THE MAN WHO DECLINES TO BE SOCRATES: JUSTICE SCALIA, TRUTH, AND THE JURISPRUDENCE OF TRADITION

DAVID M. WAGNER*

I. INTRODUCTION

For a word that has mainly benevolent connotations outside of academia, the word "tradition" has certainly caused sparks to fly in constitutional law, and never more so than when two titans of opinion on the subject were on the Supreme Court—and in fighting moods—at the same time; namely, 1988 to 1990, when Justices William Brennan and Antonin Scalia duked it out in ways that can still instruct us today.

The two cases in which this debate reached its apogee were *Michael H. v. Gerald D.*[1] and *Burnham v. Superior Court.*[2] While tradition has often played a role in Justice Scalia's approach to constitutional questions,[3] his analysis of its role reached a peak of clarity during this debate with Justice Brennan, complete with footnote-wars that have long delighted the sports fans of constitutional law. It is on these cases that I will concentrate at first, before trying to cash out the concept of tradition itself in greater but, I hope, helpful depth.

Of the two cases just mentioned, the argument in *Burnham* is less sharply ideological than in *Michael H.* In the ordinary course of events, a case about the propriety of transient territorial *in personam* jurisdiction would not be the sort of dispute in which to bring heavy culture war firepower to bear. Brennan's decision to turn a case that was unanimous as to its outcome into a combat zone with no majority opinion was, we may assume, a result of Justice Scalia's decision to hone the theme of tradition in the opinion he drafted for the Court's consideration but which emerged as a plurality opinion only. As the Court decided *Burnham* only a year after *Michael H.*, Justice Brennan could hardly be expected to decline the challenge.

Though the issue in *Burnham*—transient territorial *in personam* jurisdiction—may not be as sexy as jet-setting ex-adulterers and the so-called law of "adulterine bastardy"[4] that we find in *Michael H.*, the two are tied together by the fact that the Court analyzes both claims under the Fourteenth Amendment

---

* Associate Professor, Regent University School of Law. B.A., M.A., Yale University; J.D., George Mason University School of Law. Many thanks to my research assistants Elizabeth Munson and David Williford.

1. 491 U.S. 110 (1989).

2. 495 U.S. 604 (1990).

3. This includes cases where he concedes (apparently) that the text requires some glossing, *e.g.*, the Establishment Clause, where, in his view, the long acceptance of benedictions and invocations at public high school graduations establishes beyond cavil that they are constitutional. Lee v. Weisman, 505 U.S. 577, 631-32 (1991) (Scalia, J., dissenting). Also, in cases where he insists the text is self-explanatory, *e.g.,* the Sixth Amendment's Confrontation Clause, Justice Scalia adduces evidence from tradition. *See* Coy v. Iowa, 487 U.S. 1012, 1016 (1988); *see also* Maryland v. Craig, 497 U.S. 836-864-65 (1990) (Scalia, J., dissenting).

4. *Michael H.*, 491 U.S. at 124 (citing H. NICHOLAS, ADULTERINE BASTARDY (1836)).

Due Process rubric. Even if Dennis Burnham's family issues are not as baroque as Michael's, Carole's, Gerald's, and Victoria's, nonetheless his interest in evading service of process in California has this in common with Michael's interest in asserting paternal rights over Victoria: both are protected, if at all (and not at all, as it turns out), by the Due Process Clause of the Fourteenth Amendment. Hence, Justice Scalia could conclude, as he did, that he had to explain transient territorial jurisdiction with specific reference to tradition. Tradition, for him, is a key interpretive tool for finding the metes and bounds of the Fourteenth Amendment.

In discussing tradition as a tool of constitutional interpretation, I mean tradition *per se*, rather than the constituent elements of the Anglo-American legal tradition.[5] Many and various are the references throughout American legal history to the Common Law, Magna Carta, and other documents and concepts that could be called traditional, and likewise the references to the fact that judging in the Common Law world is a matter of organic development.[6] None of these are references to "tradition" within the meaning of this article. They may be examples of tradition in action, and they may constitute references to particular elements of our traditions. But, tradition is a fact of legal life long before it becomes a specific object of debate and tool of construction, and it is on the latter that I wish to focus.

This article will examine more closely the clash of views on tradition manifested in *Michael H.* and *Burnham*; it will then survey definitions and analyses and tradition in twentieth century philosophy, and then turn to the clash of opinion and nature in the thinking of Socrates, with some lessons drawn for the use of tradition by judges.

II. *MICHAEL H.* AND *BURNHAM*

"Tradition" enters the mainstream of the Due Process conversation with *Snyder v. Massachusetts*,[7] a 1934 opinion by Justice Cardozo upholding a jury crime scene view from which the trial court excluded the defendant. The *Snyder* passage that has entered the standard Due Process string cite is the one that describes the Fourteenth Amendment Due Process Clause as protecting only those rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[8] The *Snyder* dictum thus links tradition, morality (in the form of "conscience"), and democracy ("of our people").

---

5. *See* RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER (1991); NORMAN F. CANTOR, IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM (HarperCollins 1997).

6. *See*, *e.g.*, J. Richard Broughton, *The Jurisprudence of Tradition and Justice Scalia's Unwritten Constitution,* 103 W. VA. L. REV. 19, 20-24 (2000) (relying heavily on KIRK, *supra* note 5, and arguing for a Corwinian "higher law" understanding of Scalian traditionalism).

7. 291 U.S. 97 (1934).

8. *Snyder*, 291 U.S. at 105.

Perhaps not coincidentally, "tradition" also put in an appearance when Chief Justice Stone set forth the modern doctrine of Due Process as applied to the then-rapid growth in long-arm jurisdiction. Writing for the Court in *International Shoe Co. v. Washington*,[9] Stone used the phrase "traditional notions of fair play and substantial justice,"[10] borrowing the phrase from *Milliken v. Meyer*.[11] The *Milliken* Court, in turn, had borrowed from Justice Holmes's opinion in *McDonald v. Mabee*,[12] but Holmes did not reference tradition in that opinion; his formulation there was merely "substantial justice."[13] Thus, *Milliken* and *International Shoe* added tradition to the phrase they both borrowed from Holmes, and thereby anchored tradition in the discourse on the limits of *in personam* jurisdiction.

The discussion of tradition in *Michael H.* became more pointed because it involved more than just procedure. While tradition is one basis for transient jurisdiction, few people would list transient jurisdiction, or any other kind of *in personam* jurisdiction, or indeed personal jurisdiction at all, as an issue of "culture war" significance on which "tradition" is likely to be ranged on one side or the other. Relationships within the family, on the contrary, are precisely that sort of issue, and it is on this issue that the lion's share of commentary on *Michael H.* ensued.[14]

The merits of "traditional" versus "nontraditional" families are precisely *not* the aspect of *Michael H.* that I focus on in this article. The notion that Justice Scalia prefers husbands to lovers is palpable from numerous turns of phrase throughout the plurality opinion—just as it is palpable that Justice Brennan sees fathering a child adulterously and then intruding legally on the now-healed family as one form of the self-expressive lifestyle that our Constitution was designed to "facilitat[e]."[15]

The issue, rather, is one of how tradition is used as a tool of analysis. When used in the way Justice Scalia recommends, in the context of the *Michael H.* case, it yields the result that Justice Scalia (presumably) prefers; when used in the way Justice Brennan recommends, it yields the result that Justice Brennan

---

9. 326 U.S. 310 (1945).

10. *Id.* at 316.

11. 311 U.S. 457, 463 (1941) (substituted, rather than personal, service satisfies Due Process, where it is "reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard").

12. 243 U.S. 90, 92 (1917) (holding that "an advertisement in a local newspaper is not sufficient notice to bind a person who has left a State intending not to return").

13. *Id.* ("To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done.").

14. *See*, *e.g.*, Mary Kay Kisthardt, *Of Fatherhood, Families, and Fantasy: The Legacy of* Michael H. v. Gerald D., 65 TUL. L. REV. 585, 624-31 (1990-1991) (criticizing the plurality for valuing legal over emotional relationships); Gail A. Secor, Michael H. v. Gerald D.*: Due Process and Equal Protection Rights of Unwed Fathers*, 17 HASTINGS CONST. L.Q. 759, 782 (1990) (preferring Equal Protection over Due Process as vehicle for protecting unwed fathers); *but see also* Lynne Marie Kohm, *Marriage and the Intact Family: The Significance of* Michael H. v. Gerald D., 22 WHITTIER L. REV. 327, 378 (2000) (supporting the outcome of the case).

15. Michael H. v. Gerald D., 492 U.S. 110, 141 (1989) (Brennan, J., concurring) ("We are not an assimilative, homogeneous society, but a facilitative, pluralistic one . . . .").

(apparently) prefers. Yet, both of them take the trouble to describe methodologies of tradition, and I propose to take them seriously at that level, leaving the family scholars the task of debating which of them is right about which families should enjoy the greatest degree of protection at law.[16]

If we are going to move from the culture-war dispute to the dispute over methodology of tradition, we have to take into view a third issue: the role of the nature and boundaries of judicial power in a democratic society.[17] This is necessary, because Justice Scalia defends his methodology of tradition on precisely such grounds. For his disposition of this case, it is critical that the value-choice, though (we assume) it is the same one he would have made had it been his business to make it, was not made by him but by the legislature—and hence, the people— of California.[18]

A very different state of affairs is presented, for example, by *Troxel v. Granville*.[19] There, we do not have to speculate as to which outcome Justice Scalia would support as a legislator. He tells us right at the beginning of his dissent that his loyalties *as a matter of policy* are with the cause of parental rights.[20] But, in *Troxel,* the legislature made the opposite choice, choosing to curb parental rights in the interest of grandparents and others.[21] Scalia openly declared that his views, as a matter of political and moral choice, and indeed as a matter of natural law, are on the side of parents. Furthermore, the body of tradition to which Scalia appeals in *Michael H.*—focusing, as it does, on the intact, nuclear, traditional family[22]—is, quite arguably, also on the side of

16. I have discussed this issue elsewhere. *See*, *e.g.*, David M. Wagner, *Marriage: An Achievement of Centuries for the Protection of Women and Children*, 38 NEW ENG. L. REV. 683 (2003-2004); David M. Wagner, *Is the Workplace Becoming a Surrogate Home?: Examining Corporate Child-Care Policies and Incentives*, FAM. POL'Y REV. (2003); David M. Wagner, *The Family and the Constitution*, FIRST THINGS, Aug-Sept 1994, at 23.

17. The literature on this subject is vast, but the conversation generally starts with ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Bobbs-Merrill 1962). For a review of the history of this debate, *see* Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROBS. 149 (2004).

18. "Our disposition does not choose between these two 'freedoms' but leaves that to the people of California. Justice Brennan's approach chooses one of them as the constitutional imperative, on no apparent basis except that the unconventional is to be preferred." *Michael H.*, 491 U.S. at 130 (plurality opinion).

19. 530 U.S. 57 (2000).

20. *Id.* at 91 (Scalia, J., dissenting).

21. *Id.* at 61.

22. Such were, for all that appears in the decisions, the families in *Meyer v. Nebraska*, 262 U.S. 390 (1923), and similar cases from the 1920s. *See*, *e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925), Bartels v. Iowa, 262 U.S. 404 (1923) (decided the same day as *Meyer*) and Farrington v. Tokushige, 273 U.S. 284 (1927). The idea that *Pierce* protects the traditional or "patriarchal" family is common ground between admirers and critics of *Pierce*, and between admirers and critics of the "patriarchal" family. *See*, *e.g.*, Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992). Only with *Skinner v. Oklahoma*, 316 U.S. 535 (1942), did the Court begin to apply the *Meyer-Pierce* doctrine to procreation in the abstract, where no marriage was present in the facts of the case. The plaintiff was an unmarried prisoner facing chemical sterilization as punishment for a crime.

parental rights in *Troxel*. Yet this tradition is, for Scalia, not enough to justify a judicial reversal of a legislative choice. Such reversal, he maintains, requires a warrant from the Constitution, not from tradition alone.[23]

Turning back from the *Troxel* dissent to the *Michael H.* plurality opinion, we can see more clearly what the Scalian approach to tradition is meant to do, and what it is not meant to do. If California had chosen to grant to adulterous natural fathers, or indeed to anyone, unlimited rights to challenge the marital presumption, and hence the integrity of Carole's and Gerald's family, that would be a choice that Justice Scalia would probably find regrettable but not unconstitutional, similar to the one in *Troxel*. The Scalian tradition analysis does not dictate what a state must do: to the contrary, it guarantees a wide zone of free choice for legislatures. In other words, the Scalian doctrine of tradition is primarily a restriction on judicial power. Courts can prohibit states from legislating against asserted rights that meet the *Snyder* test of fundamentality, a test that considers tradition *inter alia*. If the asserted right though, does not meet that test (and it is unlikely to do so if it is not supported by tradition) then the lawgiving province of the court is correspondingly restricted and that of the legislature correspondingly enlarged.

Thus, legislatures *may* legislate against asserted rights that lack deep roots in tradition. Those asserted rights should be articulated at the most specific level of generality at which something about them can be found in our legal history one way or the other. The use of higher *or lower* levels of generality virtually guarantees that the Court will read its preferences into the historical materials.[24] The Court may of course do this anyway, but the "level of generality" analysis sketched in Footnote Six of the *Michael H.* opinion is a principled way to minimize the temptation.[25]

In *Michael H.*, tradition functions both as a methodology for evaluating substantive due process claims and as a cultural value to which both sides could lay some claim: for Gerald, the traditional status of the legally intact family; for Michael, the traditional status of the biological father. The victory (by plurality opinion) of the traditionalist legal methodology was, of course, closely associated with the victory for the family as such, as distinct from

---

Id. at 537. The Court disallowed this form of punishment, relying primarily on Equal Protection, as the state did not apply the sterilization penalty evenhandedly. *Id.* at 541. The case had substantive due process overtones that became obvious later. *See id.* I have attempted to chart the Court's changing application of the *Meyer-Pierce* doctrine in David M. Wagner, *The Constitution and Covenant Marriage Legislation: Rumors of a Constitutional Right to Divorce Have Been Greatly Exaggerated*, 12 REGENT U. L. REV. 53, 54 (1999-2000).

23. *Troxel*, 530 U.S. at 92. (Scalia, J., dissenting).

24. Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (plurality opinion).

25. There are, of course, avenues of attack against my claim that the *Michael H.* Footnote Six analysis is principled. One is that it is non-neutral because, by privileging tradition, it exerts an openly conservative influence. I respond to this argument in the main text. *See infra* notes 28-36 and accompanying text. Another is that the Footnote Six analysis depends on the assumption that history is knowable, rather than perpetually uncertain. While this assumption is indeed challenged in some academic circles, it is too widely made by scholars of too many different persuasions to require defense here.

fatherhood in isolation. Therefore, a traditionalist legal method produced a traditionalist cultural outcome.

In so stating, I am accepting Gerald's, rather than Michael's, claim that his position is the more traditionalist one. I would defend this acceptance simply by pointing to the case law and hornbook evidence amassed in the opinion itself showing that the Common Law has traditionally preferred the family *as an institution* over parenthood as an individual life-project, in those rare cases where the two conflict.[26] The law's reasons for this preference are less clear: it may believe, as do many of social theorists,[27] that the family (traditionally defined) is an efficient means of achieving various social goals, especially the rearing of children; or, as Justice Scalia's opinion acknowledges, the law may simply want to minimize state-dependency by closing off a possibly wide road into the legal status of illegitimacy.[28] Either way, the preference of the Common Law in this conflict is about as clear as any historical claim can be in this age of historical uncertainty and contested historical methodology.

Herein lies the basis for the charge that Scalia's *Michael H.* Footnote Six methodology[29] does not have the neutrality that he claims for it; that privileging tradition, in any way at all, is at bottom an ideologically conservative move.

But, let us keep in mind what Scalia does and does not claim for his Footnote Six test. He does indeed claim that it restricts the lawmaking power of the judiciary, if only in the sense that the alternative—choosing freely the level of generality at which one will characterize the right being asserted—creates too much judicial leeway. "Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all."[30]

So, indeed, the claim is being made that the Footnote Six rule restricts judicial discretion. But, one will look in vain for any claim by Justice Scalia that it does *not* privilege traditional social arrangements over innovative ones. In fact, one finds virtually the opposite—a positive claim that the Due Process

---

26. *See Michael H.*, 491 U.S. at 123-24 (plurality opinion).

27. *See* GARY BECKER, A TREATISE ON THE FAMILY (1981); MAGGIE GALLAGHER, ENEMIES OF EROS: HOW THE SEXUAL REVOLUTION IS KILLING FAMILY, MARRIAGE, AND SEX AND WHAT WE CAN DO ABOUT IT (1989); LINDA WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2000); JAMES WILSON, THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES (2002); GEORGE GILDER, MEN AND MARRIAGE (1993). *But see* SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989); STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRIP (2000); STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE (2005).

28. *Michael H.*, 491 U.S. at 125 (plurality opinion).

29. *Id.* at 127-28 n.6 (plurality opinion).

30. *Id.* at 128 n.6.

Clause has, in some sense, a conservative thrust to it.[31] This is found in Footnote Two, which deserves to be discussed as much as Footnote Six, but generally has not been.

In Footnote Two, which (unlike Footnote Six) is joined by all members of the plurality, Justice Scalia responds to Justice Brennan's claim that a tradition may exist and yet not give evidence of itself in legal materials.[32] This claim raises the reasonable question: how clear or voluminous must the evidence for a right's traditional status be before Justice Scalia will accept it? One short answer—the answer Scalia actually gives—is that this question does not arise in this case, because there exists a clear tradition of protecting legally intact families against external challenges to their internal parental relationships.[33] In other words, Michael not only lacks a favorable traditional tailwind, but also flies against a stiff traditional headwind because the Common Law has traditionally blocked what he is trying to do.[34]

In Footnote Two, Justice Scalia perceives the conservative thrust of his analysis—and more or less openly embraces it, albeit without calling it "conservative." The purpose of the Due Process Clause, he argues, "is to prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones."[35] Whether or not this is the correct reading of the Due Process Clause, it is definitely the syllabus of the case for tradition in two ways: (1) it embodies wisdom that we are apt to forget but need to remember; and (2) it helps us do the right thing when reasons for doing the wrong thing seem very strong. In Burkean terms, it helps us be human beings rather than "the flies of a summer."[36]

But, in that case, does not tradition—and the Due Process Clause, if Footnote Two is correct—stifle innovation and preserve the bad as well as the good within a body of tradition? Justice Scalia's answer to this is no, as long as

---

31. *Michael H.*, 491 U.S. at 122 n.2.

32. *Id.* Justice Brennan's dissent states the following:

> Moreover, by describing the decisive question as whether Michael's and Victoria's interest is one that has been 'traditionally *protected by* our society,' rather than one that society traditionally has thought important (with or without protecting it), and by suggesting that our sole function is to '*discern* the society's views,' the plurality acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States.

Id. at 140-41 (Brennan, J., dissenting) (internal citations omitted). Actually, if the identification of "due process of law" with Magna Carta's expression, "per legem terrae," is accurate, this proposition, though distasteful to Justice Brennan, sounds rather reasonable.

33. *Id.* at 124, 126-27.

34. Or, in Justice Scalia's words: "The protection [of the asserted right] need not take the form of an explicit constitutional provision or statutory guarantee, but it must at least exclude (all that is necessary to decide the present case) a societal tradition of enacting laws *denying* the interest." *Michael H.*, 491 U.S. at 122 n.2 (plurality opinion).

35. *Id.*

36. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 192-93 (Conor Cruise O'Brien ed., 1968). For an instructive commentary on this passage, *see* Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1047-55 (1990).

legislatures are free to expand on traditional Due Process requirements.[37] There, in the electorally accountable arena of legislation, is where the risky yet sometimes necessary business of tinkering with tradition is to take place—and not in the courts, least of all the Supreme Court, where an unpopular or ill-advised piece of tinkering is extremely difficult to dislodge. In *United States v. Virginia*,[38] an Equal Protection case, but with same methodological point, Justice Scalia stated in his dissent:

> The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: They left us free to change.[39]

This passage could be read as a culture war battle cry, but it could equally well be read as a straightforward—and, one would think, not very controversial—observation about separation of powers. Under a Constitution with Due Process Clauses binding legislatures at all levels, those legislatures are free to expand, but not to contract, the range of process deemed to be due; the job of such expansion, if desired, is theirs, not the courts'. The courts merely check to make sure that the legislature has not dipped below the minimum by ensuring that the legislature has acted in accordance with a legal tradition that is historically ascertainable. Thus, the Scalian approach to tradition as a judicial methodology consists only of *allowing* states to follow tradition, not forcing them to do so (as, in his view, the majority did in *Troxel*).[40]

Burnham presents an apparently different picture because the issue goes less directly to the core of family relationships, and because the unfortunate Mr. Burnham found all nine Justices agreeing that, on the facts of the case, he had no valid Due Process objection to being served with process in California.[41] Consequently, Justice Brennan's weapon here is a concurrence, not a dissent. But a weapon it is, as he continues the duel over tradition that began in *Michael H.*

The holding of the plurality in *Burnham* may be stated as follows: while absent defendants may be subject to state-court jurisdiction only if they have at least "minimum contacts" with the state, the requirement of "minimum contacts" vanishes when the defendant is physically present, even if only transiently, and even if he is present on business unrelated to the litigation.[42] In other words, where the defendant is physically present, "naked

37. *See infra* note 40 and accompanying text.
38. 518 U.S. 515 (1996).
39. *Id.* at 567 (Scalia, J., dissenting).
40. *See supra* notes 19-23 and accompanying text.
41. Burnham v. Superior Court, 495 U.S. 604, 604 (1990).
42. *Burnham*, 495 U.S. at 619-20.

territoriality" suffices as a basis of personal jurisdiction. Why? In a word: tradition. "Naked territoriality" has traditionally sufficed at Common Law, and the Due Process Clause guarantees to potential defendants a tradition-based minimum threshold of protection against novel theories of jurisdiction,[43] rather than a philosophy-based, and quite possibly fluctuating, level of protection that may be higher, or, depending on the make up of the Court, quite possibly lower, than those guaranteed by tradition.[44]

Justice Brennan, as noted, has no problem with serving Dennis Burnham with process in a divorce case based on his brief stay in California unrelated to that litigation, but he absolutely will not accept the proposition that legal tradition is a sufficient basis for that jurisdiction.[45] Tradition is a factor, but only one.[46] He searches for others, and finds them in, for example, the fact that Burnham benefited from protection by California's emergency and social services, and use of its roads and waterways, during the three days he spent there.[47]

If protecting defendants (other than Mr. Burnham) from unexpected assertions of long-arm jurisdiction is one of Justice Brennan's goals, then tradition would seem to offer more predictable protection: it is predictable that the legal traditions applied in *Pennoyer v. Neff*[48] will still be applied, whereas the Court's hunch-based assessments of fairness are far from reliable. One might observe Justice Brennan's view in *Burnham*, for example, that there is a certain disproportion in the idea that three days' worth of entirely notional use of California's no-doubt-excellent social services could lead to valid service of process and a trial at which "all Mr. Burnham's worldly goods acquired during the 10 years of his marriage, and the custody of his children"[49] will be at stake. To be sure, abandonment of rigid adherence to *Pennoyer* would offer to any defendant the hope that in his case, even if not in Burnham's, the Court might evaluate the facts differently and get him off the hook. But uncertainty is a burden to all litigants (though often popular with the practicing bar), especially when, as here, a Brennanesque, *Pennoyer*-free analysis would rarely favor the defendant, just as it did not favor Mr. Burnham. Tradition is simpler, and sometimes what is simpler is fairer.

A jurisprudence of tradition, however applied, requires some understanding of the nature and function of tradition. To this we now turn.

---

43. *Id.*

44. Justice Scalia has had occasion to protest that a Court, which believes itself sovereign over the content of Due Process, can just as well constrict it as expand it. *See*, *e.g.*, Maryland v. Craig, 497 U.S. 836, 860-61, 869-70 (1990) (Scalia, J., dissenting) (rejecting the Court's diminution of Confrontation Clause protections, made applicable to the states via the Fourteenth Amendment Due Process Clause: "I have no need to defend the value of confrontation, because the Court has no authority to question it.").

45. *Burnham*, 495 U.S. at 629 (Brennan, J., concurring).

46. *Id.* at 629 & 633.

47. *Id.* at 637-38.

48. 95 U.S. 714 (1877).

49. *Burnham*, 495 U.S. at 623 (plurality opinion).

III. DEFINING TRADITION

"How does one define a 'tradition'?," ask commentators,[50] evidently thinking the question is a debate-stopper. The situation, however, is not hopeless.

The Oxford English Dictionary ("OED") concentrates first on "tradition" as meaning the handing over or legal delivery.[51] The second definition is betrayal, but with a note that this is obsolete.[52] The baleful connotation of that second definition is a result of the double meaning of "handing over." For example, a parent may "hand over" a family tradition to a child, by teaching and example.[53] Alternatively, a hostile government agent may knock on the door, demanding that you "hand over" your subversive books. For the ancient Romans, the word *tradere* would be the verb to cover both types of handing over. The early Christians in Rome frequently experienced the knock on the door just described. Those who complied and "handed over" their Bibles and other precious religious manuscripts were called "handers-over," or *traditores*, and so the word *traditore* took on the sinister meaning conveyed by the English word "traitor."[54]

For the most part, though, handing over is benevolent: it links generations with one another, it preserves folk customs; and it gives young people a sense of identity, something that becomes more important the more society treats every individual as an unencumbered assembly of consumer decisions. Consider, in this regard, the OED's fourth definition for "tradition"—"The action of transmitting or 'handing down,' or fact of being handed down, from one to another, or from generation to generation; transmission of statements, beliefs, rules, customs, or the like, [especially] by word of mouth or by practice without writing."[55]

Definition five states: "That which is thus handed down," and locates the first such use in words of Wycliffe: "I-bounden oonly by a posityue lawe or a tradycion . . . ."[56] And 5.b. adds: "More vaguely: A long-established and generally accepted custom or method of procedure, having almost the force of

---

50. DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 120 (Rowman & Littlefield 1996) (apropos of Justice Scalia's appeal to long-standing popular practices in Establishment Clause cases).

51. OXFORD ENGLISH DICTIONARY 353 (Vol. XVIII) (2d ed. 1989) ("Tradition"—Definition 1).

52. *Id.* ("Tradition"—Definition 2.a.).

53. *Id.* ("Tradition"—Definition 4).

54. *Id.* ("2.b. *spec.* in *Ch. Hist.* Surrender of sacred books in times of persecution").

55. *Id.* ("Tradition"—Definition 5.a.).

56. *Supra* note 51, at 354.

a law;"[57] citing *Richard II*, "Throw away Respect, Tradition, Forme, and Ceremonious dutie . . . ."[58]

So, tradition is a handing-over that is benevolent and community-forming (except in isolated cases in which it is disloyal and community-disrupting), and it leads to customs and/or procedures that have almost the force of law.

A. T.S. Eliot

As a literary critic, the poet T.S. Eliot rehabilitated the word and concept "tradition" in his 1920 essay, *Tradition and the Individual Talent*.[59] In it, he wished to confront the cult of novelty and subjective expression that lingered in the arts, poetry in particular, as a result of romanticism.[60] Yet, he wished to do this without encouraging a countervailing cult of pedantry.[61]

An analogy can perhaps be drawn to the constitutional interpreter who wishes to work within the tradition of which he is a part, while still allowing that tradition to develop.[62] This would be in contrast to either (a) one who would use constitutional adjudication to preserve tradition against a legislature that wishes to depart from it (as does the Court in *Troxel*, according to Justice Scalia's dissent[63]), or (b) one who would accelerate the process of change by viewing tradition as an inadequate and perhaps irrational basis for legislation (e.g., Justice Brennan's *Michael H.* dissent,[64] and the opinions of the Court in *Romer v. Evans*[65] and *Lawrence v. Texas*[66]).

Tradition, which Eliot parses as "handing down,"[67] "is a matter of much wider significance"[68] than mere repetition:

---

57. *Id.* ("Tradition"—Definition 5.b.).

58. *Id.*; *see also* SHAKESPEARE, RICHARD II 103 (Peter Ure ed., Arden Shakespeare 1956) (Act III, scene ii, lines 172-3) (1597). Interestingly, Justice Scalia cited *Richard II* for support for the meaning of a legal proposition; namely, that the pursuit of truth is aided by face-to-face confrontation of accused and accuser. *See* Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (citing RICHARD II, Act I, scene i, lines 15-17: "Then call them to our presence – face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak.").

59. T.S. Eliot, *Tradition and the Individual Talent*, *in* THE SACRED WOOD: ESSAYS ON POETRY AND CRITICISM 47 (1920), *reprinted in* 1967.

60. *Id.* at 47-48.

61. *Id.* at 52.

62. *See* the Eliot-like views expressed by Kronman, *supra* note 36, at 1051 ("The longevity of the artifacts that at any given moment constitute the world of culture make it possible for one generation to build upon the work of its predecessors, to refine their accomplishments and to extend them.")

63. Troxel v. Granville, 530 U.S. 57, 91-92 (2000) (Scalia, J., dissenting).

64. Michael H. v. Gerald D., 491 U.S. 110, 136 (1989) (Brennan, J., dissenting).

65. 517 U.S. 620, 631-32 (1996) (holding that a state constitutional amendment disadvantaging homosexuals lacked a rational basis).

66. 539 U.S. 558, 578 (2003) (holding that a statute prohibiting sodomy between persons of the same sex lacked a rational basis).

67. Eliot, *supra* note 59, at 48.

68. *Id.* at 49.

> It cannot be inherited, and if you want it you must obtain it by great labour. It involves, in the first place, the historical sense, which we may call nearly indispensable to anyone who would continue to be a poet beyond his twenty-fifth year; and the historical sense involves a perception, not only of the pastness of the past, but of its presence.[69]

Eliot perhaps has much to say to the lawyer as well as to the poet. Thinking of law as a present past obtained by great labor is even more intuitive than thinking of poetry that way. High school students are sometimes encouraged to write poems; they are not encouraged to litigate cases. The lawyer, even more than the poet, should, in the Eliot system, be aware that past and present, in Eliot's words, "compos[e] a simultaneous order."[70]

B. Alasdair MacIntyre

Probably the most original theorist of tradition in recent years has been Alasdair MacIntyre.[71] His contribution[72] characterized tradition as a mode of knowing, by giving it a starring role in the narrative of rationality itself. More specifically, a way of thinking and arguing about basic problems, carried out by a set of thinkers working from similar premises within a given culture, becomes a tradition.[73] Meanwhile, other traditions form, often in other cultures, and eventually clashes occur. The "winner," so to speak, is the tradition that can best assimilate and respond to the challenges posed to it by the rival tradition, and thereby become a better tradition, or perhaps a newer and more robust one altogether.[74] The classic example would be the Christian tradition's encounter with the Aristotelian tradition in the High Middle Ages, leading to the achievement—arguably a new tradition—of Thomas Aquinas.[75]

In this scheme, no one thinker within a tradition is sufficient unto himself to constitute that tradition: even when there is a dominant figure, such as Aristotle or Aquinas, there are also students and interpreters who keep the tradition going. This is why MacIntyre insists on speaking of clashes of traditions rather than clashes of philosophies.

MacIntyre makes a further move that is critical for our purposes here. He argues at length that liberalism, dating from the Enlightenment, offered itself

---

69. Eliot, *supra* note 59, at 49.

70. *Id.*

71. *See generally* ALASDAIR MACINTYRE, AFTER VIRTUE (1981) [hereinafter AFTER VIRTUE]; ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988) [hereinafter WHOSE JUSTICE?]; *see also* David M. Wagner, *Alasdair MacIntyre: Recovering the Rationality of Traditions*, *in* LIBERALISM AT THE CROSSROADS: AN INTRODUCTION TO CONTEMPORARY LIBERAL POLITICAL THEORY AND ITS CRITICS 121 (Christopher Wolfe ed., 2d ed. 2003).

72. For which he has received rather a "chilly reception," according to one of his eminent academic admirers. Kronman, *supra* note 36, at 1047.

73. WHOSE JUSTICE?, *supra* note 71, at 7.

74. *Id.*

75. *Id.* at 349-369

as a neutral, archimedean point of pure reason that would critique all traditions, and transcend them—"to construct a morality for tradition-free individuals."[76] An example, though not one that MacIntyre uses, would be Justice Brennan in *Michael H.* Thinking of the Constitution as a product of the Enlightenment, Brennan naturally finds that the use of tradition to interpret it would render it "a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past."[77] Instead of a tradition-based society, he says, we are a "facilitative" one.[78] For him, the notion that society exists to facilitate the personal life-projects of individuals is a key to the U.S. Constitution.

MacIntyre does not write about specific issues in constitutional law, so we do not know how he would analyze *Michael H.* But, he would not agree that the Constitution offers a tradition-neutral zone from which traditions can be surveyed and critiqued. Rather, he would point out that the liberalism of Justice Brennan brings Enlightenment ideology into the dispute between Michael, Carole, and Gerald, and that the Enlightenment is not an objective, tradition-neutral point at all, but rather is itself a tradition.[79] As such, it is as vulnerable to a fundamental challenge as any other tradition. Even if overcoming "the prejudices and superstitions of a time long past" were, as Justice Brennan appears to maintain, the purpose of Due Process analysis,[80] knowing this would bring us no closer to knowing which prejudices and superstitions should be substituted for those of the past. Some set of prejudices and superstitions, MacIntyre would argue, will in any event receive the blessing of society's highest lawgiving authority. Only they will not, of course, be called prejudices and superstitions, but rather "liberty,"[81] "an assimilative . . . facilitative [society],"[82] and "a living charter."[83]

In fact, MacIntyre would continue to argue that Enlightenment liberalism, far from being self-evident, is on the brink of collapse. Its modern-day disciples have been left with little more than "emotivism" as a way of distinguishing right and wrong.[84]

What of the Scalian solution to *Michael H.* in a MacIntyrean perspective? I think it can be seen in either of two ways. One, is to view it as also an Enlightenment solution, though of a more modest kind than Justice Brennan's: certain strands of the Enlightenment believed in fundamental decision-making by popular legislatures, rather than by supposedly more knowledgeable elites.[85] Thus, by declining to impose the tradition that it

---

76. WHOSE JUSTICE?, *supra* note 71, at 334.

77. Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).

78. *Id.*

79. WHOSE JUSTICE?, *supra* note 71, at 334.

80. *Michael H.*, 491 U.S. at 141 (Brennan, J., dissenting).

81. *Id.* at 142 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

82. *Id.* at 141.

83. *Id.*

84. AFTER VIRTUE, *supra* note 71, at 12.

85. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 9-14 (1997).

praises but rather "leav[ing] that to the people of California,"[86] Scalia's solution can be seen as an Enlightenment one in a procedural sense.

Clearly, that is not the whole story. The Scalian solution to *Michael H.* embodies not only deference to legislatures, but more specifically, deference to legislatures when they choose to protect by law a traditional value, in this case the privileges of legally intact families and the desirability of protecting them from outside challenges. In MacIntyrean terms, Scalia is showing respect for tradition as an ongoing discourse (in this case, about the family), and is willing to allow the MacIntyrean clash of traditions to play itself out in the state legislatures. The slow and cast-of-thousands approach to clashes of tradition is much closer to MacIntyre's description of how such clashes actually work than would be an approach that confines the clash to the chambers of the Supreme Court, the cleverness of its clerks, and the speculations of the professors who mentored those clerks.

IV. SOCRATES, TRADITION, AND NATURE

Defenders of tradition, including Justice Scalia, are sometimes charged with thinking that tradition is *per se* good, or with embracing the slightly less relativist, but still highly problematic, view that tradition is an infallible indicator of the good. Obviously, anyone who takes either of these views is vulnerable to the "bad tradition" comeback, which in present debate in this country usually takes the form of a challenge based on slavery: was that not a tradition?

The traditionalist must have a way of distinguishing good from bad traditions; but this requires a frame of reference outside of tradition itself. So, perhaps traditionalism is incoherent after all: it must deny itself in order to defend itself against a devastating moral critique. But, perhaps this problem only forces us to theorize tradition out to a new level, and in so doing, rehabilitate a modified but still robust doctrine of tradition. This may especially be the case when those seeking to use a methodology of tradition are not political philosophers but judges in the American constitutional system. Judges—even Justices of the U.S. Supreme Court—supposedly work with constraints that do not bind philosophers. This is perhaps why Justice Cardozo, when invoking tradition as a standard for Due Process in *Snyder,* also included "conscience,"[87] and anchored both "tradition" and "conscience" with the key qualifier, "of our people,"[88]—as distinct from, for instance, our elite law professors or our cutting-edge academic philosophers.

Philosophers, whether academic or not, do not face the same constraints as Justices. How do they think about tradition?

---

86. Michael H. v. Gerald D., 491 U.S. 130 (1989) (plurality opinion).
87. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
88. *Snyder*, 291 U.S. at 105.

Socrates was the first political philosopher,[89] and this role arguably made him also the first theorist of tradition, since tradition, by its nature, is in place before human beings start philosophizing about whether and how social arrangements should be different, as Socrates did. It is not possible to say simply whether Socrates was "for" tradition or "against" it. He urged his most adept disciples to distinguish between two types of law: that which was valid as a matter of nature, or *phusis*; and that which was binding as a matter of convention, or *nomos*.[90] The latter cannot be known, strictly speaking, but is rather a matter of *doxa*, or opinion. The highest human calling—so he seems to have taught in *The Republic*[91]—is to transcend *nomos* and contemplate *phusis*.[92] Someone who, by use of *doxa*, follows *nomos* only, may indeed be going the right way, but he doesn't know why. Plato's Socrates likens that person to "blind men who travel the right road."[93]

There is an implicit anti-traditionalism in this procedure, and the citizens of Athens did not fail to notice it. Socrates taught the best and brightest of their sons to relativize the customs and folkways of the city, perhaps even its gods, in order to pursue truth. He was brought to trial on such charges, and executed.[94] According to the Platonic texts that record his trial, imprisonment, and execution, he tried to give a positive account of how he, as a philosopher, is at the service of the city, but he at no point denied the potential for conflict between the calling of the philosopher and the traditions of the city.[95]

---

89. This claim is made and defended in Introduction to HISTORY OF POLITICAL PHILOSOPHY 1 (Leo Strauss & Joseph Cropsey eds., 2d ed. 1963).

90. *Id.* at 3. Some commentators identify *phusis* with natural law and *nomos* with positive law. *See*, *e.g.*, Broughton, *supra* note 6. I suggest that this identification unnecessarily, and perhaps confusingly, imposes a nineteenth/twentieth century debate (naturalism versus positivism) on the ancient Greeks. Socrates was participating in a different debate: between sophists who argued that all law and morality are merely *nomos*; would-be disciples who did not see how to transcend *doxa*, or common opinion, and his own teaching that *phusis* is real. *See* PLATO, THE REPUBLIC 473c-408 (Book V) (Allan Bloom trans., basic Books 1968) (380 B.C.) [hereinafter THE REPUBLIC].

91. THE REPUBLIC, *supra* note 90.

92. *Id.* at 185 (505d)

> Isn't it clear that many men would choose to do, possess, and enjoy the reputation for things that are opined to be just and fair, even if they aren't, while, when it comes to good things, no one is satisfied with what is opined to be so but each seeks the things that *are,* and from here on out everyone despises the opinion?

(emphasis in original).

93. *Id.* at 186 (506c) ("Haven't you noticed that all opinions without knowledge are ugly? The best of them are blind. Or do men who opine something true without intelligence seem to you any different from blind men who travel the right road?").

94. Plato, *The Apology*, *in* SOCRATES AND LEGAL OBLIGATION 37 (R..E. Allen ed., 1980) [hereinafter *The Apology*].

95. THE APOLOGY, *supra* note 94, at 37.

And yet, Socrates himself had fought in the Peloponnesian War.[96] He did not sit it out as if he were too valuable to expose himself to danger. Furthermore, even in teaching his students to pursue absolute truth, he also taught them to respect the social necessity of their city's law and the customs behind them.[97] Finally, and most remarkably of all, when offered an opportunity to escape execution, Socrates demurred, citing his obligation to his city, its laws, and its traditions.[98]

There is here a paradigm for all later forms of traditionalism: tradition is not, in itself, truth. It may be wrong. But *it will not be wrong regularly*. Indeed, keeping in mind Professor MacIntyre's narratives, one underestimates tradition's chances of correspondence to truth if one dismisses tradition-based constitutional judging as "stagnant, archaic, hidebound [and] steeped in the prejudices and superstitions of a time long past," as Justice Brennan puts it in *Michael H.*[99]

Socrates respected tradition yet taught his most promising students to go beyond it, to truth, or nature, itself—to come out of the now-famous "cave."[100] There is a division of labor here, almost a separation of powers. Socrates allowed his students to dream briefly of a regime of philosopher-kings,[101] but quickly brought them back to a discussion of actual regimes.[102] What should one make of this? The meaning could be that philosopher-kingship is less just and less tolerable in practice than it seems "in speech."

Now, it is time to take a conclusion from the excursion into Socrates and apply it to modern American constitutional law, and especially to the limited role for judges that follows from Justice Scalia's way of using tradition in substantive due process adjudication. In a system (unlike that of ancient Athens[103]) that separates legislative and judicial power, attempts by judges to transcend tradition in favor of truth and nature should be avoided. These efforts would capture the disadvantages, as well as the advantages, of rule by philosopher-kings. The potential for dislocation between the conclusions reached by philosophers when they "build a city in speech"[104] and the deeply-intuited moral sensibilities of ordinary people—best exemplified in *The Republic* by that dialogue's famous speculation that the family must be replaced by

96. Plato, *The Crito*, *in* I THE DIALOGUES OF PLATO 128 (R.E. Allen trans., 1984) [hereinafter *The Crito*].

97. *The Crito*, *supra* note, 96 at 128 (53c).

98. *Id.*

99. Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) Even when tradition is wrong, its entitlement to respect may be such as to oblige one to submit to it, as long as the burden falls mainly on oneself, as did Socrates' own death. Slavery is of course a different case, as the burden falls on many.

100. THE REPUBLIC, *supra* note 90 at 193 (Book VII).

101. *Id.*

102. *See generally* THE REPUBLIC, *supra* note 90 (Books VII-IX).

103. *See generally The Apology*, *supra* note 94 (Plato's account of the trial of Socrates, where the jury was the legislature of Athens).

104. *See generally* THE REPUBLIC, *supra* note 90 (Book III).

state-directed breeding centers—is at its gravest when Justices themselves "build a city in speech," or, in Justice White's words: "The Judiciary, including this Court is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."[105]

To this ground for caution should be added another: Americans have even more cause than Socrates to disfavor rule by philosopher-kings, because our system of government gives us a basic commitment to democratic decision-making, whereas Socrates's philosophy had no such commitment.

In a system of separated powers, where judges apply the written *nomos* and the customs that Socrates respected even as he pointed beyond them, to whom does it fall to implement *phusis,* that is, truth or nature? Surely not to the legislature, the unwashed, the *hoi polloi?* Yes: to them. Justice Scalia gives us just such a hint in *Michael H.*, "California law, *like nature itself,* makes no provision for dual fatherhood."[106] Legislators, of all people, have imitated nature.

For Socrates, the many followed tradition, the few pursued truth. Democracy, in contrast, opens up the possibility for the many to pursue truth. A restrained jurisprudence of tradition, such as Justice Scalia explicates in *Michael H.*, allows the courts—the few—to allow the many to fulfill this role.

105. Moore v. City of East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting).
106. Michael H. v. Gerald D., 491 U.S. 110, 118 (1989) (emphasis added).