

PANEL ON LAW AND TRADITIONALISM: A PROBLEM FOR TRADITIONALISM

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I'm delighted to be here. I always love coming to Notre Dame so much, and to be among very great scholars whose work I have long admired and who are among the best of my friends. It's such a pleasure for me to disagree with my friends. I also want to take a moment to thank Professor Martin for selecting this topic. It is such a rich, wonderful topic, and I have so enjoyed listening to the panels and discussions that I have heard.

I want to reflect on a problem for traditionalism in the law, and perhaps for tradition in contemporary society. Many problems have been raised for the sort of systematic reliance on tradition in American constitutional law of the kind that I have advocated.¹ In general, these have been doctrinal or conceptual objections on the legal-technical side. And that is as it should be. Law is a technical discipline. It is a discipline of *techné* or skill in craftsmanship, as Professor Jeff Pojanowski has so eloquently said.²

The problem I want to sketch is sociological, or cultural. It concerns what I will call *the need for submission*. To be traditional, and to value tradition, is to submit to existing forms of authority, structure, and knowledge external to oneself. A person *de-grades*, in the sense of grading as less important, his or her will for the sake of obedience to some other power that is thought to be greater than that person.

I. TRADITIONAL DISABILITY

Certainly, in the modern period—but perhaps always—that self-degradation has a cost. I bind myself to a way of life and I am disabled from other projects that I might wish to undertake—from doing what I want to do, when I want to do it. We might say that to follow a tradition, I have to accept a self-imposed disability. That self-imposed disability might be described as

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1. See, e.g., Marc O. DeGiolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123 (2020); Marc O. DeGiolami, *The Constitution of Practice: On Law and Tradition* (forthcoming, 2026).

2. See Jeffrey Pojanowski, *The Return to Tradition in the Law*, THE PUBLIC DISCOURSE (Jan. 4, 2026), <https://www.thepublicdiscourse.com/2026/01/99848/>.

manifesting a kind of autonomy. When Ulysses bound himself to the mast so as not to be drawn against his will toward the sirens, we could say that he was exercising autonomy in a more complete or full way than he would have if he had simply acceded to his more immediate desires.

But whether it is an exercise of autonomy or an exercise, as I believe, of submission to higher authority—really a kind of *heteronomy* of control by other wills, older wills, to whom one submits one’s autonomy—disability can have great value. That, I think, is interesting in its own right—the notion that disability has a value, a worth.

Nevertheless, for tradition to be attractive, the benefit I receive from submission to these other authorities needs to somehow be worth the cost, worth a high enough or good enough or noble enough payout.

But the very concept of the noble and submission to the noble, to the higher and to the better, is a special problem for contemporary Americans. Even for those Americans who work in places and institutions whose very existence depends upon hierarchies of value and patterns of discrimination. Perhaps especially for such Americans. When we think of tradition we think of something received, not personally created, curated, or chosen. In Oliver Wendell Holmes’s terms, tradition is one of those *can’t help’s*—ways of thinking and doing that we accept as givens and cannot imagine changing.³

On a recent trip to Florence, the site of my family’s ancestral home, my wife and I took a photo of the *Via de’ Girolami*, located right off of the *Ponte Vecchio* crossing the Arno River, and we were fortunate enough to meet with a Florentine de’ Girolami, of whom I had not previously been aware, who still lives in a residence on that very street. When I asked him why the family had remained, he said: “We could never leave. The de’ Girolami have been in this place since the eleventh century.” This might have been an embellishment, a sort of reference to time immemorial. Still, there are hard records of a Florentine Cardinal who lived on that street, Raffaele Cosimo de’ Girolami, dating from the seventeenth century.⁴ He was prefect for the Congregation for Indulgences and Relics.

At any rate, returning to my relation, he said: “We’ve always been here, we will always be here. Our home has claims on us.” Now, this family member could have chosen another path. He could have reinvented himself, to use a contemporary phrase, and moved to a rather spacious apartment in Buenos Aires or Manhattan or Hong Kong or really anywhere. But that would have meant a complete break with his friends, family, history, and everything he knows and loves: for him and for the family, a great rupture.

This way of thinking is not so common for people in the United States today, and maybe it never has been. We are supposed to be the country of

3. Oliver Wendell Holmes, Jr., *Letter to William James* (Mar. 24, 1907). Available at <https://viewer.lib.harvard.edu/viewer/URN-3:HLS.LIBR:8362502?n=37&canvasId=https%3A%2F%2Fnrns.harvard.edu%2FURN-3%3AHLS.LIBR%3A8362502%3AMANIFEST%3A3%2Fcanvas%2Fcanvas-drs%3A43007426>.

4. See *Raffaele Cosimo Cardinal de’ Girolami*, CATHOLICHIERARCHY (Feb. 25, 2024), <https://www.catholic-hierarchy.org/bishop/bgirolami.html>.

personal liberty and choice. Tradition implies communal and historical limits on all of that, and we do not believe in those things. Children are supposed to leave the geography, physical and psychological and spiritual, in which they once had home and family. We believe in creating our own paths and “light[ing] out for the Territory” like Huckleberry Finn.⁵ Now that the frontier has closed, we believe in exploring the territories of our inner selves. From what I can gather online about the New Trads, all of this also seems true. One of the ironies in twenty-first century America is that it seems inevitably a matter of personal choice, all of this tradition. One has to choose affirmatively to join one of the many traditions on offer. It is often said liberalism creates an exit option for people in traditional communities. But I would say it creates an entrance requirement as well.

Now one might say—and in fact I have said something like this in response to this objection to my claims for tradition—of course individualism is an important value in U.S. culture. But still, the idea of tradition has much to recommend it. And many people, even many Americans, rely on it constantly, even subconsciously. They rely on it so deeply and in such fundamental features of their lives that they are likely not even to see it or recognize it for what it is, in the way they eat and drink and think and work and worship and play together.

II. LITTLE TRADITIONS

About a decade ago, Sir Roger Scruton gave a lecture (as part of a project on tradition that I co-directed with my friend Professor Mark Movsesian⁶) in which Sir Roger recommended I distinguish “trivial from deep traditions.”⁷ Among the former he included traditions like “Highland dress.”⁸ He also mentioned “the ceremony of Lessons and Carols, Christmas itself” as trivial traditions.⁹

I have learned a great deal from Sir Roger’s work on tradition, and I am very grateful to it. But on this matter (and setting Christmas aside, which Scruton realized is hardly trivial), I think he was wrong. I think he was deeply wrong. We can learn about the worth of tradition from its smallest and seemingly least significant expressions. Indeed, it is in these little, day-to-day matters, matters of ordinary life, of ordinary citizens, that we can find a keyhole into what might otherwise seem like an inaccessible door. We learn about tradition by attending to the way we behave together in undistinguished places.

5. Mark Twain, *Adventures of Huckleberry Finn* 318 (Charles L. Webster & Co., 1891) (1884).

6. *The Tradition Project*, ST. JOHN CENTER FOR LAW AND RELIGION, <https://lawandreligionforum.org/tradition-project/>.

7. Sir Roger Scruton, *Tradition, Culture, and Citizenship*, Law & Liberty (Dec. 18, 2017), <https://lawliberty.org/tradition-culture-and-citizenship/>.

8. He probably had Hugh Trevor-Roper’s excellent essay *The Invention of Tradition* in mind. Hugh Trevor-Roper, *The Invention of Tradition: The Highland Tradition in Scotland*, in *THE INVENTION OF TRADITION* (Eric Hobsbawm and Terence Ranger, eds., Cambridge University Press 1988).

9. Scruton, *supra* note 7.

In dumps, in homeless shelters, in bars, in chain restaurants, in bodegas and more. In fact, what I am trying to do in some of this work is to render tradition appealing and describe its beauty and attraction for a democratic age and a democratic world.

III. TRADITION IN THE LAW

Just why is it the Supreme Court has turned in this direction just now? Many answers may be given. Some Justices have claimed, for example, that tradition allows for judicial decisions to be controlled by history *rather than* by moral judgment.¹⁰ That is not a plausible answer in my view. A better answer is that the Court is looking for something that can bind us, glue us together. And tradition of all things might do that precisely because it is something unlooked-for, and yet a powerful subterranean force with surprising appeal.

In this sense I have tried to democratize tradition, to smooth out the lumps that sociological observers of the American character since Tocqueville have so keenly observed. But there is a problem, and it was pointed out to me in an acute way by Prof. Pojanowski in response to something I wrote previously.¹¹ Jeff observed that true traditions, real traditions, such as the Great Tradition of the Catholic Church, depend on great men—Popes, saints, and so on—to do the authoritative expository work of the tradition.¹² The people need to show that work a proper attitude of deference and respect, even of submission. That submission is reflected in a disposition of participation in the life of the Church and adherence to the Magisterium.¹³

Yesterday I heard a very good talk by Prof. David Schindler in which he rightly emphasized that for scholars like Josef Pieper, tradition is not a conversation among co-equals.¹⁴ The *traditum* is handed down by the older and the greater to the younger and the lesser. It is, in fact, the way that the younger

10. See, e.g., *United States v. Rahimi*, 602 U.S. 680, 718 (2024) (Kavanaugh, J., concurring) (“[I]n a constitutional system that counts on an independent Judiciary, judges must act like umpires. To be an umpire, the judge ‘must stick close to the text and the history, and their fair implications,’ because there ‘is no principled way’ for a neutral judge ‘to prefer any claimed human value to any other.’ History establishes a ‘criterion that is conceptually quite separate from the preferences of the judge himself.’ When properly applied, history helps ensure that judges do not simply create constitutional meaning ‘out of whole cloth.’” (First quoting Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 8 (1971); and then quoting Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).)

11. Marc O. DeGirolami, *The Very Idea of Tradition*, 35 HARV. J. OF L. & PUB. POL’Y PER CURIAM (2024).

12. Jeffrey A. Pojanowski, *St. John Henry Newman’s Development of Doctrine and Law: Some Preliminary Notes and Questions*, 36 HARV. J.L. & PUB. POL’Y: PER CURIAM (2024).

13. See, e.g., INTERNATIONAL THEOLOGICAL COMMISSION *SENSUS FIDEI* IN THE LIFE OF THE CHURCH ¶ 3 (2014) (“On the other hand, the *sensus fidei* refers to a communal and ecclesial reality: the instinct of faith of the Church herself, by which she recognises [sic] her Lord and proclaims his word. The *sensus fidei* in this sense is reflected in the convergence of the baptized [sic] in a lived adhesion to a doctrine of faith or to an element of Christian *praxis*.”).

14. David Schindler, *Is there a Philosophical Tradition?*, presented at the dCEC 2025 Fall Conference. Available at <https://www.youtube.com/watch?v=voHURLCDZdg>.

and the lesser become the older and the greater. It is a one-way exchange which requires an attitude of submission by the young to the old. And so it is to the saints, Jeff suggested, that we should look for our traditions, not necessarily to the people.¹⁵ Tradition is about truth and beauty and excellence, but many ordinary customs of the common democratic citizen are not about any of these things. And so, if we want people to be formed by the best things of this world, and the best things of the next, we will require they submit to those formative structures of truth and meaning. We will require that they submit to formation by others who are better, greater, nobler than they are.

But in the United States, this submission is going to be a problem. First, of course, as a society, we lack a common sense of what is authoritatively good and authoritatively bad. And second, and perhaps even worse, we sometimes lack that as individuals. The very idea of submission to the higher and the nobler and the elevated, to what and who is superior to oneself is regarded by many as anathema. Even institutions that are themselves dependent on this type of distinction-drawing have come under great strain through the pressure of the democratic egalitarian spirit so common in America. Here, I think especially of the university and its once-rigorous standards of discrimination for what was of high scholarly quality and what was not. The university was once not merely, as Prof. David Rabban has put it, a meritocratic institution. It was an aristocratic institution, even as late as the Humboldtian period, whose universities are usually taken to be the model for contemporary American universities.¹⁶

Submission to what is better than you just does not sit well in this country. There are some sound reasons, I think, for the collapse of that view, but its collapse has also meant a great loss for this country. Submission to tradition allows people to transcend themselves. To become better or greater or somehow *more* than they could have been if they had just lived poorer, sadder, smaller lives of relentless self-reinvention.

15. Pojanowski, *supra* note 12, at 5–6.

16. David M. Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* 7 (2013).