ST. JOHN HENRY NEWMAN'S DEVELOPMENT OF DOCTRINE AND LAW: SOME PRELIMINARY NOTES AND QUESTIONS

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When one thinks about the relationship between Newman's thought on the development of doctrine in the Church and the development of *legal* doctrine, it is hard to know where to begin. There are so many potential parallels and fruitful avenues of inquiry, but also worries about superficial resemblances or imperfect analogies between theological doctrine and legal doctrine. This is all the more challenging because Newman's work on doctrinal development is complex, subtle, and hotly contested. That different theologians interpret Newman in such different directions makes it all the trickier for the interloper. One cannot help but feel that one is building the ship while at sea.

To anchor this discussion, I will rely on the work of three excellent scholars. First, my legal focal point is Professor Marc DeGirolami's work on tradition in general and constitutional law in particular.[1] This work, which is the occasion for this conference, is theoretically sophisticated and, given the recent prominence of tradition of the Supreme Court's constitutional decisionmaking, timely indeed.[2] For the theological side of the discussion, in addition to Newman's masterwork on doctrinal development,[3] I have profited from reading two recent, excellent works by Professors Matthew Levering and Tracey Rowland.[4]

Rowland contends that Newman's work served as a crucial *via media* in Catholic theology between intellectualism and historicism.[5] Theories about legal doctrine have similarly dangerous

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[1] *See generally, e.g.*, Marc O. DeGirolami, *The Very Idea of Tradition*, 35 HARV. J. L. & PUB. POL'Y *PER CURIAM* (2024) [hereinafter DeGirolami, *Idea of Tradition*]; Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9 (2023) [hereinafter DeGirolami, *Traditionalism Rising*]; Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123 (2020) [hereinafter DeGirolami, *Traditions of American Constitutional Law*].

[2] *See, e.g.*, United States v. Rahimi, 144 S. Ct. 1889, 1898 (2024) ("[T]he appropriate analysis [under the Second Amendment] involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." (citing New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2111 (2022))); *see also* Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1496–1502 (2023) (cataloging the extent to which the Court's jurisprudence relies on tradition to inform constitutional meaning).

[3] JOHN HENRY CARDINAL NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE (6th ed. 1989).

[4] MATTHEW LEVERING, NEWMAN ON DOCTRINAL CORRUPTION (2022); Tracey Rowland, *John Henry Newman on the Development of Doctrine: A* Via Media *between Intellectualism and Historicism*, *in* A GUIDE TO JOHN HENRY NEWMAN: HIS LIFE AND THOUGHT 352 (Juan R. Vélez ed., 2022).

[5] Rowland, *supra* note 4, at 354 (citing Heinrich Fries, *Newmans Bedeutung für die Theologie*, *in* NEWMAN STUDIES ERSTE FOLGE 181–99 (1948)).

terrain. First, consider intellectualism. Scholars of private law will be well aware of philosophies of tort, contract, and property that drink deeply of Kant's philosophy of right or Hegelian understanding of personhood but treat messier case law as unfortunate dregs at the bottom of the glass. Rationalist theories of constitutional law also abound, as we observe Ronald Dworkin's Judge Hercules (and his judicial imitators) laboring to make the Constitution the best it can be in light of abstract political morality.[6]

Historicism also abounds, especially in pragmatic legal theory. For all their differences in other respects, legal realists and descriptive doctrinalists alike in private law regard the common law as contingent developments directed by forces of history or general intellectual trends. Much of the same can be said for constitutional law, including by originalists of the legal positivist variety who think the domain of law is limited to rules and conventions that we happen to have. There, in the legal domain at least, all that succeeds is success.

One might note, provocatively here in a conference focused on tradition, that some forms of legal traditionalism are particularly susceptible to the risk of historicism. One of the early leading theorists of the common law tradition was David Hume, whose conventionalism is well known.[7] Classical common lawyers often had a kind of ambivalence about natural law, leaving it to lie at the subterranean level and feeling much more comfortable talking about how the law is suitable to the ways and practices of a particular people.[8] More contemporary theorists of classical common law thinking like Brian Simpson and Gerald Postema also focus on convention, shared reasoning, and local particularity.[9] And if one reads Martin Krygier, the excellent Australian philosopher of legal tradition, it is hard to find anything *but* tradition as the fundament of law.[10] To echo Levering's question: Could there be any standard for corruption if all that succeeds in tradition is historical success?[11]

The specter of relativism therefore hangs over this approach to traditionalism. Professor DeGirolami, as a natural lawyer and non-relativist, would surely like to avoid that. And his theory traditionalism in constitutionalism does that: there is *some* space for the critique and replacement of bad traditions, with "bad" meaning objectively wrong as a moral matter, not simply unpopular.[12] But how does one find a *via media* here in law?

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[6] *See* RONALD DWORKIN, LAW'S EMPIRE 239 (1986) (introducing his mythical Judge Hercules).

[7] *See* GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 110–43 (1986).

[8] *See id*. at 37 ("[T]his reveals a deep ambiguity in Common Law theory, for it is not clear whether Common Law is regarded as itself defining the standard of reason and justice in this area of social life (Common Law regarded *as* reason), or whether Common Law is the working out of reason (reason regarded as working *in* or *through* Common Law). Both can be regarded as historicist . . . .").

[9] *See generally* Gerald J. Postema, *Philosophy of the Common Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 588 (Jules Coleman & Scott Shapiro eds. 2002); Brian Simpson, *The Common Law and Legal Theory*, *in* A.W.B. SIMPSON, LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 359 (1986).

[10] *See generally* Martin Krygier, *Law as Tradition*, 5 LAW & PHIL. 237 (1986).

[11] *See* LEVERING, *supra* note 4, at 41 ("My goal is to reflect with Newman upon the threat of doctrinal corruption as it presented itself to him over the course of his long career of faithful proclamation of the Gospel.")

[12] *See* Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1671 (2020) ("[T]here are times where a tradition violates a moral or political principle of great power that defeats it—and rightly so.") [hereinafter DeGirolami, *First Amendment Traditionalism*].

It is important to note here that merely transposing Newman's "seven notes"[13] of doctrinal development to the legal context might not be enough. Certainly, they are illuminating aids for seeing how a body of law can be coherent within itself, how a tradition can grow in an organic fashion rather than sit frozen in amber. It can provide a measure, internal to the body of law itself, of doctrinal development or corruption. Any student of ordinary doctrinal legal science would benefit from seeing how Newman's seven notes characterize the development of a doctrinal tradition.[14]

But tradition, for Newman, was not enough. Presumably one could use the seven notes to track the development of Eastern Orthodox or Protestant doctrine, or the development of Halachah and particular schools of Islamic Jurisprudence. That fact would not lead him to assent to those teachings. Tradition, as Newman understands it, seems crucial for building a mode of thought that is an alternative to deductive rationalism or idealism but is not sufficient unto itself.[15] Non-historicist legal theorists who value tradition, then, need something more.

It is therefore worth briefly considering the other building blocks in addition to tradition that Professor Rowland notes in her chapter on Newman. She identifies three others besides "the organic account of tradition": first: a "historical account of Revelation"; second, an understanding of the teaching office of the Pope and the *ecclesia docens* more generally; and third, conscience.[16] I will focus on the first two.

First, revelation. Newman does not value tradition for its own sake, but rather for the way it can help reveal a deposit of faith that has always existed but becomes clearer to us in the fulness of time.[17] If we are going to transpose the development of legal doctrine, especially constitutional doctrine, into a Newmanian key, it is worth wondering whether there is a legal analogue to "revelation" and what it would look like. This raises very important questions that I cannot easily answer but are worth considering.

Now, we need to be very careful here, lest we slide into a kind of legal idolatry. Nevertheless, if the development of legal doctrine is to avoid just being the story of one thing after another, there needs to be a measure of doctrinal corruption more robust than internal coherence. One natural candidate is, of course, the natural law. I believe in natural law and think all human law is answerable to it, but I worry whether that alone is enough of an anchoring analogue. The natural law directs, but leaves unanswered, many important questions of human affairs. While this suggests the natural law can provide inspiration for, and a salutary check on, the development of tradition, it also seems to present risks for understanding natural law *alone* as the anchoring source of human law's magisterium.

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[13] *See* Newman, *supra* note 3, at 169–206.

[14] *See, e.g.*, DeGirolami, *Idea of Tradition, supra* note 1; ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 123–24 (2022) (drawing on Newman's seven notes to distinguish development from corruption in constitutional doctrine).

[15] *See* Rowland, *supra* note 4, at 361 (stating that "the organic account of tradition [was] not however Newman's only building blocks" for constructing his doctrinal theory).

[16] *Id.* at 361–62.

[17] *See* LEVERING, *supra* note 4, at 38–39 ("Newmanian doctrinal development does not entail moving *beyond* the apostolic deposit of faith as communicated in Scripture and Tradition, as though new revelation were being received or parts of revelation now could be rejected.").

My worry here is that it seems odd to suggest that the development of our contingent legal system is the revelation of the natural law over time. This is so even if the legal system is entirely compliant with the natural law, which underdetermines so many questions. It may be plausible to say our Constitution, ratified in 1789, in some sense provided the seed for the Supreme Court's doctrine on the removal of executive officers in a fashion analogous to the way that the magisterium always contained but had not yet articulated the Assumption of Mary.[18] It would be strange, however, to say the natural law contained the seed of such officer-removal doctrine. Especially since many just constitutions have no such provision. On the other side of the coin, it is not so easy for Catholics to say the Immaculate Conception was one of many reasonable options for revelation in the way we can say that about the contents of Article II, section 2 of the U.S. Constitution.

A more fitting analogue, then, seems to be a kind of foundational document or, if we are in a country with an unwritten constitution, statutes and fixed practices of equivalent status. A tradition that departs from that original, fixed lodestar law is a doctrinal corruption, which is the measure and starting point of any tradition.[19] To put it in originalist terms, doctrinal development can occur in the construction zone but cannot replace interpretation of the original norms.

I suspect Professor DeGirolami would resist this, though his theory does have a proviso that says traditions cannot depart from the clear text of the constitution.[20] And I wonder if Newman and the Fathers of Vatican II would resist the analogy as well. This analogy views human law, and its revelatory analogue, as a kind of propositional information contained in a canonical document (and its separate source of tradition, whose teachings are somehow "contained" in scripture). *Dei Verbum*, however, treats scripture and tradition as interpenetrating each other and working together as the living revelation of Christ himself in our world.[21] Understanding sublunar, civil law in those terms, however, is trickier. Taking the analogy too seriously risks treating *all* human law as the unfolding of some kind of divine plan (and thus either ignores or gives little explanation for human law's well known and crucial variety) or it suggests a kind of legal polytheism where each system has an eternal essence revealed in the fulness of time through legal science. And I know Professor DeGirolami does not want to go back to the most exotic

[18] *Compare* Morrison v. Olson, 487 U.S. 654 (1988) (seeking to synthesize conflicting doctrine on the President's power to remove principal officers) *with* Pope Piux XII, *Apostolic Constitution of Pope Pius XII,* Munificentissimus Deus (Nov. 1, 1950), https://www.vatican.va/content/pius-xii/en/apost_constitutions/documents/hf_p-xii_apc_19501101_munificentissimus-deus.html [https://perma.cc/F6XJ-LEWM] (defining the dogma of the Immaculate Conception of Mary).

[19] *Cf.* Jeffrey A. Pojanowski and Kevin C. Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule's New Theory*, 98 NOTRE DAME L. REV. 403, 415 (2022) ("The central criterion [for such a theory of development is] whether the legal development [is] consistent with or authorized by the original law of the Constitution, or rather a departure that contravenes the original law.").

[20] *See* DeGirolami, *First Amendment Traditionalism*, *supra* note 12, at 1666 (noting that "clear text to the contrary" can displace traditional practices).

[21] Documents of the Second Vatican Council, *Dei Verbum*, No. 9 (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/3YLA-HQ4F] ("Hence there exists a close connection and communication between sacred tradition and Sacred Scripture. For both of them, flowing from the same divine wellspring, in a certain way merge into a unity and tend toward the same end . . . . Therefore both sacred tradition and Sacred Scripture are to be accepted and venerated with the same sense of loyalty and reverence." (footnote omitted) (citing Council of Trent, session IV, Decree on Scriptural Canons: Denzinger 783 (1501))).

branches of the historical school of jurisprudence and its discussion of national essences and the like. So, either we need to think more and better about human law and how it can relate to revelation in our adaptation, or perhaps we need to conclude that translating Newman to this context requires a humbler understanding of a doctrinal anchor. And if it is the latter, we might need something more fixed if tradition and development are to be more than just change over time.

Second, there is Newman's understanding of the role of the Pope and the *ecclesia docens*. Although Newman rejected the strongest versions of ultramontanism on offer,[22] he gave an important role to the Holy Office as an authoritative developer of doctrine.[23] A crucial custodian of tradition that helps manifest revelation, if you will. Some classical common lawyers would readily agree, though focusing more on the learning of the twelve men in scarlet who used to supervise the King's justice. As Brian Simpson wrote, a traditionary system "can function only if it can preserve a considerable measure of continuity and cohesion, and it can do this only if mechanisms exist for the transmission of traditional ideas and the encouragement of orthodoxy."[24] In the development of Catholic doctrine, at least, the papacy plays an important, if contested role. Professor DeGirolami's work on constitutional traditionalism pays some credence to such a need: he does not argue for a kind of popular constitutionalism in which the courts in general, and the Supreme Court in particular, get entirely out of the way and allow the people to govern themselves through their own organic traditions alone.[25]

The Supreme Court's role is for Professor DeGirolami, however, somewhat ambiguous. The primary driver of determining traditional constitutional meaning under his theory is popular practice.[26] The role of the Supreme Court, then, is to identify and recognize authoritatively the popular practices that are presumptively authoritative for the meaning of what our law is.[27] One can't help but reach for *sensus fidelium* analogies here. But the Church doesn't treat *sensus fidelium* as the same things as majority opinion or popular custom. As Pope Francis said in his 2013 address to the International Theological Commission, for authentic expressions of the *sensus fidelium*, there needs to be a disposition of participation in the life of the Church, listening to the word of God, openness to reason, adherence to the magisterium, holiness, and seeking edification in the Church.[28] As Rowland points out in her chapter, for Newman "it is the saints who embody the *sensus fidei* in its highest power and especially the saints who stand out among the Church doctors."[29] If, for the lawyers in the room, we are going to draw a crude analogy, *sensus fidelium*

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[22] *See* LEVERING, *supra* note 4, at 317 ("Most importantly, Newman rejects a maximalist interpretation of the dogma.")

[23] *See* Rowland, *supra* note 4, at 361–62 (citing Heinrich Fries, *Die Dogmengeschichte des fünften Jahrhunderts im theologischen Werdegang von John Henry Newman*, *in* 3 DAS KONZIL VON CHALKEDON 431 (Aloys Grillmeier, S.J., & Heinrich Bacht, S.J., eds. 1954)).

[24] Simpson, *supra* note 9, at 377.

[25] DeGirolami, *Idea of Tradition*, *supra* note 1.

[26] *See* DeGirolami, *Traditions of American Constitutional Law*, *supra* note 1, at 1161–68 (arguing that traditionalist constitutional interpretation looks to political practices of longstanding duration).

[27] *Id.* at 1168–70 (explaining how longstanding political practices enjoy a presumption of constitutional validity).

[28] *See* Address of Pope Francis to Members of the International Theological Commission (Dec. 6, 2023), https://www.vatican.va/content/francesco/en/speeches/2013/december/documents/papa-francesco_20131206_commissione-teologica.html [https://perma.cc/YU4D-35CL] (*discussed in* Rowland, *supra* note 4, at 368–70).

[29] Rowland, *supra* note 4, at 370.

looks a lot more like the constitutional doctrine of liquidation, where prominent members who are faithful to the constitution seek to settle through argument and reasoned decision the meaning of an uncertain provision,[30] not the more populist, practical construction we see in Professor DeGirolami's legal traditionalism.[31]

Again, law is not theology and the constitution is not Our Lord's revelation incarnate on Earth. It is possible we need to adjust our analogies accordingly. And, if we do, there could be difficult questions about what a system that hangs together well in Catholic theology can tell us once we alter the dimensions of some of those building blocks. In any event, the parallels and resemblances between the two systems of development are too striking to ignore. Nevertheless, if we are going to discover what Newman's development of doctrine can teach us about law, we might first have to answer important threshold questions about the nature and relevant similarities between human law and revelation, the proper way of reading those texts, and the constitutive role of the people in the City of Man versus the City of God. Those answers will take far more than one person with fifteen minutes to provide, but it sounds like a very fruitful research agenda for a community of Catholic legal scholars. I am clearly in the right place to raise these questions about Newman and the law, and Catholic University's Columbus School of Law could not have picked a better eponymous chair to lead the pursuit of such answers.

[30] *See generally* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (identifying the elements of liquidation).
[31] *See* DeGirolami, *Traditionalism Rising*, *supra* note 1, at 25–34 (distinguishing traditionalism from liquidation).