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Professor Wax presents two very different ways of grappling with the issues of the day.[1] On one hand, there are those who grant a strong presumption in favor of long-established tradition and custom, believing that a certain wisdom born of accumulated experience usually stands behind them—even when that wisdom is not immediately obvious to the observer. I will call them "traditionalists." On the other hand, there are those who put their faith in the ability of human beings to construct new and better practices using reason and principle as raw materials. Michael Oakeshott called them "rationalists," and so will I.[2]

Traditonalists and rationalists are, of course, types, not real individuals. But they help explain some of the legal and policy debates of our time and why participants in those debates often seem to be talking past each other. The world is full of individuals who can fairly be described as traditionalists. They share a suspicion of arguments built on abstract principles and a belief that newfangled proposals usually work better on paper than they do in practice. Traditionalists sometimes butt heads with their rationalist opposites, who, in turn, are baffled by what they regard as traditionalists' irrational fondness for established practice. Irrationality, however, turns out to be in the eye of the beholder. To the traditionalist, it is the rationalist's confidence in the superiority of his own intellect over the collective wisdom of the ages that seems irrational.

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1. Amy Wax, *The Conservative's Dilemma: Social Science, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059 (2005).

2. MICHAEL OAKESHOTT, *Rationalism in Politics, in* RATIONALISM IN POLITICS AND OTHER ESSAYS 5–6 (Liberty Press 1991) (1962).

On some issues, the gap may be unbridgeable. Indeed, same-sex marriage might turn out to be such an issue. The bold rationalist demands proof that a break with the traditional concept of marriage will have some deleterious effect on society. The cautious traditionalist demands proof that it will not. Given that neither side has the proof being demanded of it, which of the two sides triumphs depends on which has the burden of proof. That, in turn, depends ultimately on the forum in which the debate occurs—an academic journal or a coffee shop, a court of law or a general election.

This brief Comment looks at the character of some of these forums, beginning with universities, because they are an easy case to classify and a good contrast with institutions that are more directly concerned with law and policymaking. Professor Wax is surely correct to regard the modern university as among the most natural of habitats for the rationalist and the least hospitable forum for the traditionalist. Academics pride themselves on their ability to evaluate the world critically. It is what they do for a living, and many do it well. But academics do not get rewarded for being right; they are rewarded for coming up with interesting and novel ideas—ideas that are, or purport to be, derived from scientific inquiry and reason. It is, therefore, not in their nature to write in praise of the customs and mores of Middle America. There is more in it for them to argue against American middle-class traditions and beliefs or to draw favorable attention to some previously obscure group that they rightly or wrongly suppose to have very different traditions and beliefs—like Margaret Mead's Samoans of the 1920s.[3] It is no wonder that Professor Wax found a dearth of academic argument opposed to same-sex marriage. It is hard to make a splash in the academic world by arguing that the intuitions of the average American on this issue are wiser and more sensible than the intuitions of the educated elite.

The vice to which rationalist thought is prone has been well discussed by Edmund Burke, Oakeshott, and now by Wax.[4] All of them suggest that in the rationalist's zeal to produce novel insights, he sometimes makes progress, but just as often he finds himself mired in error. Unprotected by the moderating influence of tradition, sometimes his errors are egregious. There may be a good reason his new idea was never suggested before: it may be a silly idea. Fortunately for the *academic* rationalist, at least in the short run, not much turns on whether he is right or wrong. His ideas are simply ideas, incapable of doing much harm or

3. MARGARET MEAD, COMING OF AGE IN SAMOA: A PSYCHOLOGICAL STUDY OF PRIMITIVE YOUTH FOR WESTERN CIVILIZATION (2001) (1928).

4. *See* OAKESHOTT, *supra* note 2. *See generally* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (L.G. Mitchell ed., Oxford Univ. Press 1993) (1790).

good except insofar as they are persuasive. Only occasionally do novel ideas produced by academics break out of the academy in any meaningful way.

Contrast all this with institutions that make actual policy—especially courts. Each day, courts make decisions that directly affect lives. Legal disputes must be disposed of—criminal defendants found guilty or not guilty, civil defendants found liable or not liable. A judge's professional merit is thus assessed in a very different way from an academic's. When a judge errs, his fellow judges do not smile and say that although he may be wrong, he is nevertheless a good judge because he errs in thought provoking ways. He is a bad judge. His errors affect real people leading real lives in a direct and immediate way. In a more perfect world, we would replace him with a better judge, but there is the problem of life tenure.

Judicial decisionmaking must therefore be cautious and conservative. The high rate of serious error that is acceptable in the academy in exchange for an occasional flash of brilliance is simply not acceptable in court. While errors will inevitably result, it is important to at least avoid egregious errors.

Historically, this has meant a culture of legal traditionalism in the courts—decisionmaking driven by legal precedent. Oliver Wendell Holmes put it well: "The life of the law has not been logic: it has been experience."[5] Abstract principles like liberty and equality, no matter how high-minded or appealing they might sound, were historically frowned upon in legal discourse. It was the less high-minded and even boring precedents that mattered.[6] In the absence of strong political pressure for change, which would be registered through the legislatures and not the courts, traditionalism was the way of caution.[7]

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5. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Little, Brown and Co. 1938) (1881).

6. Courts would only entertain appeals to principle at a very modest level. In the interest of equality, like cases must be treated alike; but only those cases that are in fact extremely similar would be viewed as "like."

7. De Tocqueville too noted the traditionalist bent of Anglo-American courts when he compared them to French courts, which were then still in thrall to the intellectual legacy of the Revolution:

> The English and American lawyers investigate what has been done; the French advocate inquires what should have been done: the former produces precedents; the latter reasons. A French observer is surprised to hear how often an English or an American lawyer quotes the opinions of others and how little he alludes to his own, while the reverse occurs in France. There the most trifling litigation is never conducted without the introduction of an entire system of ideas peculiar to the counsel employed; and the fundamental principles of law are discussed

One way to look at the common criticism that modern courts are inappropriately activist—a criticism that has become more and more persuasive in the wake of decisions like *Goodridge v. Department of Public Health* [8]—is to cast it in terms of an evolution among courts from a traditionalist culture to a rationalist culture. In an earlier era, courts were unlikely to be hospitable to the legal recognition of same-sex marriage, since the legal tradition that marriage was a union of a man and a woman, and not of two members of the same sex, could hardly have been clearer. In more modern times, however, courts have become more receptive to rationalist arguments that proceed from the abstract principles of equality and fairness and not from the most directly on point legal precedent.[9] In essence, the burden of proof has shifted. While at one time arguments based on legal precedent would have always carried the day in the absence of persuasive evidence that following precedent would have harmful consequences, today it is the arguments based on abstract principle that hold this favored position, when, as is often the case, the ultimate consequences of a change in the law are unknown and unknowable.

This judicial shift is not entirely a happy turn of events. This is not because abstract notions of equality and fairness have no place in law or policy making. They do. And in the American constitutional system, the shift was arguably unavoidable—or at least difficult to avoid—especially once the Fourteenth Amendment, with its guarantees of due process and equal protection, was adopted.[10] But courts may not be as well equipped as legislatures to avoid the worst pitfalls of rationalist decisionmaking.[11]

> in order to obtain a rod of land by the decision of the court. This abnegation of his own opinion and this implicit deference to the opinion of his forefathers, which are common to the English and American lawyer, this servitude of thought which he is obliged to profess, necessarily give him more timid habits and more conservative inclinations in England and America than in France.

1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 276–77 (Phillips Bradley ed., Alfred A. Kopf, Inc. 1953) (1835).

8. 798 N.E.2d 941 (Mass. 2003) (holding Massachusetts' failure to recognize same-sex marriage unconstitutional).

9. *See id*.

10. It is hard for courts to avoid considering arguments that proceed from abstract notions of equality when little in the way of legal tradition existed to illuminate them prior to the Fourteenth Amendment.

11. Traditionalist decisionmaking, of course, also has its pitfalls. All through their history, common law courts have had bouts of hypertraditionalist decisionmaking—becoming stuck in ruts that they could not or would not attempt to escape. An example whose holding few would defend as a policy matter today might include Baker v. Bolton, (1808) 170 Eng. Rep. 1033 (holding that no cause of action for wrongful death exists). Parliament intervened years later with Lord Campbell's Act, 1846, 9 & 10 Vict. c. 93 (Eng.). Lots of other, but more contestable, examples exist.

To begin with, unlike judges who act alone or in small groups, legislators are part of large bodies—a characteristic whose importance should not be overlooked. To act, a majority—and sometimes a supermajority—must be convinced of the need for the contemplated action. In a bicameral legislature, this feat must be achieved in both houses. Thus, error resulting from isolation or eccentricity is less likely to occur.

Moreover, legislators are answerable to voters and most retain close contact with them to be re-elected. That should make legislators even less likely to pursue their eccentricities or to err on account of lack of information. On important matters, their constituents will tell them what they as constituents know and think. And it is in the legislators' interest to listen carefully.

Finally, courts, when they are in their most rationalist mode, are usually deciding issues of constitutional law. Thus, they are employing their riskiest form of decisionmaking at the very moment when a regrettable decision will be most difficult to fix. Legislatures, on the other hand, are more flexible. Issues that are binary before a constitutional tribunal—"yes" a right exists or "no" it doesn't—can be made multidimensional before a legislature and, hence, more likely the subject of a satisfactory compromise. Solutions can be phased in slowly with room for revision if necessary.

But the occasional need for a legislative bailout may not be such a terrible thing. It allowed each institution to specialize—the courts in applying legal tradition on a day-to-day basis and the legislatures in intermittent legal innovation. Requiring courts to perform both functions would likely result in their doing neither well. Indeed, one *could* look at legislatures as the traditionalist courts' rationalist counterpart. Legislatures have contributed systematic criminal codes, codes of civil procedure, evidentiary codes and probate codes to the law—all of which can be viewed as rationalist influences on the legal culture. But viewing legislatures as conduits by which rationalist ideas reach the law is probably a bit more accurate. The most notable rationalist contributions to the law—including the fascinating mixture of rationalist and traditionalist thinking that is the Uniform Commercial Code—are uniform acts and other codifications that are cooperative efforts among law professors, judges, lawyers, and legislators. One can thus view the legislature's job as sifting through the many competing suggestions for legal reform and choosing those rare gems that actually improve matters.

What does all this mean in the context of the controversy over same-sex marriage? I started off by suggesting that the gap between rationalists and traditionalists may turn out to be unbridgeable. But who can say for sure whether that is right? One thing can be said: If the gap is to be bridged, it is very unlikely to happen in the courts. It will happen in a forum where compromise and revision are possible. Is that the legislatures? Well, maybe, especially if they get a little help in the coffee shops, family dining rooms, and other gathering places where the debate always begins and ends.