutes adequate grounds to relativize its ideational content, or to cease deploying the adjective 'true' when describing that content").

[113] Descartes, supra note 82 at 5.

[114] Cf. James, supra note 2 at 184 (arguing that "so far from ethical scepticism being one possible fruit of ethical philosophizing, it can only be regarded as that residual alternative to all philosophy which from the outset menaces every would-be philosopher who may give up the quest discouraged . . . ."). H. L. A. Hart famously observed a similar phenomenon in critics who are radically skeptical of the possibility of legal rules. See H. L. A. Hart, The Concept of Law 138-39 (2d ed. 1994):

> The rule-sceptic is sometimes a disappointed absolutist; he has found that rules are not all they would be in a formalist's heaven, or in a world where men were like gods . . . The sceptic's conception of what it is for a rule to exist, may thus be an unattainable ideal, and when he discovers that it is not attained by what are called rules, he expresses his disappointment by the denial that there are, or can be, any rules.

and intuition, would be noxious to both. And the ideal of a life in which practice and custom and emotion are rigorously subjugated to the directives of "reason" seems to be less a vision of genuine "Enlightenment" than of enslavement. "Better chaos forever," William James declared, "than an order based on any closet-philosopher's rule, even though he were the most enlightened possible member of his tribe."[115] Conversely, the ideal of an "integrated" life-- one in which reason is united with feeling and theory is immanent in practice-- seems to the traditionalist an ennobling vision.

C. Tradition, Development, and Politics

The "traditionalist" orientation can be further elaborated by returning to the alternatives described at the outset– the developmental, political, and traditionalist alternatives– and comparing their respective stances with respect to three elements that we might describe as "universal" or "canonical" truths, "low-level" or "ancillary" truths, and "practice."

As discussed earlier, the developmental account of a changing discourse accepts the existence of "eternal verities"-- universal or canonical truths-- that can be understood, at least to some extent, and also articulated in human discourse. And the goal, from this perspective, is to bring "practice" into conformity with these universal truths. However, both because the universal truths are not perfectly grasped all at once and because they are too abstract to dictate answers to all of the specific questions of practice, these truths must be supplemented by lower-level and more contingent "ancillary" truths that serve to expound on and implement the universal truths. The distinction, emphasized by theorists

[115] James, supra note 2 at 204.

such as Ronald Dworkin, between “concept” and “conception”[116] serves to convey this contrast between the most fundamental and enduring truths and the more changeable, local, day-to-day truths. To similar effect is the older Thomistic distinction between the universal principles of natural law and the more contextual and contingent determinations (*determinatio)* that implement those principles[117] or the distinction employed by some theologians between “dogma” and “doctrine.”[118]

The political account reverses this hierarchy, and in doing so transforms it. This account gives primacy of place to the “passing earthly show”– to “practice” understood as the culturally developed pursuit of various human goods or interests. Conversely, this account has little use for, and indeed may doubt the very existence of, the “eternal verity”-- of universal or canonical truths. The political account can still accept the importance, however, of various less pretentious “truths”-- the scare quotes become essential– that are now seen simply as a component of how human practices work. These “truths” are the work-a-day rules of thumb, the pragmatic propositions, the agreed-on-for-now notions and values by which the practices of life and politics are carried on. So practice becomes supreme, while lower-level “truths” (which may, to be sure, *pose as* canonical truths) are the fuel and oil that power and lubricate the engine of practice; and truly “universal” truths are forgotten, mocked, or denied.[119]

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[116] See supra note 34.

[117] See Summa Theologica I-II, qu. 95, art. 2.

[118] Terrence Tilley notes that “some Catholic theologians try to make a clear distinction between dogma and doctrine. Dogma is the revealed truth; doctrine says how that truth should be understood.” Tilley, supra note 72 at 35 n. 44. However, Tilley criticizes this distinction: “considered from the point of view of semantics, this distinction won’t hold; it would mean dogma was incomprehensible.” Id.

[119] See Schlegel, supra note 109. Criticizing what he describes as “Platonism” or “transcendental philosophy” or “Philosophy,” Richard Rorty argues likewise that “there is nothing deep down inside us except what we have put there ourselves, no criterion that we have not created in the course of creating a practice, no standard of rationality that is not an appeal to such a criterion, no rigorous argumentation that is not obedience to our own

How does traditionalism depart from these approaches? In the account I am offering here, traditionalism is like the developmental alternative, and radically unlike the "political" approach, in that it accepts the existence of an "eternal verity." Its universe is not limited to human beings, their "interests," and the pragmatic lower-case "truths" by which humans struggle to secure those interests. But traditionalism departs from the developmental account by distrusting our ability to grasp and articulate universal truths and values in abstraction from the localities of our cultural situation. So traditionalism is instinctively distrustful of, as William James put it, "clean-shaven systems."[120] And it is wary of the self-congratulatory claim that our moral and philosophical articulations that depart from those of our ancestors represent *progress*, or a more complete and accurate understanding of the universal truths. Traditionalism is likewise skeptical of the distinction between "concepts" and "conceptions"; even if the distinction itself is valid at some level, our capacity as humans to sort our various truths cleanly into those categories is severely limited.

To be sure, we sometimes confidently state propositions that have the tone of universal truths. "We hold these truths to be self-evident: that all men are created equal . . . ," and so forth. It seems we cannot help offering up such truths, nor should we try: to forego such declarations might be to lapse into a pragmatism of the crude and complacent variety.[121] Still, from the traditionalist orientation such declarations will be taken as, to quote William James again, "hypotheses which we now make while

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conventions." Richard Rorty, Consequences of Pragmatism xlii (1982). Consequently, "[t]he question of what propositions to assert, which pictures to look at, what narratives to listen to and comment on retell, are all questions about what will help us get what we want (or about what we *should* want)." Id. at xliii.

[120] James, supra note 2 at 294.

[121] Cf. Pelikan, supra note 1 at 27-28 ("Recognition of the 'traditionary system' made . . . possible for [Newman] . . . an awareness of the limitations of creedal formulas and a recognition of their necessity . . ..").

waiting."[122] Upon closer inspection, our universal truths are likely to be true by virtue of being empty of the specific substantive content needed to do work in the real world. ("Do good and avoid evil"). Or else, as in Karl Llewellyn's "thrust and parry" lists of the canons of construction,[123] a universal truth may come paired with a seemingly contrary proposition that appears equally true. Thus, our most majestic social and moral truths affirm the value of liberty *and* restraint, individuality *and* community, mercy *and* justice[124]– of the Yin and the Yang. We can articulate the truth, perhaps, but why *that* truth rather than its contrary governs the given occasion defies clean articulation and is grasped in and through local practice.[125]

And in any case, traditionalism does not share the developmental urge to separate the universal truths from local practice. On the contrary, the traditionalist thinks the universal truths are valuable just insofar as they are embedded in our practices: words are valuable when they take on flesh, souls when they are embodied. In this respect, the traditionalist view of the relation between stated truths and actual practices comes closer to the political perspective–but without the cynicism or relativism that so often attend that perspective's denial of universal values and exaltation of "interests." It's *not* "all *just* politics."

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[122] James, supra note 2 at 184.

[123] See Llewellyn, infra note 152 at 521-35.

[124] Cf. Lloyd L. Weinrib, Natural Law and Justice (1987), at 225 (arguing that "[b]oundless individually, liberty and justice are mutually opposed"), at 235 (asserting that "[d]esert and entitlement . . . are antinomic"), at 240 (discussing the "antinomy of justice"). See also Alasdair MacIntyre, After Virtue 6-10 (2d ed. 1984) (describing the incommensurability of premises for moral reasoning in modern discourse).

[125] Cf. Weinrib, supra note 124 at 244 ("Unable to reason from a general principle to specific applications, we build up a picture of the world from innumerable concrete instances; we learn how to regard one case after another and extend that learning to other similar cases.").

D. Living by Tradition

So what practical difference, if any, does the traditionalist account suggest for the way we live? The question is difficult– more difficult than it might at first appear-- because if the traditionalist account of change is correct, then it seems we mislead ourselves if we suppose that we have any straightforward choice between living by reason and principle or, instead, living by tradition. On the contrary, we will inevitably be immersed in both. Even if we aspire to live by reason, we will of necessity think and act from within traditions that will powerfully influence our exercises of reason: Holmes's dictum about "continuity with the past" being "only a necessity and not a duty"[126] is applicable here. Conversely, even if we are attracted to a traditionalist approach, we will surely still recite and reason from and about "principles," many of which will come to us with the imprimatur of tradition.

Thus, familiar descriptions which suggest that the rationalist lives in a "top down" way, deducing decisions from theory or principle, and that the traditionalist lives in a "bottom up" way guided by ongoing experience[127] are suspect: these descriptions arguably fail to appreciate the traditionalist criticism which suggests that rationalism is not simply an ill-advised but an impossible way of life.[128] It might almost seem, rather, that far from offering us a viable practical alternative, the traditionalist account simply gives a different description or interpretation of the way we will, inevitably, live anyway.

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[126] Oliver Wendell Holmes, Jr., Collected Legal Papers 211 (1920).

[127] See, e.g., McConnell, Jurisprudence, supra note 76 at 672 (contrasting the "moral philosophic approach," which is "deductive and theoretical," with the "traditionalist approach" which "reasons up from concrete cases and circumstances").

[128] Gellner, though an avid proponent of rationalism, admits as much: the life of detached rationality separated from culture was never a possibility. But the aspiration gave rise to a new form of culture–"rational culture"–that Gellner believes to be superior to a traditionalist culture. See Gellner, supra note 81 at 136-65.

Indeed, taken as a piece of practical advice, a traditionalist account conceivably might be worse than useless; it might be pragmatically self-defeating, like certain familiar admonitions: "Just be yourself." "All you have to do is act naturally." "Try to be more spontaneous."

The issue is complicated.[129] Still, the tempting conclusion that would regard the developmental and traditionalist accounts merely as contrasting interpretive frameworks or perspectives, not practical differences in the way people actually live, seems to run contrary to observed reality. There *does* seem to be a discernible difference in the orientations to life taken by a Coke and a Hobbes, a Burke and a Paine, a Jefferson and an Adams. And that difference seems susceptible to being described, at least suggestively, by contrasting terms such as "traditionalist" and "rationalist." The hard task is to articulate more clearly just what the difference consists in.

At least a partial answer might observe that aspirations and self-understandings can be practically significant in themselves– even if they are to some extent mistaken. Traditionalism, by underscoring the limitations and potential delusions in aspirations to live by "reason" and in rigorous accordance with "principle," might at least serve to free us from a false rationalism.[130]

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[129] Jaroslav Pelikan observes that although tradition is inescapable, "[w]e do, nevertheless, have some choices to make. One . . . is whether to understand our origins in tradition or merely to let that tradition work on us without our understanding it, in short, whether to be conscious participants or unconscious victims." Pelikan, supra note 1 at 53. For a similar argument drawing on Heidegger and with specific reference to the role of tradition and precedent in adjudication, see Linda Ross Meyer, Is Practical Reason Mindless?, 86 Georgetown L.J. 647, 663-64, 673-75 (1998). Perhaps. But this claim may also reflect a residual rationalist urge to use mind or intellect to transcend tradition.

[130] It is ironic, perhaps, that a champion of rationalism such as Ernest Gellner makes much this same point--albeit in favor of an opposite bottom-line assessment: he thinks the delusive aspirations of rationalism are salutary.

> This [rationalist] aspiration *defines* us, even though it cannot be fulfilled. We are what we are, precisely because this strange aspiration is so deeply inherent in our thought. We may never fulfill its demands fully, but we are what we are because our intellectual ancestors tried so hard, and the effort has entered our souls and pervaded our cognitive custom. We are a race of failed Prometheuses. Rationalism is our destiny. It is not our option, and still less our disease. We are

In addition, if we view tradition as possessing at least a *prima facie* normative authority (and thus decline to embrace the modern hostility to tradition), then it seems that even if our decision-making and our rhetoric are not radically altered, we would naturally assume a somewhat different attitude and general orientation in our way of living. For example, we might naturally adopt different presumptions–different "burdens of proof," so to speak–when the question is whether to follow or instead depart from what we perceive as a prevailing practice or pattern of behavior. To the rationalist the fact that we have been thinking or doing something for a long time counts for nothing when the question of *justification* arises; to the traditionalist that fact, though not dispositive, counts for a good deal.[131]

This difference in attitude or orientation is thoughtfully expressed in Gail Heriot's descriptions contrasting the "scientific law reformer" or "rationalist" with what she calls the "man of experience." The rationalist, Heriot observes, is

> kin to the skeptical man of science, the child of Enlightenment. He is loath to accept anything as truth that has not been subjected to what he regards as rigorous scientific testing. In general, he is no friend of tradition. The unexplainable custom holds no charm for him, and he is not inclined to assume that a custom should be followed in the absence of proof that it is producing beneficial effects. Neither its age not its near-universality creates a presumption in its favor; the scientific law reformer wants proof.[132]

> not free of culture, of Custom and Example: but it is of the essence of *our* culture that it is rooted in rationalist aspirations.

Gellner, supra note 81 at 159.

[131] Cf. Merrill, supra note 76 at 513 (footnotes deleted) ("Sunstein has repeatedly admonished judges to be alert for, and to resist bias in favor of, the status quo. The conventionalist interpreter would be alert for, and would always exhibit a bias *in favor of*, the status quo–understood here to mean the existing consensus view about legal meaning in the legal community.").

[132] Gail Heriot, Songs of Experience, 81 Va. L. Rev. 1721, 1732-33 (1995). Not surprisingly, Gellner offers a more sympathetic portrayal:

> A rational person is methodical and precise. He is tidy and orderly, above all in thought. He

Heriot's "man of experience," by contrast, distrusts the "[r]igorous 'starting from zero' analysis"[133] that the rationalist finds so enticing. Instead, the man of experience gravitates to "localized reasoning" that operates by "placing a thumb on the scale in favor of tradition."[134]

> He has plenty of traditional knowledge from which to draw localized analogies. As his experience at drawing those localized analogies develops, he may find that his ability to intuit appropriate results and then reason backwards runs ahead of his ability to arrive at those results by a step-by-step thought process. . . . . He never veers too far from what he considers to be the traditional approach and hopes that the decisions he makes will be viewed as somehow consistent with that tradition. Like a common law judge, he sees the decisions that he makes as falling into the interstices of whatever body of experiences he takes as his tradition.[135]

In the end, Heriot's contrasting portraits might still reduce down to differences of degree– in the rigor of the demand for *explicit* articulation of reasons for action (as opposed to the acceptance of largely implicit reasons), and in the fervor with which an overarching consistency is pursued. But such differences, even if they are a matter of degree, add up to a fundamentally difference orientation toward the issues posed in law, and in life.

IV. Religious Freedom as a Tradition

The preceding section has tried to present the notion of a tradition, and to explain how a

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> does not raise his voice, his tone is steady and equal; that goes for his feelings as well as his voice. He separates all separable issues, and deals with them one at a time. By so doing, he avoids muddling up issues and conflating distinct criteria. He treats like cases alike, subjecting them to impartial and stable criteria, and an absence of caprice and arbitrariness pervades his thought and conduct. . . . His life is a progression of achievement . . . .

Gellner, supra note 81 at 136-37.

[133] Heriot, supra note 132 at 1739.

[134] Id. at 1733.

[135] Id. at 1741.

traditionalist view of a changing discourse will differ from a developmental view or, conversely, from a political view. In this section I want to argue that the American commitment to church-state separation, and to religious freedom generally, can best be understood as a tradition. However, two caveats are warranted at the outset.

First, although I have argued that these three alternatives manifest fundamentally different orientations toward life, reason, and practice, in the real world persons and cultures do not adhere monolithically to one and only one of these orientations. The accounts are meant to be "ideal types": real world people and practices will not neatly fall into these categories. Thus, even the purest developmentalist will inevitably be drawn into the political sphere of life, while even the most hard-crusted Machiavellian may betray moral ideals or commitments that he would be embarrassed to own up to openly. So the practical differences, as noted, will be largely in emphasis, attitude, and orientation.

Second, there seems no *a priori* reason compelling us to embrace any one of these accounts across-the-board. It might be that a developmental approach seems suitable to one domain of life– to a religion, for example, that believes in the revelation of canonical truths. Thus, Newman's developmental account was addressed specifically to *Christian* doctrine, which in his view reflected "supernatural truths irrevocably committed to human language, imperfect because it is human, but definitive and necessary because given from above."[136] A traditionalist approach might be more congenial in other domains, and still other spheres might be most amenable to straightforward politics or prudentialism.

[136] Newman, supra note 26 at 325.

So my claim is not that we are or should be "traditionalists" for all purposes, or that "traditionalism" is the preferred approach to all areas of life. The more modest claim, rather, is that both as a descriptive or explanatory matter and as a normative proposition, traditionalism offers the best account of the American experience with *religious freedom*.

A. The Explanatory Value of the Traditionalist Account

As an explanation of our experience in the area of religious freedom, the traditionalist account has the virtues of the developmental and political accounts without suffering, at least as fully, from their deficiencies. As discussed earlier, the explanatory strength of the developmental account is that it recognizes that from the outset of the Republic, our ways of thinking and talking about issues of religious freedom have been deeply normative in character, carried on with constant reference to "eternal verities." We have not treated such issues in the way we have treated, say, questions of banking policy or the determination of where to locate highways–that is, as routinely practical or political matters. The weakness of that account, as noted, is that actual decisions and practice in the area do not seem to follow from this normative discourse in any straightforward or logical way: we have "talked the talk" of principle, so to speak, but we do not seem to have "walked the walk" (except, perhaps, in a thoroughly inebriated fashion).

Viewed as explanation, the political account presents almost the mirror image of the developmental account. It seems more cogent in explaining what we have *done*. So there is an air of hard-headed realism about studies like that of Jeffries and Ryan which link changing decisions and doctrines to the shifting political needs and alignments of different times. But the political account fits

awkwardly with the way we have *thought and talked* about religious freedom.[137]

In short, it appears that the American approach to religious freedom not only *seems* but *is* deeply normative in character-- but also that this approach does not consistently conform to any discernible and articulable principle or theory. The traditionalist account is consistent with both of these features.[138] By this account, the relation of religion to law and government *is* a matter of deep normative import– as much so, perhaps, as any matter that government must address. And the traditionalist account accepts the possibility that there are transcendent truths and values to which our practices in this area should be responsive. At the same time, a traditionalist will doubt that these truths and values are nicely congruent with finite human understanding, or that they are reducible to any manageable, articulable, normatively attractive principle or harmonious set of principles. Moreover, our lives (individual and collective) are not *solely* committed to honoring these truths; that commitment must take its place among a host of varied pursuits and imperatives. So our experience reflects an ongoing struggle to instantiate these only dimly visible, partially articulable truths and values into a diverse and complex and ever-changing set of practices.

This struggle has generated support for a variety of what we might call *themes* that run through

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[137] As noted earlier, while emphasizing the explanatory superiority of an "external" and "political" account, Jeffries and Ryan concede that this sort of account does not capture the way judges think about the issues. See supra note 71.

[138] It would be overclaiming to suggest, though, that the traditionalist account fits our practice and discourse *perfectly*. As I have already suggested, lawyers, judges, and professors typically present constitutional law in *developmental* terms. So even if the traditionalist perspective can give a plausible account both of what we do and what we say in the area of religious freedom, it is to that extent in tension with the prevailing *self-understanding*: it is forced to say, I think, that this self-understanding is to some extent a misunderstanding–one which carries over to the discourse conducted in accordance with that (developmental) self-understanding. Nonetheless, the traditionalist account can (more gracefully than the political account can) credit the prevailing normative discourse with being both normative and causative of actual decisions.

our discourse. Americans mostly converge in acknowledging the importance of authenticity in religion, and so we tend to look favorably on the related ideas of the sanctity of conscience and religious voluntarism. And we share, to differing degrees, the concern to avoid the corruption that sometimes attends governmental involvement with religion–a corruption that famously can run both ways. We also recognize– some of us cheerfully and some not-- the necessity of living with what seems an irreversible religious pluralism.[139] And of course we harbor commitments to more general, perhaps platitudinous values like fairness, equality, cooperation, and individual freedom.

Our discourse naturally appeals to these themes, as it should. But the themes do not add up to any particular "principle" or theory of religious freedom; so our changing decisions, doctrines, and practices cannot usefully be described as elaborations or developments any such principle or theory. Our experience has been more one of an ongoing, adaptive, but always contested *tradition* than of genuine "development."

B. The Normative Value of the Traditional Account

Nor is this messiness–this resistance to reduction into any theory–something to regret. On the contrary, the traditionalist account is more attractive than the alternatives not only for its descriptive cogency, but in normative terms as well. Its attractiveness can be appreciated from two perspectives–from a democratic perspective, but also from a more directly normative standpoint.

1. *Tradition and democracy.* From the standpoint of democracy, the traditionalist account

[139] For an enthusiastic though not uncritical endorsement of pluralism, see Peter Schuck, Diversity in America: Keeping Government at a Safe Distance, ch. 7 (forthcoming, Harvard University Press 2003). Cf. Murray, supra note 38 at 74 ("American society is religiously pluralist. The truth is lamentable; it is nonetheless true.").

understands that the American political order places great weight on "the consent of the governed" and also that, as Alexander Bickel argued in his later work, real and effective consent is not easily ascertained through resort to either theory or arithmetic, but rather inheres in "the experience of the past, in our tradition, in the secular religion of the American republic."[140] With specific regard to religious freedom, the basic point was eloquently put by Mark DeWolfe Howe in his classic *The Garden and the Wilderness*; I have already quoted Howe's statement in an epigraph that bears repeating. "My deeper concern," Howe said

> with the Court's current inclination to extract a few homespun absolutes from the complexities of a pluralistic tradition is derived from the conviction that in these matters *the living practices of the American people* bespeak our basic constitutional commitment more accurately than do the dogmatic pronouncements of the justices. . . . [T]he justices may waste the nation's inheritance if they constantly dip into principle.[141]

2. *Tradition and normative correctness.* Of course, it might happen that an approach that is able to generate widespread acceptance at a particular time in a particular democracy is not attractive from a more dispassionate philosophical or moral perspective. Democratic support conceivably might coalesce around wicked practices; slavery and racial segregation are the common examples. Likewise, a proponent of principle might find it regrettable that American democracy has been as "unprincipled" as it has been in matters of religious freedom. It is a common lament that particular traditional practices

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[140] Alexander M. Bickel, The Morality of Consent 24 (1975). Bickel's reference to "the secular religion of the American republic" raises complicated issues that need not be explored here. For a more recent argument that a traditionalist jurisprudence is most consistent with democratic assumptions, see McConnell, Jurisprudence, supra note 76 at 682-85. See also Scott Idleman, Religious Premises, Legislative Judgments, and the Establishment Clause (forthcoming) (discussing the importance of an establishment jurisprudence that has "moral resonance" with the culture). In a similar vein, Thomas Merrill suggests that what he calls "conventionalism" is more compatible than either originalism or "normativism" with democratic assumptions. Merrill, supra note 76 at 521-23.

[141] Mark DeWolfe Howe, The Garden and the Wilderness 174 (1965) (emphasis added).

viewed as wrong or unconstitutional in the abstract– legislative prayer, perhaps, or various instances of governmental endorsement of religion, such as the national motto ("In God We Trust")-- have been or perhaps must be tolerated because they are firmly entrenched in popular practice and sentiment.[142] But while admitting that this sort of objection to democratic practice might be cogent in some areas– democracy is emphatically *not* the final criterion of moral truth-- the traditionalist account of religious freedom would respond that *in this area* the objection is misdirected.

The objection is misdirected not because our practices and traditions in this area have always been righteous or wise-- *no one* believes *that,* surely-- but rather because the objection cannot be sustained, at least in any thoroughgoing way, without presupposing something that does not exist. In order to make a meaningful claim that traditional American practices depart from the normatively correct position, that is, one would first need to have a convincing account of what that normatively correct position is. But the simple fact is (or at least so the traditionalist can argue) that after centuries of struggle in Western history, and after decades of debate under the American Constitution, no theory or determinate principle– that is, no principle with real substantive content or "bite"-- has been persuasively shown to be the "true" or best theory or principle of religious freedom. On the contrary, the principles commonly offered as well as the justifications commonly given for these principles seem either substantively empty (equality, neutrality, reciprocity[143]), or else they are manifestly context-

[142] See, e.g., Andrew Koppleman, Secular Purpose, ___ Virg. L. Rev. ___ (forthcoming); Steven B. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 Colum. L. Rev. 2083 (1996).

[143] For an analysis of the substantive emptiness of "equality" in the context of religious freedom, see Smith, Getting Over Equality, supra note 63 at 12-20. With only a little modification, I think, a similar analysis will hold for "neutrality" or "reciprocity."

bound. This is not to say either that the abstract and substantively empty principles are useless[144] or that the more limited principles and justifications are false or wrong-- only that they are appropriate or persuasive for one time and place but not for others.

So we say, perhaps, that the "separation of church and state" is valuable because it is more conducive to "civil peace" than a more integrated arrangement is. In a community with a particular citizenry (a religiously diverse but also, paradoxically, significantly secular citizenry, for example) and with a particular collection of memories and expectations, that claim is likely true. But when we try to project that conclusion onto eternity, difficulties arise. For centuries, after all, the "universal assumption" held by "[e]very responsible thinker, every ecclesiastic, every ruler and statesman who gave the matter any attention," Sidney Mead has explained, was precisely the opposite: "with no exceptions other than certain disreputable and 'subversive' heretics," everyone believed that "the stability of the social order and the safety of the state demanded the religious solidarity of all the people in one church."[145] It might be, of course, that all of the theorists and statesmen who held this view over the centuries were simply and flatly wrong, and that the currently fashionable American view is simply and flatly right: until a few people like Madison came along, perhaps, the kings and bishops and advisers and scholars somehow just had a topsy-turvy view of things. This dismissive and self-flattering conclusion *might be* right. Or it might be (and this seems more probable) that "separation" of a particular kind works to promote civil stability in one kind of society and not in others.

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[144] See, e.g., id. at 22- 25 (suggesting that the language of religious "equality" may often have been useful for diplomatic purposes precisely because it is empty and question-begging).

[145] Sidney E. Mead, The Lively Experiment: The Shaping of Christianity in America 60 (1963) (quoting W. E. Garrison).

Or perhaps we argue, with Locke and Madison and Roger Williams, that religious belief must be genuine in order to be spiritually efficacious, so that it does no good to coerce people to profess beliefs they do not sincerely hold. This proposition has the ring of a universal truth-- one that even high school students (or perhaps *especially* high school students[146]) can easily and enthusiastically embrace-- so we wonder why the older thinkers, such as Aquinas, for example, couldn't understand it. The perplexity increases when we learn that they *did* understand the point–and indeed insisted upon it– and yet somehow failed to draw the proper conclusion condemning all forms of coercion in matters of religion.[147] Meanwhile, in our own practices we go on exercising forms of coercion in matters of belief, both privately– religious parents, for example, routinely require children to attend church and receive religious instruction– and publicly: for example, we compel children to attend school and to receive instruction in particular subjects such as civics or tolerance or the dangers of drugs. We fully appreciate that such instruction will be pointless unless the students actually internalize the teachings. But in our practice we also understand that even if sincere belief is the goal, a judiciously-administered coercion involving compelled exposure, and even compelled recitation, *can* often contribute over time to the formation of correct, sincere belief.[148]

[146] But also law professors, including (at one time) this one. See Steven D. Smith, The Rise and Fall of Religious Freedom in Constitutional Discourse, 140 U. Penn. L. Rev. 149, 154-62 (1991).

[147] See Tierney, supra note 40 at 24-26, 32-33.

[148] Cf. Steven H. Resnicoff, Professional Ethics and Autonomy, in Law and Religion 329, 334 (Richard O'Dair & Andrew Lewis eds. 2001) (emphasis added, footnotes omitted):

> In a society governed by Jewish law, rabbinic leaders would use coercion– including physical force if necessary– to induce an individual to perform a commandment requiring a specific action. . . . Jewish law believes that a person is metaphysically affected by his deeds. Fulfillment of a commandment, even if not done for the right reason, leads a person to performing more commandments and, *ultimately, to doing so for the right reason*. . . . Thus, such coercion leads to the coerced individual's ultimate perfection.

So it seems that the older thinkers were perhaps not oblivious after all to an overarching truth that we now understand; they may have been somewhat more clear-sighted and candid than we have become.[149] But they were also situated in very different circumstances, in which the needs and possibilities influencing the application of state coercion were different than they are now, thus calling forth different conclusions.

In short, it is doubtful that any adequate candidates for *the principle* or theory of religious freedom (against which prevailing practices might be judged) have yet been discovered, or that any acontextually persuasive justifications for such a principle or theory have been devised. And in any case, the theme which provides the subject of this conference–namely, "separation"–seems a particularly inauspicious candidate. In the first place, it seems that "separation" lacks the stability needed to qualify as such a principle. The shiftiness of "separation" that Professor Hamburger chronicles did not begin with the First Amendment or in America: the medieval popes and the Massachusetts Puritans believed in a separation of church and state,[150] though not, as you might guess, in a sense that Jefferson would have been happy with or that Justice Souter would find to his liking.

More fundamentally, if we try to consider "separation" as some sort of pure ideal or universal

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[149]Cf. Jeremy Waldron, Locke: Toleration and the Rationality of Persecution, in John Locke: *A Letter Concerning Toleration* in Focus 120 (John Horton & Susan Mendus eds. 1991):

> Censors, inquisitors and persecutors have usually known exactly what they were doing, and have had a fair idea of what they could hope to achieve. If our only charge against their enterprise [is that it was] hopeless and instrumentally irrational from the start, then we perhaps betray only our ignorance of their methods and objectives, and the irrelevance of our liberalism to their concerns.

[150] On the medieval conception, see Walter Ullmann, Principles of Government and Politics in the Middle Ages 55-68 (1974 ed.). On the Massachusetts Puritan arrangement, see Timothy L. Hall, Separating Church and State: Roger Williams and Religious Liberty 62-63 (1998).

truth-- as something that we might aspire to for its own sake-- I think we will find that it is less than compelling. The point can be appreciated by comparison. For example, I imagine that "justice" is a notion that resonates well with us in the abstract: even without knowing the details we intuitively feel that "justice," whatever it is, is something we should want for ourselves or our society. Other notions-- "peace," "prosperity," "health"--may have similar resonances. But "separation" is not such a commanding or welcoming ideal.

Indulge for a moment in some free association. Close your eyes, clear your mind, and listen to the word: "*Separation*." What images or feelings does the term arouse? What associations does it call to mind? "*Separation*." For many, I suspect, the word itself carries connotations of the parting of friends, or the divorce of spouses– of loneliness, alienation, even death. The term is closely related to "segregation," and it is arguably synonymous with "dis-integration" with its overtones of division and dissonance. "Separation" seems almost the opposite of the alluring values of "peace," or "unity," or "concord."

This is not to say, of course, that a commitment to "separation of church and state" is misguided, but only that "separation" does not denote some sort of abstract ethical ideal that is desirable for its own sake. "Separation" has been and will likely continue to be a valuable instrumental or practical notion or tool, but it is hardly a universal truth expressing an intrinsic good. It carries no millennial credentials.

In sum, the traditionalist approach to religious freedom seems normatively attractive, not only in a democracy in which "consent" is the preferred or at least expedient basis of legitimacy, but also in general. The character and moral seriousness of our struggles over religious freedom– struggles that

have been going on for centuries– show that what is at stake is more than a mere conflict over competing "interests." At the same time, it seems almost delusional to imagine that an adequate theory specifying the proper relationships among government, the churches, and the individual believers is either presently available or imminently forthcoming--laid out in some judicial opinion or pending law review article, perhaps– so that the task of the law can be simply to bring the practices of Americans into conformity with that theory. The wiser course, it seems, would be to work out the viable meaning of religious freedom in accordance with, as Mark Howe said, "the living practices of the American people."

C. Tradition and Judicial Practice

I have suggested that, compared to both the developmental and political positions, traditionalism offers both a better explanatory account of the American experience with religious freedom and a more attractive normative orientation. Suppose, though (as seems most unlikely), that a court were actually convinced by these arguments. What difference would they make? Would a court converted to the normative importance of tradition decide cases, or explain its decisions, any differently than courts currently do?

My tentative response is that there *would be* differences–though, as suggested earlier, they would be differences mainly in attitude or orientation that would manifest themselves mostly in subtle variations in emphasis. Three such differences should be noted. First, I think that a tradition-oriented court would make more ample, and somewhat different, use of precedent. Second, although a tradition-friendly court might still announce general doctrines, it would regard those doctrines more as

themes than as *principles* or *rules*. Third, a traditionalist approach would suggest greater judicial deference, not necessarily to government officials in general, but at least to legislatures.

We can consider these differences in turn.

1. *The Uses of Precedent.* Judicial decision-making routinely relies on precedent, of course, and this practice, as Dean Kronman has pointed out, is already evidence of a deep traditionalism in law.[151] However, courts differ significantly both in the extent of their reliance on precedent and in the particular uses they make of precedent.[152] A careful review of precedents may constitute the central argument of an opinion. Conversely, a citation or two may be offered as authority for an abstract proposition or doctrine that does the real argumentative work: the invocation of precedent may seem almost a formality, almost a matter of satisfying some venerable legalistic protocol.

In addition, some decisions use precedent in a fact-intensive way, carefully comparing the particular circumstances of the predecessor cases to those of "the instant case." Other, more doctrinally-oriented decisions are more concerned with what the precedent opinions *said;* they comb the opinions for statements of abstract doctrine, paying scant heed to the actual facts. Herman Oliphant expressed this difference by distinguishing between *stare decisis* and *stare dictis*.[153]

A principle-oriented, developmental approach will naturally tend to view precedents primarily as enunciations of governing principles, or as sources of doctrine. Consequently, this approach will

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[151] Kronman, supra note 7 at 1031-32.

[152] For an exquisitely refined study, see Karl Llewellyn, The Common Law Tradition: Deciding Appeals (1960).

[153] Herman Oliphant, A Return to Stare Decisis, 14 A.B.A. J. 71 (1928). Oliphant lamented, three-quarters of a century ago, that "we are well on our way toward a shift from following decisions to following so-called principles, from *stare decisis* to what I shall call *stare dictis* . . ." Id. at 72.

tend to downplay the facts of earlier cases in favor of examining the doctrines they announced. If a case manifests a discrepancy between the doctrine that is recited and the decision on the facts, it is presumptively the specific *decision*– not the *doctrine*– that will appear problematic.[154] Moreover, once the doctrine has been settled, it would seem pointlessly repetitious to survey a range of cases. Conversely, a tradition-oriented approach will be more concerned with learning from, and maintaining continuity with, past practices. What matters most is not what was said (abstracted from the particular facts), but what was done (a category broad enough to encompass what was said). *Stare decisis*, not *stare dictis*. Hence, a traditionalist court would naturally tend to place greater reliance on precedent– and on the actual facts and decisions of the applicable precedents– than on statements of doctrine.[155]

But there is a complication: what about prior decisions that themselves were the product of unduly detached or rationalist thinking that a traditionalist would view as wrong-headed? Should a later court conclude that however mistaken these decisions may have been at the time they were rendered, they are nonetheless precedents, . . . and hence part of our tradition, . . . and hence deserving of deference? Or should the court treat these decisions with less respect because of their dubious origins? In this (all too common) situation, it may seem that the court faces a hopeless dilemma. Must traditionalism dissolve itself by meekly acquiescing in what Mary Ann Glendon calls "the tradition of

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[154] The position of the dissenters in *Everson*–a position joined in by numerous "separationist" critics ever since–typifies this stance.

[155] In this vein Michael McConnell traces a traditionalist jurisprudence back to Edward Coke and discusses Coke's use of precedent. Coke, McConnell explains, "devoted his considerable intelligence and energies to uncovering precedent, as much and as ancient as possible. That was enough." Nor did Coke attempt to draw out of the precedents any "abstract or utilitarian principles" or "principles of natural justice." How then did Coke know which precedents were applicable to a given case? McConnell suggests that Coke's famous "artificial reason" was "based on a deep, intuitive, almost aesthetic, sense of the way in which the new case 'fits' into the rich body of the law." McConnell, Tradition, supra note 76 at 179-81.

antitraditionalism"?[156] Or should it instead negate itself by, in hypocritically principled fashion, refusing to honor a tradition that in fact exists?

An answer to the enigma is again suggested, I think, by Howe's recommendation that we try to respect and follow "the living practices of the American people." However misguided they may have been, some past decisions will have gained widespread acceptance, both in the law and perhaps in the general culture; so they will have become part of the nation's "living practices." Other misguided decisions will remain unassimilated impositions on the body politic. The distinction is one of degree, of course, but it is suggestive; and I think a traditionalist approach would strive to treat the former but not the latter decisions with deference, even if the decisions seem equally unwarranted as an initial matter.[157]

It may be, for example, that the Supreme Court was mistaken in *Everson* both in asserting that the Fourteenth Amendment was intended to incorporate the establishment clause against the states and also in asserting that the establishment clause was intended to adopt a position of "no aid" separationism. But the first of these assertions has become solidly entrenched not only in the caselaw but also in the popular understanding; most citizens would surely be shocked at the suggestion that state governments are not subject to the First Amendment, and hence are constitutionally free to set up an old-fashioned established church if they so choose. By contrast, the second assertion–the assertion of "no aid" separationism-- has been hotly contested almost from the outset. If anything, that position has

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[156] Mary Ann Glendon, Tradition and Creativity in Culture and Law, 27 First Things 13, 13 (Nov. 1992).

[157] Bob Nagel points out to me– correctly, I think– that this approach to precedent would be just the opposite of that taken and advocated in the famous Joint Opinion in Planned Parenthood v. Casey, 505 U.S. 833 (1992). Concerned with maintaining judicial authority against any impression of giving in to public pressure, the plurality in *Casey* suggested that adherence to precedent is most important when the prior decision was and continues to be highly controversial.

become more beleaguered as time has passed and research has expanded; nor has it been honored in recent legislation or decisions that have swung in the direction of "substantive neutrality."[158] So a traditionalist court would be disinclined to revisit the "incorporation" issue (even if it thinks that incorporation was mistaken in the first instance), but it would regard the "no aid" separationism of *Everson* as much more frail.

2. *The Uses of Doctrine.* While giving greater weight to precedent, however, and to the *facts* of precedents, a tradition-friendly court would likely still become involved in discussions of doctrine. Indeed, such involvement seems inevitable, because the judicial effort to explain why one precedent seems "on point" while another does not naturally impels the court to discuss underlying ideals or values,[159] and these ideals or values are the ingredients from which doctrine is made. Consequently, an inspection limited to the formal features of judicial opinions might find it difficult to distinguish between decisions that are "principled" and "developmental" and those that are more "traditionalist."

The difference, once again, would be mostly in attitude and emphasis. A tradition-friendly court would treat legal doctrines not so much as rigorous principles or *rules* from which correct decisions could then be deduced, but rather as *themes* to be considered and addressed in pondering the facts of given cases.[160] And there would be no expectation that these themes would add up to any all-purpose "test" which could be mechanically applied, and which any challenged law would be required to "pass"

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[158] See generally Ira C. Lupu, The Lingering Death of Separationism, 62 Geo. Wash. L. Rev. 230 (1994).

[159] Cf. Larry Alexander and Emily Sherwin, The Rule of Rules 128 (2001) (arguing that "it simply is not possible to reason from one case to another without a tying rule or principle that determines which factual similarities are important and which are not"). But cf. supra note 155.

[160] For a discussion of this less "formalistic" use of doctrine, see Smith, Getting Over Equality, supra note 63 at 83-96.

in order to survive judicial scrutiny.

3. *Judicial deference.* The traditionalist approach also supports a fundamentally different judicial attitude toward legislative enactments than the developmental approach indicates. Grounded in Enlightenment or rationalist assumptions, the developmental approach reflects a confidence in the human capacity to grasp and articulate enduring principles to govern practice; and it favors the articulation and application of these principles by institutions that are detached from the complexities and compromises of practical life. These assumptions suggest a dominant role for courts relative to legislatures. After all, a central recurring teaching of modern constitutional theorists has been that judges are– and legislators are not– removed from the entangling corruptions of practical politics. Three decades ago, in an account recited in only slightly varying terms by lawyers and theorists both before and since, Alexander Bickel explained the standard view. "[T]he supreme autonomy that the Court asserts in many matters of substantive policy," Bickel declared

> can have [justification], if at all, only in the claim that the function never relinquishes the *pursuit of reason*, and that ultimately it is *principled* . . . The justification must be that constitutional judgment turns on issues of moral philosophy and political theory, which we *abstract* from the common political process . . . .[161]

In that more political process, he observed, "[t]he jockeying, the bargaining, the trading, the threatening and the promising, the checking and the balancing, the spurring and the vetoing are continuous." By contrast, "[t]he judges are insulated from this environment, and secure against its influence . . . ,"[162] and this insulation–this secure detachment–provided the warrant for their extraordinary authority in our

[161] Alexander M. Bickel, The Supreme Court and the Idea of Progress 86 (1978) (first published 1970) (emphasis added).

[162] Id. at 83.

political order.[163]

The traditionalist approach inverts these valences, doubting our capacity to capture the "eternal verities" in tidy doctrines or principles, and favoring an ideal of embodiment over an ideal of detachment. From this perspective, it is legislatures rather than judges who should have the leading role in implementing the unfolding traditions of religious freedom. It is precisely the factors that the developmental account sees as suspicious or debilitating– namely, the legislators' immersion in the conventions and complications of actual governance– that fit them to play this leading role.[164] Indeed, if it is to be the "living practices of the American people" rather than a static principle or doctrine that provides the constitutional standard, then presumably it would be a rare occasion on which a court could legitimately overrule the decision of a legislature. How could a judge, or a small cloister of judges, plausibly claim to be more closely in touch with the "practices of the American people" than a body of officials directly elected by and in constant interaction with those people?

So traditionalism counsels deference. But two qualifications should be noted. First, the point is not that a traditionalist approach to religious freedom is empty, or that it forbids nothing, but rather that at any given time it is apt to forbid little that an actual legislature at that time (as opposed to the depraved legislatures sometimes hypothesized by law professors for pedagogical or polemical purposes) is realistically likely to enact. In the year 2002 A. D., for example, a traditionalist approach

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[163] For similar accounts, see Michael J. Perry, The Constitution in the Courts 106-110 (1994); Ronald Dworkin, A Matter of Principle 24-25 (1985). Jeremy Waldron notes that "our jurisprudence is pervaded by imagery that present ordinary legislative activity as deal-making, horse-trading, log-rolling, interest-pandering, and pork-barreling– as anything, indeed, except principled political decision-making." Jeremy Waldron, The Dignity of Legislation 1-2 (1999).

[164] For a valuable discussion, see Nagel, supra note 97 at 118-20.

would almost certainly condemn a vast array of measures that are not only imaginable but that in fact governments–including American governments–have sometimes adopted in the past: compulsory church attendance, exclusion on religious grounds from public office or public universities, governmental selection of church officials, direct subsidies to churches for the payment of clergy, government codification of religious creeds. Indeed, the list of prohibited measures could go on almost indefinitely.

To be sure, a legislature today *might* decide to enact one of these forbidden measures; and if it did, a traditionalist court might step in to invalidate the measure. It *could* happen. And the Cubs *could* win the World Series. There is no law of nature-- none that scientists have yet discovered, anyway-- preventing such occurrences. Still, ...

From a familiar rationalist standpoint, this fact is damning: a constitutional provision that does not prohibit measures that a legislature might currently be tempted to adopt seems as pointless as a diet that forbids no foods that a particular person happens to want to eat.[165] From the traditionalist orientation, by contrast, this attitude seems perverse-- as applied both to diets and to constitutions. The purpose of a diet is not to impose deprivation; the office of a constitution is not to be officious.

Second, the deference I have been discussing has specific reference to legislatures. As noted, it seems plausible to assume that legislators are more in touch than judges are with the "living practices of the American people." But the same assumption may not hold for all officials–in particular for officials that we might place under the general heading of "bureaucrats." Indeed, whereas judges will typically at least hear cases raising a host of issues and involving people from all sectors of life, bureaucrats with

[165] Cf. Employment Division v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring in the judgment) ("If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice.").

focused jurisdictions and little immediate accountability may be more susceptible than judges to the sort of "tunnel vision" zeal that comprises the dark side of commitment to "principle." Hence, the argument for judicial deference to legislatures may not apply to other organs of government.

D. An Illustration: The Burger Opinions

Much of the preceding discussion, ironically, has considered the traditionalist approach in the abstract. As it happens, however, the traditionalist approach to precedent and doctrine is concretely if imperfectly illustrated in the major establishment clause opinions of Chief Justice Warren Burger.[166] A common view holds, as Vincent Blasi has put it, that Burger had "no discernible coherent philosophy"[167]; from a traditionalist perspective this was precisely the source of his strength as a jurist. Burger's traditionalist credentials are jeopardized, to be sure, by the fact that he was the author of the majority opinion announcing the doctrinal framework that has governed establishment clause jurisprudence ever since– the so-called *Lemon* test. But as one of his law clerks has pointed out,[168] he almost surely did not intend that "test" to be used in the aggressive and formalistic manner evident in so many later cases. And in other major cases, Burger nicely reflected the traditionalist orientation.

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[166] Burger's free exercise decisions might illustrate the same point. I have argued at length elsewhere that his controversial opinion in *Wisconsin v. Yoder*, the Amish school case, can best be understood by relaxing our usual, principle-ridden assumptions about how doctrine is supposed to work. See Smith, Getting Over Equality, supra note 63 at 83-103. For present purposes and in a paper focusing on "separation," however, I will consider only Burger's establishment cases.

[167] Vincent Blasi, The Rootless Activism of the Burger Court, in The Counterrevolution that Wasn't 198, 211 (Vincent Blasi ed. 1983). Professor Van Alstyne made a similar point at the conference, arguing that Burger was "unprincipled." [check to see if the written comment says this].

[168] See Bruce P. Brown, The Establishment Clause Jurisprudence of Chief Justice Warren E. Burger, 45 Okla. L. Rev. 33, 34-36 (1992).

This orientation was manifest in Burger's early opinion in *Walz v. United States,*[169] upholding a New York property tax exemption that included property owned by churches along with other types of charitable institutions. In its first section, Burger's opinion reflected on "the limitations inherent in formulating general principles on a case-by-case basis." And Burger explained that earlier decisions had sometimes offered "too sweeping utterances . . . that seemed clear in relation to the particular cases but have limited meaning as general principles"; the result had been "considerable internal inconsistency in the opinions of the Court."[170] Though Burger himself went on to acknowledge a "general principle," he described that principle in broad terms that made it clear that the principle was not intended to be applicable in deductive or rule-like fashion; indeed, Burger's statement does not have the quality of a "principle" at all, but rather of a rough description of the practical evils to be avoided.[171] And in case the doctrine's flexibility remained unclear, Burger emphasized that there was "room for play in the joints," that "[n]o perfect or absolute separation is really possible," and that "[t]he test is inescapably one of degree."[172]

Applying this flexible approach, Burger placed great emphasis on the history of tax exemptions for churches in this country. It is crucial to note, moreover, that Burger's historical survey was evidently not offered as an argument primarily concerned with "original meaning" so much as an argument about, as he put it, "the national attitude toward religious tolerance" and about what was "deeply embedded in

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[169] 397 U.S. 664 (1970).

[170] Id. at 668.

[171] "The general principle," he said, "is this: that we will not tolerate either governmentally established religion or governmental interference with religion." Id. at 669.

[172] Id. at 669, 670, 674.

the fabric of our national life."[173] So although he observed that tax exemptions had been common "beginning with pre-Revolutionary colonial times,"[174] Burger neither limited himself to nor even gave any special emphasis to the founding period: it was not the ancient understanding so much as the "uninterrupted practice"[175] that interested him. For the same reason, he reported on current practice at the *state* level along with past practice at the federal level.[176]

Consistent with its concern to respect "the fabric of our national life," Burger's *Walz* opinion was deferential to precedent–but not solely or primarily to *judicial* precedent. In other opinions, Burger paid more attention to prior judicial decisions, and he treated them in the fact-focused way a traditionalist approach recommends. Thus, in *Lynch v. Donnelly*,[177] upholding the long-standing practice in Pawtucket, Rhode Island, of including a creche in the city's Christmas display,[178] Burger's majority opinion described a series of prior public acknowledgments of religion going back to the founding period and of prior judicial decisions approving such practices.[179] The discussion reasoned that the Pawtucket display provided less actual support to religion than did other common practices,

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[173] Id. at 678, 676.

[174] Id. at 676.

[175] Id. at 680.

[176] Id. at 676 ("All of the 50 States provide for tax exemption of places of worship . . . .").

[177] 465 U.S. 668 (1984).

[178] Emphasizing the traditional character of the practice, the Court pointed out that the Pawtucket display was "essentially like those to be found in hundreds of towns or cities across the Nation" and also described some of the "countless. . . manifestations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage." Id. at 671, 677.

[179] Id. at 673-78, 679-80.

many of which had been blessed in previous judicial decisions.

Critics objected to this form of reasoning. For example, in an essay squarely in the developmental genre, William Van Alstyne specifically castigated the *Lynch* Court for what he saw as a half-hearted commitment to principle and doctrine in favor of an approach that was mainly oriented to past practices, and that in effect asked whether "the government has merely acted in a manner consistent with what it has regularly done . . . in the past."[180] By contrast, this sort of fact-focused, history-sensitive use of precedent is just what a traditionalist position would recommend. To be sure, Van Alstyne and other critics were likely right in suggesting that a more rigorously rule-like application of the prevailing doctrine would have generated a different conclusion. And as noted, Burger himself had authored the opinion usually cited as the source of that doctrine. But *Lynch* shows unmistakably that, consistent with his earlier observations in *Walz*, Burger did not understand or use doctrine in this abstract and formalistic way.

Thus, in *Lynch* Burger expressly disavowed an "absolutist approach" to nonestablishment, and he described the *Lemon* doctrine not as a definitive test to be applied "mechanically" but instead as an "inquiry" that "we have often found . . . useful."[181] Rather than regarding the precedents mainly as pronouncements of authoritative doctrine, Burger's opinion reversed the priorities: the doctrine was

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[180] William Van Alstyne, Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall– A Comment on Lynch v. Donnelly, 1984 Duke L.J. 770, 783. Van Alstyne's essay is discernibly in the "development" mode. The essay begins by describing the basic principles ascribed to the religion clauses, id. at 773-74-- principles from which the *Lynch* decision itself and the other decisions on which it relied had evidently departed. The essay goes on to note that Madison himself explained away early aberrations–including those that he himself had supported (such as legislative chaplains and Thanksgiving proclamations)–by saying that they were a "deviation from strict principle." Id. at 776.

[181] 465 U.S. at 678-79.

treated as a sort of potentially helpful but flexible tool for understanding the meaning of the cases. Practice and precedent, not doctrine, were controlling.

This reversal of priorities is perhaps still more clearly illustrated by Burger's opinion in an even more controversial case– *Marsh v. Chambers*,[182] in which the Court approved the Nebraska practice of beginning legislative sessions with a prayer delivered by an official legislative chaplain. The case presented what at least from a detached perspective appeared to be a stark conflict between longstanding American practice and modern doctrinal prohibitions. And to the rationalist mind, there was little doubt about which of these antagonistic elements should yield. Thus, Justice Brennan did not deny, as Burger's majority opinion demonstrated, that legislative prayer was a deeply entrenched practice going back to and indeed preceding the First Congress-- the same body that had drafted and approved the religion clauses. But Brennan implored the Court not to defer to this history but rather to "judge legislative prayer through the *unsentimental eye* of our settled doctrine."[183] (Notice the invocation of the familiar dichotomy between reason and feeling, or "sentiment.") And he went on to argue that the practice of legislative prayer, however venerable, was a clear violation both of the *Lemon* doctrine and of the principles of "neutrality" and "separation."[184]

Indeed, Brennan had "no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the

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[182] 463 U.S. 783 (1983).

[183] Id. at 796 (Brennan, J., dissenting) (emphasis added).

[184] Id. at 797-808.

practice to be unconstitutional."[185] At first glance, this respectful invocation of the hypothetical opinion of *law students* seems curious: why accord special respect to the views of those whose grasp of the law is largely limited to classroom training in the abstract doctrine, and who have as yet little real-life experience with the way the doctrine works in a community's actual practices? Upon reflection, though, it seems that this is exactly the point: the law students' opinion is sought precisely because that opinion has not been corrupted by real world experience, and thus reflects the requisite detachment and abstraction.

In a clear manifestation of the logic of development, Brennan went on to contend that the fact that the First Congress had appointed chaplains and instituted legislative prayer should not be dispositive because– the perennial argument– even the framers of a provision may not fully appreciate the implications of their own principles. "Legislators, *influenced by the passions* and exigencies of the moment, *the pressure of constituents and colleagues*, and the *press of business* do not always pass sober constitutional judgment on every piece of legislation, and this must be assumed to be as true of the Members of the First Congress as any other."[186] (Notice again the "reason vs. feeling" allusion, the implicit privileging of detachment over practice, and the derogation of legislatures for being immersed in practice.) Two centuries later, we can understand the principles approved by the framers better than the framers themselves could.[187] So Brennan concluded by flourishing his familiar "living Constitution" point: "Finally, and most importantly, the argument tendered by the Court is misguided because the

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[185] Id. at 800-01.

[186] Id. at 814-15 (emphasis added).

[187] Cf. supra note 37.

Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers."[188]

In suggesting that Burger's view of the Constitution was "static," however, and that the majority's reliance on history had led it to "carv[e] out an exception to the Establishment Clause,"[189] Brennan fell into a common misunderstanding reflecting a failure to grasp the traditionalist approach taken by the majority. For Burger, as discussed above, articulated constitutional doctrine such as the *Lemon* test was simply a flexible aid or tool that might be helpful in understanding the meaning of the constitution– a constitution which Burger here understood, as Walter Bagehot had put it in his study of the English constitution, in terms of a "living reality" rather than a "paper description",[190] and which at least in this realm was best reflected in (Howe's phrase, again, not Burger's) the "living practices of the American people." Where those practices were unambiguous, as they were in this case, it would be perverse to allow the secondary aid to override the primary source itself-- as if a lawyer were to counter a Supreme Court precedent on point by citing a contrary dictum from a Nutshell or a *Gilberts.* Nor was the Court "carving out an exception" to the constitutional command, as Brennan charged, but was rather trying to ascertain the content of that command.[191]

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[188] 463 U.S. at 816.

[189] Id. at 796.

[190] Walter Bagehot, The English Constitution 3 (Gavin Phillipson intr. 1997). Cf. McConnell, Tradition, supra note 76 at 175 (arguing that "before there was a 'Constitution'" the founding generation "referred to a 'constitution' . . . [that] consisted of settled rights and expectations, including structure of government and representation, as well as individual rights, that had their roots in common law, colonial charters, and long-standing practice").

[191] So those commentators who follow Brennan in treating Marsh as "carving out an exception" and then go on to try to formulate the precise requirements for invoking that exception mistake, as Brennan himself did, the kind of exercise the Court was engaged in. See Idleman, supra note at [ ]. Cf. Koppleman, supra note at [ ].

For similar reasons, Brennan's argument that the practice of the First Congress was not an authoritative guide to constitutional meaning missed the mark. To be sure, the majority did observe that the First Congress had not perceived any inconsistency between the Constitution and legislative prayer.[192] But this observation was not presented as dispositive of the controversy; instead it was incorporated into a larger pattern that was not simply an "original meaning" argument but, rather, as in *Walz*, was concerned to discern the relevant content of "the fabric of our society." The crucial point was not that the *First Congress* (or "the framers") had approved legislative prayer, but rather that the *American tradition*– "the unambiguous and unbroken history of more than 200 years"-- had embraced the practice.[193]

This conclusion reveals an unintended irony in Brennan's customary invocation of "the living Constitution." Though Brennan complained that the majority's approach rendered the Constitution "lifeless,"[194] in fact it was the constitution guiding the majority opinion– the constitution embodied in "the living practices of the American people"-- that might most plausibly be described as "living." Brennan, by contrast, paid little respect to *that* "living" constitution. It is harder to say just how or where his constitution subsisted. Was it supposed to inhere in the text itself-- in the "document" that he derided as "static"? Or did it perhaps enjoy a sort of metaphysical existence, floating somehow in a kind of Platonic ether of abstract principle? Either way, the metaphor of "living" seems inapt.

Brennan's constitution was not "static," to be sure; its content could– and undoubtedly did--

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[192] Id. at 790-91 (majority opinion).

[193] Id. at 792.

[194] Id. at 817 (Brennan, J., dissenting).

change over time (including, as it happens, on the question of legislative prayer).[195] But "changing" is not synonymous with "living": the configurations of the stars, or the numbers on the face of digital clock, or the length of an Indiana icicle in March, all *change*; but those objects are not therefore *alive.* Strictly speaking, there is no discernible sense in which the quality of "life" can plausibly be ascribed to Brennan's constitution. That quality belongs more naturally to the constitution that flourishes in the traditions of a people–a living constitution that the majority opinion respected, and that Brennan's dissent (like his establishment jurisprudence generally) treated with something approaching contempt.

V. Conclusion

"Separation" has been a central theme in church-state jurisprudence not only from the adoption of the First Amendment or even since the time of Roger Williams, but since at least the Papal Revolution of the twelfth century; and there is no reason to expect that theme to vanish anytime soon. But the meaning of "separation" has changed dramatically over the years and centuries, and there is likewise no reason to expect that process of change to come to a halt with us. My argument in this paper is that it is most helpful and accurate to understand this process of change neither as the development of a uniform principle nor, conversely, as the mere product of shifts in political interests and forces, but rather as the unfolding of a dynamic tradition.

What if anything might this characterization teach us about the issues *de jour*– voucher programs, or "faith-based initiatives"? I have earlier summarized the leading "principled" perspectives

[195] See Abington Township v. Schempp, 374 U.S. 203, 299-300 (1963) (Brennan, J., concurring).

on those issues. And almost anyone here has more competence than I have to speculate about the political prospects of these initiatives. But does a traditionalist orientation point us to any different conclusion?

I'm afraid my answer to that question is bound to be disappointing. I have my own views and prejudices, of course, but I don't believe that a traditionalist perspective in itself dictates any definite conclusions. For one thing, the particular measures differ significantly in their details. And of course "faith-based initiatives" are at this point more an idea-- a rough direction, perhaps-- than a set of fully formulated programs. So we need to heed William James's advice to avoid "deduc[ing] all at once from abstract principles" but instead to "bide [our] time, and be ready to revise [our] conclusions from day to day"–in short, to "wait on the facts."[196]

There is another and even more formidable obstacle to prescription: unlike a developmentalist, the traditionalist cannot answer the constitutional questions by trotting out something that purports to be a canonical principle and then proceeding, as Justice Roberts said of the constitutional text, to "lay [it] alongside [the practice] which is challenged and . . . decide whether the latter squares with the former."[197] Indeed, that incapacity represents in a back-handed way the principal normative teaching of the traditionalist position– that the issues presented by voucher programs or "faith-based initiatives" *cannot* be wisely resolved simply by the formal application of some principle, whether phrased in terms of "separation" or "neutrality." There is more in our past– and still more in our future, hopefully– than the smooth, simplistic philosophies reflected in such principles have dreamed of; and it would be a

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[196] James, supra note 2 at 208.

[197] United States v. Butler, 297 U.S.1, 62 (1936).

mistake to stunt the growth of our "living constitution," as we say, by choking it with these stifling doctrines.

A vital tradition, as Jaroslav Pelikan emphasizes, is conducive to-- not inimical to-- creativity.[198] In this spirit, the constitutional task– one in which the courts should have something well short of a peremptory role– is to address the kinds of challenges to which these measures are responses in a creative way that respects and forwards the "living practices of the American people."

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[198] Pelikan, supra note 1 at 72-82.