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TRADITION

*John B. Attanasio**

Because of our traditions, we've kept our balance for many, many years. Here in Anatevka we have traditions for everything . . . how to eat, how to sleep, how to wear clothes. For instance, we always keep our heads covered and always wear a little prayer shawl . . . This shows our constant devotion to God. You may ask how did this tradition start? I'll tell you—I don't know. But it's a tradition . . . Because of our traditions, everyone knows who he is and what God expects him to do. . . . Without our traditions, our lives would be as shaky as . . . as a fiddler on the roof!¹

TRADITION. . . . It surrounds us; it urges us; it haunts us; it confirms us. In a certain sense, tradition stands at the crossroads of law and history. Tradition embodies the sway that history exerts on our psyches. Sometimes that pull is dull and amorphous; at other times it sharpens into the edge of law.

What counts as tradition varies tremendously with the individual—even among citizens of the same country. The complexities of what counts as a tradition often generates controversy, including in the hallowed halls of the Supreme Court of the United States. For example, in *Roe v. Wade*,² Justice Blackmun steeped the result in tradition, *viz.*, the privacy right that a woman has to control her body.³ In dissent, Justice Rehnquist queried how the right to choose an abortion could be based on tradition when the overwhelming majority of states banned abortion at the time that *Roe* was decided.⁴ Justice Blackmun countered that few states regulated abortion at the time when the Fourteenth Amendment to the U.S. Constitution was enacted.⁵ And so the debate continued. From *Roe*, we learn that people—even judges and lawyers—look to different time periods to ascertain the existence of a tradition. *Roe* also demonstrates that different approaches to ascertaining a tradition can drive tremendous differences in legal results.

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1. Jerry Bock, *Fiddler on the Roof*, Act I, Prologue, 3, 6 (Book by Joseph Stein, based on Sholem Aleichem's stories. Lyrics by Sheldon Harnick. Music by Jerry Bock, Joseph Stein & Sunbeam Music Corp. 1964).

2. 410 U.S. 113 (1973).

3. *Id.* at 152.

4. *Id.* at 174.

5. *Id.* at 129.

Roe itself has become a tradition. In *Planned Parenthood of Southeastern Pa. v. Casey*,⁶ the pivotal joint opinion of Justices O'Connor, Kennedy, and Souter specifically stated that those Justices might not have protected a woman's right to choose an abortion had they been writing on a clean slate, that is, without the precedent, or tradition, of *Roe v. Wade*.⁷ The joint opinion relied heavily on the doctrine of stare decisis, elaborating on it at some length. First, although the rule in *Roe* had encountered opposition, it had not proven "unworkable."⁸ Second, reliance on *Roe* had shaped the reproductive attitudes of the populace for nearly twenty years; moreover, people have reasonably relied on *Roe's* continued force. Third, no evolution in constitutional law supported alteration of the rule. Fourth, although certain medical advances had called into question the trimester system, viability was still a valid point of intervention.⁹

Chief Justice Rehnquist's opinion strongly criticized this approach arguing that *Roe v. Wade* was wrongly decided and thus should be overruled.¹⁰ The joint opinion insisted, however, that for a wide variety of reasons *Roe v. Wade* had become so embodied in the traditions of American law that it could not be simply reversed. Chief Justice Rehnquist countered that, by such reasoning, *Brown v. Board of Education*¹¹ should not have reversed *Plessy v. Ferguson*,¹² which by then had lasted 58 years.¹³ Similarly, the Court should not have overruled the freedom of contract tradition exemplified by *Lochner v. New York*¹⁴ in its 32nd year.¹⁵ The joint opinion acknowledged that *Brown* was correct to overrule *Plessy*.¹⁶ It also recognized that *West Coast Hotel Co. v. Parrish*¹⁷ was correct in overruling *Adkins v. Children's Hosp. of D.C.*,¹⁸ thereby signaling the demise of the constitutional tradition of freedom of contract that had emerged in *Lochner*.¹⁹ Nevertheless, the joint opinion maintained that:

6. 505 U.S. 833 (1992).

7. *Id.* at 853, 860.

8. *Id.* at 860.

9. *Id.* at 854-60.

10. *Id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

11. 347 U.S. 483 (1954) (holding that segregation in public schools is unconstitutional).

12. 163 U.S. 537 (1896) (upholding the doctrine of separate but equal facilities for white persons and black persons). Cf. Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624 (1985) (arguing that the law of race relations in the late nineteenth and early 20th centuries was partly driven by social scientific theories which were dominant in the academy at the time).

13. *Casey*, 505 U.S. at 957.

14. 198 U.S. 45 (1905) (invalidating a maximum hours law prohibiting bakers from working more than 60 hours per week as against freedom of contract).

15. *Casey*, 505 U.S. at 957.

16. *Id.* at 862-64.

17. 300 U.S. 379 (1937).

18. 261 U.S. 525 (1923) (invalidating a law fixing minimum wage standards for women as against freedom of contract).

19. See *Casey*, 505 U.S. at 861-62.

[a] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided. *See, e.g., Mitchell v. Grant*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) (“A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.”).²⁰

Casey vividly demonstrates that the strength of a tradition or the degree to which it should be observed also varies with the person. Regardless of how one comes out on these issues, one can see that a majority of the Court essentially treated *Roe* as a part of American legal tradition. And so legal traditions build on each other in the form of precedents. This raises another issue about the extent to which societies should be forward-looking rather than restrained by tradition. This is an age old question for all, not just judges and lawyers. Particularly for legal professionals, this query cannot be answered without some appreciation or understanding of codified tradition in statutes and judicial precedents.

The understanding or the scope of a tradition can also vary with an individual. Exactly what tradition was established in *Roe*? *Casey* defines the tradition as not placing an undue burden on a woman’s right to choose an abortion before the fetus is viable.²¹ In so doing, the Court explicitly departed from the trimester system which comprised an important part of the tradition articulated in *Roe v. Wade*.²² In abandoning the trimester system, Chief Justice Rehnquist argued that *Casey* reduced *Roe* to “a sort of judicial Potemkin Village”²³ and substituted another analysis—perhaps another tradition? The joint opinion retorted that it was preserving “the essential holding” of *Roe v. Wade*.²⁴ And so the debate continued.

In *Stenberg v. Carhart*,²⁵ the Court debated whether the right to choose an abortion included the right to choose a partial birth abortion. A majority of five struck down the statute because it was overly broad in that it constricted abortions other than partial birth abortions. However, one of its number, Justice O’Connor, indicated that she would uphold a statute banning only partial birth abortions that contained an exception to protect the mother’s life and health.²⁶ In dissent, Justice Kennedy complained that the joint opinion which he had helped to write in *Casey* did not embrace partial birth abortion.²⁷ This debate illuminates the impor-

20. *Id.* at 864.

21. *Id.* at 846, 874.

22. *Id.* at 872-73.

23. *Id.* at 966.

24. *Id.* at 870.

25. 530 U.S. 914 (2000).

26. *Id.* at 951 (O’Connor, J., concurring).

27. The majority “contradicts *Casey*’s premise that the States have a vital constitutional position in the abortion debate.” As medical opinion is divided “on the propriety of

tance of tradition's scope, or at least how understandings of it can differ even among those close to it.

One of the most interesting exchanges about the idea of tradition in the Supreme Court of the United States occurred in a little-known case styled *Michael H. v. Gerald D.*²⁸ In that case, the Court upheld against substantive and procedural due process challenges a California statute conclusively presuming that the father of the child was the one married to her mother.²⁹ Justice Scalia wrote an opinion for a plurality of four that only Chief Justice Rehnquist joined in its entirety. After rejecting the procedural due process claims,³⁰ Justice Scalia also rejected Michael's claim that the statute violated his substantive due process rights by depriving him of his relationship with Victoria, his daughter. Justice Scalia held that, to be constitutionally protected, a liberty interest must be "an interest traditionally protected by our society."³¹ Taking issue with Justice Brennan's dissenting opinion, he found the notion of tradition to have a limiting effect on the jurisprudence of the Due Process Clause: "Its purpose is to prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones."³² Justice Scalia found no such traditionally-protected interest on the facts of this case. "What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace a child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made."³³

In a footnote, Justice Scalia defended his focus on the "rights of an adulterous natural father rather than" the dissent's focus on traditions involving the rights of "parenthood."³⁴ He described his method of identifying constitutionally relevant traditions accordingly:

We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more

the partial-birth abortion technique (both in terms of physical safety and ethical practice)," the legislature should decide this matter. *Id.* at 972-73.

28. 491 U.S. 110 (1989).

29. California had used this statute to deny visitation rights to the child's natural father, Michael H. and instead presumed the fatherhood of Gerald D., who was married to the child's mother, Carole D.

30. Justice Scalia rejected Michael's claim that the statute violated his procedural due process rights. He said that the statute involved the "implementation of a substantive rule of law" rather than a simply procedural restriction. *Id.* at 119. In this connection, Justice Scalia viewed conclusive presumptions foreclosing particularized determinations no different from any "legal rule that establishes general classifications, whether framed in terms of a presumption or not." *Id.* at 120.

31. *Id.* at 122.

32. *Id.* at 123.

33. *Id.* at 127.

34. *Michael H.*, 491 U.S. at 127 n.6.

specific tradition, and it unqualifiedly denies protection to such a parent.³⁵

Justice Scalia concluded the opinion by rejecting a due process challenge on Victoria's behalf based on the same analysis of tradition.

Justice O'Connor, joined by Justice Kennedy, wrote an opinion concurring in all of Justice Scalia's opinion except his footnote outlining how to ascertain relevant traditions under the Due Process Clause. "On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available."³⁶ Justice O'Connor would not confine the Court in advance to "a single mode of historical analysis."³⁷

Justice Brennan wrote a dissenting opinion, in which Justices Marshall and Blackmun joined. Justice Brennan focused criticism on the concept of tradition as developed in Justice Scalia's opinion. "Apparently oblivious to the fact that this concept can be as malleable and as elusive as 'liberty' itself, the plurality pretends that tradition places a discernible border around the Constitution."³⁸ Justice Brennan not only criticized the specificity with which Justice Scalia described constitutionally relevant traditions, but also criticized excessive reliance on notions of tradition "in interpreting the Constitution's deliberately capacious language."³⁹ By concentrating on "historical practice,"⁴⁰ the concept of tradition can transform the Constitution from a "living charter"⁴¹ into a "stagnant, archaic hidebound document steeped in the prejudices and superstitions of a time long past."⁴² For Justice Brennan this narrow, past-oriented emphasis on tradition resulted in the plurality's "rhapsody on the 'unitary family.'"⁴³

In one sense, *Michael H.* merely carries on the debate about the appropriate scope of a tradition. *Michael H.* demonstrates that the result in a particular case may turn on the level of generality or specificity pursued in defining a tradition. But the case is about so much more and carries us into even deeper and more fundamental questions. In *Michael H.*, the

35. *Id.*

36. *Id.* at 132 (O'Connor, J., concurring).

37. *Id.* Justice Stevens concurred in the judgment. Even assuming that Michael's interest qualified for due process protection, Justice Stevens thought that the statute's visitation provision gave Michael a "fair opportunity to show that he is Victoria's natural father, that he had developed a relationship with her, and that her interests would be served by granting him visitation rights." *Id.* at 135 (Stevens, J., concurring in the judgment). Essentially, he found that the trial judge followed California law in making an independent determination of visitation rights that took paternity into account.

38. *Id.* at 137 (Brennan, J., dissenting).

39. *Michael H.*, 491 U.S. at 140.

40. *Id.* at 141.

41. *Id.*

42. *Id.*

43. *Id.* at 145. Justice White filed a separate dissenting opinion in which Justice Brennan joined. Disagreeing with Justice Stevens, he maintained that Michael "was precluded at the very outset from introducing evidence which would support his assertion of paternity" and "has never been afforded an opportunity to present his case in any meaningful manner." *Id.* at 163.

Justices debate at length the relationship of history to tradition. The Justices differ dramatically about how one uses history. Justice Brennan openly discusses the limits of tradition. In the dissent, Justice Brennan comes very close to rejecting the concept of tradition altogether, as being too backward-looking. The problem, of course, for him is that basically all of the Courts' substantive due process jurisprudence is based almost exclusively on tradition, articulated in early cases as "implicit in the concept of ordered liberty."⁴⁴ The obvious question which he among us must confront is: "If not tradition, what?"

Amid making this move, however, Justice Brennan candidly confronts the central tension between past and future, or to be a bit more precise, between stability and change. In many ways, this idea is the central theme of *Fiddler on the Roof*. As each of his daughters violates one tradition, Tevye is forced to come to grips with new approaches and accommodations that seek to reconcile the traditions of the past with new states of affairs involving his three beloved daughters. Finally, when the third daughter dares to marry a Christian, Tevye draws the line. He draws this line because for him to accept this marriage would not merely be to alter a specific tradition, but to reject his entire Tradition, or his Faith.

These brief comments on the role of tradition in law are primarily intended to illustrate the richness and complexity of the relationship between law and history. Professor Joseph M^cKnight has labored at this intersection throughout his distinguished career. As a constitutionalist, I chose constitutional cases merely to illustrate the intense engagement between law and history. Of course, with particular regard to constitutional decision-making, the appropriate scope of tradition's role is controversial among judges, scholars, lawyers, and the public. One could go through the same exercise with many other bodies of law. This would be particularly easy for the common law lawyer because our stock in trade is precedent. Nonetheless, common law lawyers hardly boast a lock on the idea of tradition. After all, civil codes substantially reflect codifications of traditions in those systems. Indeed, the European civil codes harken back to the codes of Napoleon and Justinian.

Professor M^cKnight has spent a lifetime learning and teaching about the junction of history and law. He has tried to instill in all of us the spec that we represent in the panorama of legal and historical tradition. For many years, he taught Roman law, which unfortunately we no longer offer. As the good Rhodes Scholar will tell you, you cannot do a B.A. in law at Oxford without passing the examination in Roman law. Professor M^cKnight has also taught English legal history, the other great legal tradi-

44. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). In *Palko*, Justice Cardozo also looked to whether a "'principle of justice [is] so rooted in the traditions and conscience of our people as to be ranked as fundamental. Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them.'" *Id.* at 326 (citations omitted). Does it violate those "'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?'" *Id.* at 328 (citations omitted).

tion that influences our law. While he is an eminent legal historian, Professor M^cKnight is always looking forward. He did not allow tradition to hinder the overhaul of Texas marital property law or of the Texas family law code. Indeed his journey as a scholar exhibits some of the tensions in the idea of tradition sketched out above. As with his other endeavors in life, Professor M^cKnight has navigated the complexities inherent in the concept of tradition with grace, aplomb, and balance.

A fiddler on the roof. Sounds crazy, no? But in our little village of Anatevka, you might say every one of us is a fiddler on the roof, trying to scratch out a pleasant, simple tune without breaking his neck. It isn't easy. You may ask, why do we stay up there if it's so dangerous? We stay because Anatevka is our home. . . . And how do we keep our balance? That I can tell you in a word . . . [.] Tradition.⁴⁵

45. Bock, *supra* note 1, at 3.

