THE VERY IDEA OF TRADITION IN THE LAW

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It is a pleasure to be with you, on the occasion of this conference to honor the polymath and prince of the Church, St. John Henry Newman.

It is customary in lectures of this sort to make grand pronouncements to other scholars in one's field. But I have a different audience in mind. I want to talk to students, friends, colleagues in other areas, and generally interested people, about tradition. To those who might find in tradition something appealing, enchanting, and attractive. I want to ask why so many Americans—and, increasingly, so many young Americans—are drawn to or even wish to "return" (here the "u" is sometimes spelled with the Latin "v") to tradition. How can we account for the worth of tradition? How might we understand its persistent allure, in our lives and in our law today?

For the appeal to tradition has become something of a lingua franca in constitutional law. The Supreme Court seems to have discovered tradition's many attractions. But tradition is a hard word. It gets lumped together with other things—*history* and tradition, for example; or *text* and tradition; or *history, analogy*, and tradition; or some other pastiche, with the result that *tradition* itself becomes obscured or is even erased. Yet if tradition really is a legal lingua franca—a language meant to bridge cultural difference or make communication possible for a scattered people—we will need to know a good deal more about what it might be.

Hence my subject, *the very idea of tradition*, which may be taken in two senses. First, as scandalized remonstration, as in, "*the very idea* he told me I look like I've been eating well," or, for my students, "*the very idea* that I must suffer through this tedious lecture." Second, as the earnest attempt to get at the truth of a matter. As in, "I want to get at *the very idea* of the reasonable person in criminal law, or the Christian doctrine of the Trinity, or the nature of love."

Let me begin with the scandalous sense. To say in America today that we are bound by tradition, let alone improved or ennobled by it, is to flirt with taboo. Many of us want to believe, perhaps we really do believe, that we are entirely self-moved and self-motivated agents, unconstrained by our past and at perfect liberty to choose our own destinies:

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It matters not how strait the gate,

How charged with punishments the scroll,

I am the master of my fate,

I am the captain of my soul.[1]

William Ernest Henley's poem is something of a modern American anthem. It may then seem surprising, or even bizarre, to say that in our world, tradition exerts a powerful influence on us.

In this lecture, I will reflect on four matters. First, and to create the conditions for a favorable hearing, on tradition in ordinary life. Second, on tradition in law, and constitutional law especially. Third, on the value or worth of tradition, where I will somewhat tentatively and speculatively explore an analogy between constitutional law and Christianity. Fourth, and drawing insight from some of Cardinal Newman's political writing, on the relationship of tradition and change.

I. TRADITION IN LIFE

To begin to see how tradition maintains claims on us, it may be helpful to begin with something commonplace and familiar: food. Here we will notice the very idea of tradition everywhere. Consider a well-known Italian restaurant in New York City (not a destination widely regarded as the beating heart of traditionality), *Il Gattopardo*—"The Leopard"—after the novel by the Sicilian nobleman, Giuseppe Tomasi di Lampedusa. Though the restaurant itself is just a generation old, it proclaims that it maintains "the tradition of Italian culture." Quoting the book's most famous line, the restaurant says, "If we want things to stay as they are, they will have to change." Or, as Cardinal Newman said of an idea, "it changes with them to remain the same." New York follows in Italy's wake. There is a common Italian expression—"un ristorante tipico"—which means a restaurant of a locality or a region that specializes in the ancient recipes and methods that endure and that "typify" the best of the spirit of the people of that place. The "traditional" manner of dining.

Or reflect on a story a few years ago about an uncanny spike in demand for Chartreuse, a green liqueur made for centuries by Carthusian monks.[2] The recipe is known only to them, based on a secret manuscript given to them in 1605, which was itself derived, so the lore goes, from a medieval alchemist's brew for an "elixir for long life." During the COVID-19 years, when cocktail creation as well as collective thirstiness were trending upward, the monks stubbornly declined to expand production in response to these market pressures, as this would have interfered with their life of prayer and solitude. The spirit in consequence became even more desirable. The ancientry of the method, the mystery of the ingredients, the hand-crafted care with which the cordial is made, and its sheer endurance across the centuries—all of these seem somehow to hold Chartreuse's aspiring drinkers spellbound. Even today, green Chartreuse remains as expensive and as difficult to acquire.

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[1] WILLIAM ERNEST HENLEY, *Invictus*, *in* POEMS 83–84 (1920), https://www.poetryfoundation.org/poems/51642/invictus [https://perma.cc/6AF9-4L4L].

[2] Becky Cooper, *Why Is Chartreuse So Hard to Find Right Now? Ask the Monks Who Make It*, N.Y. TIMES (Apr. 14, 2023), https://www.nytimes.com/2023/04/14/dining/drinks/chartreuse-shortage.html [https://perma.cc/C9YT-9WF].

Many other similar stories could be told. But are these anecdotes about merely inessential matters? I do not think so. What could be more essential, more elemental, than how we eat and how we think about our food? It was the eminent *ancien régime* French lawyer and judge, the author of "The Physiology of Taste," Jean Anthelme Brillat-Savarin, who once said, "tell me what you eat, and I will tell you who you are."[3] In fact, one sees appeals to tradition in cuisine routinely. In cooking, in fine dining, in the fashioning of specialty foods and spirits, and in far less bespoke and more everyday settings: in the kitchen and the cellar and the dairy and the distillery and the little grocery and the bodega, to be traditional is often thought desirable and admirable. We see in this a longing for access and connection to prior worlds by respecting and perfecting the recipes of old, those that endure, those that are correct and pure and perfect.

Other areas of ordinary human endeavor are like this, too: singing and the playing of musical instruments, sports, and other games; auto mechanics and repair; sailing or seamanship; drawing and painting; carpentry; the composition of poetry; the practice of learning how to write well; even the learning of a language. To engage in these activities is to submit oneself to a body of past and enduring standards of excellence. Of quality, knowledge, and expertise.

II. TRADITION IN LAW

Now, to my second theme—what about law? It is also this way. In the common law, the body of law determined (some say "discovered," others say "made") in judicial decisions over long spans of time, tradition is a constant and subterranean force in the form of "custom." Custom serves as a way to construct and transmit the legal past, looking back at it from the present. A lawyer or a judge approaching the law generally intends to carry on some lasting way of thinking or reasoning or behaving into the present.

So, too, with judging and law practice, which are often described as "crafts." Judge Learned Hand, himself known as a judicial craftsman, once even likened the qualities of a judge to those of a cook: "Into the composition of his dishes," Hand said, "he adds so much of this or that element as will blend the whole into a compound, delectable or at any rate tolerable to the palates of his guests. The test of his success is the measure in which his craftsman's skill meets with general acceptance."[4]

Law practice is like this too. Lawyers learn the traditions and craft of letters, motions and memoranda, briefs, discovery documents, contracts, wills, trusts, legal codes, oral arguments, registration statements for the sale of securities, bits and scraps of official legal counsel, all the while applying what the late legal scholar, Frederick Schauer, has called distinctive "techniques of reasoning."[5] These all have a shape and a form that must not deviate from the just-so formalities that have always made such artifacts what they are.

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[3] JEAN ANTHELME BRILLAT-SAVARIN, THE PHYSIOLOGY OF TASTE 25 (1825).

[4] Learned Hand, *The Nature of the Judicial Process by Benjamin N. Cardozo*, 35 HARV. L. REV. 479, 479 (1922) (reviewing the same).

[5] FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING, at xi (2009).

In constitutional law, traditions are made up of enduring political practices which are given presumptive authority as determinants of the law of the Constitution. Endurance is itself made up of the age of a practice, its longevity, and the density of its adoption across the nation. Traditions are ongoing sets of arguments representing the views of those situated within these practices, developing over time, concerning excellence in it. And what I have before called traditionalism in constitutional law gives primacy to enduring political practices for several reasons.

First, because constitutional justice—the justice referred to in the Preamble of the Constitution—is in part a collection of goods internal to the enduring practices that shape our constitutional law, and not merely the external result of those practices. Constitutional justice is often *disclosed* to us through lives of political practice, and in the social and political institutions that structure those practices. There are many features of constitutional justice that cannot be accessed or specified apart from the practices that determine our constitutional law. The complex of rules determining, for example, the just use of deadly self-defensive force with a firearm, over time and geographic space, or the laws and liberties that shape the proper exercise of legislative prayer, or the regulation of signage in the physical spaces where people live and work together—these are the traditions within which people acquire certain political excellences, or virtues, and through which those virtues are manifested in community.

This is not to say that constitutional justice is a matter of popular referendum or of mindless, repetitive behavior. It is not. But it is also *not* a matter of abstract thinking alone. Traditionalists in constitutional law believe that thinking and doing should be united. Thinking well about the worth of a political practice in constitutional law is bound up with engaging in the practice of constitutional government. And if thinking about the worth of the practice cannot be extricated from the practice itself, then getting a true grasp on the world depends upon our doing things in it—regulating behavior, governing, and participating politically—and not only thinking about the things that we or others do. Without that union, we fail to account for embodiment and purposiveness, for those features of actual thinkers who are always in particular situations.

Second, "We the People" are sovereign in our polity. The people are supposed to be, as the philosopher Matthew Crawford once put it, "masters of their own stuff."[6] Shepherds and custodians of their own government, seeking political excellence as they see it. Why, then, do increasing numbers of Americans feel alienated and disaffected from their institutions of government and their Constitution? How is it that the deformation of our politics has made Americans particularly skeptical about their own Constitution and the possibility of excellence in constitutional governance?

The problem involves a central feature of republican agency: the people mature in their constitutional excellence through the experience of their practices, and they derive cognition of excellence from sources other than abstracted, universal, reflective reason. When constitutional theorists and judges refuse to incorporate or account for the people's practices, they strip the people of that agency. They prop themselves up as the constitutional "scientific management" over the menial workers, as the meaning of constitutional work becomes more remote from the

[6] MATTHEW B. CRAWFORD, SHOPCLASS AS SOULCRAFT: AN INQUIRY INTO THE VALUE OF WORK 54 (2009).

worker who does it. The people are in consequence alienated from their Constitution. They feel no affection for it. They come not to love it.

III. TRADITION'S WORTH: THEOLOGY & CONSTITUTIONAL LAW COMPARED

But why? What is the value or the worth of tradition? I propose, in the spirit of this conference and yet with no small degree of trepidation, to reflect on this problem comparatively—in Christian theology and constitutional law.

Two rather sizable cautions are in order. First, I am not a theologian. There are theologians with us today, and I will do my best not to induce the excessive raising of their eyebrows. But I may not succeed, and this is a far more tentative and exploratory portion of my lecture. Second, the analogy between Christian theology and constitutional law will be highly imperfect. It will have limits. While both Christian and constitutional texts are venerable, and even venerated, Christian Scripture is meant to be prayed and believed. American Scripture, as the historian Pauline Maier once called the Declaration of Independence, is not meant to be prayed at all.[7] If it is meant to be believed, the beliefs are of a different order than the truths of Christianity. Yet with the decline of belief in the authority of Christian Scripture, secular scripture filled a void. For some, the Ten Commandments of the Bill of Rights may even substitute for the Ten Commandments of the Decalogue. A polity with no national church will find its civil religion somewhere.

Still, drawing on, yet disagreeing with, some observations by the Christian historian, Jaroslav Pelikan,[8] I want first to *make* the analogy. You may then apprise me of its infelicity. I am not the first to notice it. In 1959, Edward Corwin, one time McCormick Professor of Jurisprudence at Princeton, fired off this broadside: "The Reformation superseded an infallible Pope with an infallible Bible; the American Revolution replaced the sway of a king with that of a document."[9] I hope to do a little bit better than that.

In both Christian theology and American constitutionalism, a communal tradition of belief and practice *precedes* a foundational, ancient, and, in some sense, inspired text. The community of Christians believed in Jesus Christ and practiced accordingly. We the People believed in and practiced certain arts of good government. In time, membership in the community was partly constituted by the text. The text was incorporated into the tradition. The Scriptures *alone* did not bring the Christian tradition into being; the tradition, in the Church, is the interpretive key to the Scriptures. The constitutional text did not bring the American people into being. We the People came before the Constitution, and we ordained and established it presupposing a tradition of excellence in government—a constitution in Aristotle's sense, a polity or regime—that is the text's interpretive key.

The text's authoritative status is partly grounded on the assumption that the tradition of the text's understanding may be applied by future practitioners to the considerably changed

[7] *See* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE (1997).

[8] *See* JAROSLAV PELIKAN, THE VINDICATION OF TRADITION (1984); JAROSLAV PELIKAN, INTERPRETING THE BIBLE AND THE CONSTITUTION (2004).

[9] EDWARD CORWIN, THE 'HIGHER LAW' BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 1 (1955).

circumstances of later times, many of which the writers who originally wrote the document could not themselves envision. Enduring practices disclose the law and doctrine of the document and glue together the consecutive generations of the respective communities. The text itself elicits painstaking, highly elaborate, often byzantine interpretation and reinterpretation. But it does not specify how its meaning or law must be derived. A church council, or Roman Rota, or Sanhedrin, or Supreme Court, submits itself to this ancient authority to unravel the text's meaning and law today.

These efforts result in doctrine which include techniques for coping with inner contradictions and change within a supposedly homogeneous body of learning. Indeed, it is to *the development of doctrine*, far more than to formal amendment, that the community looks for guidance as to change that nevertheless is supposed to preserve continuity.

We might ask several questions at this point. One is explanatory. How do we account for these similarities? Have constitutionalists consciously adopted the techniques that Christian expositors had used in previous centuries? Or have interpreters in these different spheres independently arrived at the same kinds of questions and techniques?

A second question might concern meaning. How is deriving meaning in this way possible? We say of some passage, a recondite parable in the Gospel of Matthew, or a difficult tract of St. Paul's Letter to the Romans, or the Fourteenth Amendment's Due Process Clause: "The people who wrote these words never imagined that they meant X, and the uninitiated reader today would be startled to learn that they mean X; and yet still, the passage means X." But what does it mean to say that the text means X in those circumstances?

A third question is anthropological. What sort of human need does the drive to rely on tradition respond to? We need not do things in this fashion. Human beings could live their lives in a resolutely forward-looking, pragmatic way. Some constitutional theorists have even recommended that course.[10] But for some reason, Christians and citizens of the American constitutional republic have chosen another path: we live not (or not only) on the basis of what can be, but instead bonding ourselves to what has been. How do we make sense of this compulsive need to cherish the reconstructed past?

One of this trio only will be enough for today. Exegetical commonalities and the meaning of meaning, I will leave to the side. But I have something to say about people, and why they seem ineffably drawn to tradition.

One answer might be called the response from *utility*. Tradition serves our interests and needs because, through a process of the survival of the fittest, and in the sifting of "many minds," and in the refining fires of the "test of time," the best ideas and practices are the ones that win out or last. The value of tradition is that it cautions us to be epistemically humble about our present capacities. It punctures the pretensions of an overconfident rationalism to see here and now what is best for us.

A second answer concerns *identity*. We value Christian tradition and constitutional tradition because it is *ours*, because it is what constitutes us as individuals and communities. Tradition endows us with a stable sense of ourselves and this is necessary for us, psychologically and

[10] *See, e.g.*, RICHARD POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003).

culturally. Without our traditions we are nobody, and we are nowhere. Our traditions give us existence, an existence we lose if we depart from them, at least too dramatically.

Here is a third answer that incorporates the other two while adding something of its own: the response from *excellence*. Traditions are the way human beings manifest an important part of what is excellent about us. This is, as far as I can make out, what those who find traditions self-evidently, magnetically compelling—in cuisine, architecture, sports, poetry, music, writing and the many uses of language, university life and learning, law, and, perhaps in part, Christianity—have in mind and are ineffably drawn toward. They are looking for a union with and a continuity of their own practices with something more than, or greater than, their individual lives, choices, and achievements. With something lasting and true.

In the Christian tradition, they are looking for the Logos. For the peace of God that surpasses all understanding. St. Paul tells us in the First Letter to the Corinthians: "that which I received from the Lord I passed on to you," and he enjoins us in the Second Letter to Timothy to "guard the good deposit entrusted to you, guard it with the help of the Holy Spirit who lives in us."[11] In the 5th century, Pope Leo I put it this way: "A man who has not the most elementary understanding even of the creed itself can have learned nothing from the sacred texts of the New and Old Testaments . . . At least he should have listened carefully and accepted the common and undivided creed by which the whole body of the faithful confess."[12] The Emperor Justinian, about a century later, said this: "This is the sound tradition that we preserve, which we have received from the holy fathers . . . This we would take as our companion during our life that we might be made citizens [of heaven]."[13] Or here, more than a millennium later, from Pope Paul VI's Dogmatic Constitution, "Dei Verbum": "Sacred tradition and Sacred Scripture form one sacred deposit of the word of God, committed to the Church. Holding fast to this deposit the entire holy people united with their shepherds remain always steadfast in the teaching of the Apostles, in the common life, in the breaking of the bread and in prayers, so that holding to, practicing, and professing the heritage of the faith, it becomes on the part of the bishops and faithful a single common effort."[14]

What does tradition offer? Something to render a person's own existence coherent and continuous with the lives of admired progenitors and hoped for progeny—to live, as Edmund Burke put it, in the presence of "canonised forefathers" and to walk amid "the gallery of portraits" of "illustrating ancestors," but also, I would add, to take one's own place in that mighty portico in the view of those that are to walk in it afterward.[15] True, traditions are useful to us and constitutive of our identity. But at their best, they are more than that. The notion of human

[11] 1 *Corinthians* 15:3; 2 *Timothy* 1:15.

[12] Letter from Pope Leo I to Flavian of Constantinople, Tome of Pope Leo I (449), https://www.newadvent.org/fathers/3604028.htm [https://perma.cc/9RSD-WM4U].

[13] JUSTINIAN, EDICT ON THE TRUE FAITH, VOLUME 3 (551).

[14] POPE PAUL VI, DOGMATIC CONSTITUTION ON DIVINE REVELATION *DEI VERBUM*, art. 10 (Nov. 18, 1965), https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651118_dei-verbum_en.html [https://perma.cc/8JJH-ABNF].

[15] EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790).

excellence depends upon transcendent concepts of valuation that extend in the before- and after-time of a person's own life.

Human beings value what they do on the generally tacit premise that human excellence existed before they were born and will exist long after they die. Without that assumption, they would think of achievement in human affairs very differently than they actually do, if they thought of it at all. For the "standards of achievement," as Alasdair MacIntyre once put it, "within any craft . . . are justified historically," and "what are actually produced as the best judgments or actions or objects so far are judged so because they stand in some determinate relationship" to the finally perfected work.[16]

I believe that this answer from human excellence also can explain what is now occurring in the invocation of tradition as a lingua franca in American constitutional law. Even as the very concept of constitutionalism is inherently preservative and custodial, connoting that which is legally essential and enduring, treatments of the meaning and legal content of the Constitution relentlessly slight the gravitational attractions of tradition. The notion of doing constitutional law well by doing what has been done before is not rejected; it is usually not thought of. But if one looks only at the changes and disruptions in our constitutional order, the result will be a failure to do justice to that order, which also tells a tale of tradition.

Note, again, an analogy that we might run backward to theology. Irenaeus and Origen in the second century AD appealed to the authority of the people as arbiters of Christian doctrine.[17] "We the People" as the foundation of the constitutional order finds its parallel in the theological notion of the *sensus fidelium*, which, as Cardinal Newman put it, testifies to the apostolic tradition, and affirms "the role of the laity as bearers of authentic Catholic tradition."[18] Both domains have also generated a thick *scholarly* incrustation that has created a great escarpment between the realms of the academy and those of common practice. The result of this "academification" is the emergence of two normative systems: one contained in the tradition; the other found in the creeds—theological and constitutional—of the professors. But not of the Church, and not of the People.

IV. TRADITION & CHANGE

A final matter: what about change? What about bad traditions? A common criticism of traditionalism, in constitutional law and in general, is that, as Chief Justice Roberts recently put it, it traps what exists "in amber," or that it is brittle and incapable of development.[19] We want growth, to be sure, but of the right kind. We want our children to grow strong and well. But cancers grow, too.

It is certainly true that not all traditions are worth preserving. Slavery might be described as an enduring practice in this country. Segregation of the races in railway cars and schools might

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16 ALASDAIR MACINTYRE, THREE RIVAL VERSIONS OF MORAL INQUIRY: ENCYCLOPAEDIA, GENEALOGY, AND TRADITION 64 (1988).

17 Pelikan, *supra* note 8 at 25–26 (quoting Origen and Irenaeus).

18 JOHN HENRY NEWMAN, ON CONSULTING THE FAITHFUL IN MATTERS OF DOCTRINE (1858).

19 United States v. Rahimi, 144 S. Ct. 1889 (2024).

as well. Some of these practices were expressly supported by the Court on the basis that they comported with the traditions of the people. We have come to see that these practices should be rejected. And we have rightly done so by formal amendment or other mechanism of change. Does this mean that our traditions must fail us?

I would not say so. What it shows is that *we* are fallible, and that we should therefore expect some fallibility in our traditions of constitutional law. And not the kind of fallibility that can be interpreted away through one more clever argument about what the text really means, or what a disembodied principle that has to this point been misunderstood actually demands. To see the fallibility of some of our traditions is not to repudiate *all* of them, and it is a mistake, or else a piece of cynicism, to take our worst moments as a kind of warped, house-of-mirrors reflection of our constitutional polity. Indeed, the capacity to see the fallibility in some of our traditions presupposes that we understand what they are. *Especially* if the people are to cast off or abandon a tradition, they will not know why they do so unless they first have understood it. Practice and cognition go together here, too.

Here, again, we might recur to a theological analogue. We will be hearing from distinguished guests today about Cardinal Newman's 7 tests for, or as he later called them, notes on, distinguishing authentic developments of doctrine from corruptions, in his "Essay on the Development of Christian Doctrine." In fact, Newman several times expressly analogizes between theology and jurisprudence.

In my estimation, Newman's notes are valuable, but taken alone, they are more in the nature of rules of thumb, or what he later called "tokens," than rules. Consider, for example, the second note: preservation of principle. Newman writes that because "doctrines expand variously according to the mind, individual or social, into which they are received . . . the life of doctrines may be said to consist in the law or principle which they embody." Newman may be right about this. Probably he is.

But there is a difficulty that will confront anyone who tries to use Newman's notes as rules for how tradition should, or should not, develop. The notes are conclusions about what to argue about rather than rules that could help resolve such arguments. Preservation of principle is a familiar concept in constitutional law, but constitutional lawyers will understand what asserting it can and cannot do. For any live constitutional dispute—affirmative action, sexual liberty, federalism, religious liberty, and so on—it is of only modest help to say that we should adopt an interpretation that is continuous with principles discernible in the text and the tradition. Most know that already. Most take it for granted. The dispute will be about which among the clashing principles extractable from the text and tradition best succeeds in maintaining such continuity.

Can we nevertheless mine Cardinal Newman's work for some assistance? I believe so, if we look to some of his more political and legal or constitutional writing. He takes a view of development as to *these* questions that highlights the centrality of enduring political practice.

Before getting to the notes, Newman describes what he calls "political change," of which he thinks "changes in the Constitution" a variety. In these, "often the intellectual process is detached from the practical, and posterior to it . . . [A] new theory is needed for the constitutional lawyer,

in order to reconcile the existing political state of things with the just claims of" the state.[20] For Newman, the pressure for legal change comes from practice first, and only later is the ratiocinated theory devised to account for it.

Legal change Newman also describes as "historical change, . . . the gradual formation of opinion concerning persons, facts, and events . . . Some authoritative accounts die away; others gain a footing, and are ultimately received as truths. Courts of law, Parliamentary proceedings . . . are in this day the instruments of such development. Accordingly, the Poet makes Truth the daughter of Time."[21] Again, we see Newman—here quoting Francis Bacon, the outstanding 16th century English lawyer, judge, and scholar—discussing legal change as both motivating and motivated by custom and popular acceptance or ratification.

But Newman's most acute observations on law appear in a series of eight letters, written under the pseudonym "Catholicus," during the Crimean War, concerning English constitutionalism. These are collected under the title, "Who Is To Blame?"

Here is a bit from the third letter: "It is, then, no paradox to say that every State has in some sense a Constitution; that is, a set of traditions, depending, not on formal enactment, but on national acceptance, in one way or other restrictive of the ruler's power; though in one country more scientifically developed than another, or more distinctly recognized, or more skilfully and fully adapted to their end."[22]

Or this, from the seventh letter:

> [It is] inexpedien[t] [to] suffer[] the tradition of Law to flow separate from that of popular feeling, whereas there ought to be a continual influx of the national mind into the judicial conscience; and, unless there was this careful adjustment between law and politics, the standards of right and wrong, set up at Westminster, would diverge from those received by the community at large, and the Nation might some day find itself condemned and baffled by its own supreme oracle of truth."[23]

Newman's conception of legal development depends upon his view that within the ambit of reason permitted by the natural law, the political and historical problems of constitutionalism lie within the space of what St. Thomas Aquinas called *determinatio*—the specification or disclosure of the political ends of justice, pursued through the enduring customs and practices of the people.[24] That is, through what in our constitutional law is tradition.

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[20] Newman, *supra* note 18 at 34–36.

[21] *Id.* at 38. Newman quotes "Crabbe's Tales," a series of poems by the Reverend George Crabbe about late eighteenth and early nineteenth century provincial life in England.

[22] Letter 3 from John Henry Newman to the Editor of the Catholic Standard, Constitutional Principles and Their Varieties, https://www.newmanreader.org/works/arguments/blame/letter3.html [https://perma.cc/MC4X-RNRP].

[23] Letter 7 from John Henry Newman to the Editor of the Catholic Standard, English Jealousy of Law Courts, https://www.newmanreader.org/works/arguments/blame/letter7.html [https://perma.cc/V3BL-TYX6].

[24] For acute remarks along these lines, *see* Adrian Vermeule, *The Chief Justice and the Catholic Bishops*, THE NEW DIGEST (June 25, 2024), https://thenewdigest.substack.com/p/the-chief-justice-and-the-catholic [https://perma.cc/5CR3-HYSD].

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In the last of these letters, Newman draws a parallel between constitutions of healthy physical bodies and healthy polities. I take some small inspiration that his central metaphor is, to end where I began, about food: "as in our own persons, one by one, we consult for our particular constitution of mind and body, and avoid efforts and aims, modes of exercise and diet, which are unsuitable to it, so in like manner those who appreciate the British Constitution aright will show their satisfaction at what it does well, resignation as to what it cannot do, and prudence in steering clear of those problems which are difficult or dangerous in respect to it."[25]

There are those who might say that for us, in America today, this is inapt and ill-suited. After all, we have a written document. We are exceptional in our constitutionalism, having made the world anew.

But Newman had the greater insight. Constitutions are meant to sustain. They are meant to endure. They are meant to assist human bodies and their bodies politic in becoming as excellent as they can be. It is in the very idea of tradition, whether of life or of law, that we learn how to be good.

[25] Letter 8 from John Henry Newman to the Editor of the Catholic Standard, English Jealousy of Church and Army, https://www.newmanreader.org/works/arguments/blame/letter8.html [https://perma.cc/YG3C-V4C9].