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Tradition, Betrayal, and the Politics of Deconstruction

J. M. Balkin

Using deconstructive techniques to make political and legal arguments raises the obvious question whether there is any connection between deconstruction and politics or deconstruction and justice. In fact, I believe that there are important connections between deconstruction, justice, and politics. But deconstruction itself does not have a politics, or rather, it has only the politics of those who make use of it. And deconstruction itself is not just, although it may be used to pursue justice. These are controversial claims. In this essay I want to explore them by deconstructing a particular case that raises issues of justice. It concerns the concept of tradition in constitutional law. I shall use deconstruction to explore this important and enigmatic concept, and, equally importantly, to consider what this deconstructive analysis tells us about the relationship of deconstruction to ethical and political choice.

I. TRADITION AND BETRAYAL

I begin with a recent decision of the United States Supreme Court, *Michael H. v. Gerald D.*¹ This case is especially interesting to constitutional scholars because its various opinions offer a number of contrasting theories about the meaning of the "liberty" protected by the due process clause of the Constitution. For those not familiar with the case, it involves an attempt by one Michael H. to establish parental rights to a little girl, Victoria, who Michael claimed was his biological daughter, and who had lived with him as his daughter on and off for three years. Michael sued to establish his paternity and obtain visitation rights. Victoria, however, was conceived and born while her mother Carole was married to another man, Gerald D. Michael H. offered genetic tests establishing to a 98.07 percent certainty that he, and not Gerald D., was the biological father. Nevertheless, the United States Supreme Court upheld a

¹ 109 S. Ct. 2333 (1989).

California statute which established a presumptive conclusion that a child is the offspring of the man who is married to the mother at the time of the child's birth, unless the mother or her husband wish to deny the husband's paternity.² Neither Gerald nor Carole wished to contest paternity in this case because they did not want Michael to visit Victoria.

Michael H. argued that California's statutory presumption denied him a liberty guaranteed by the due process clause of the fourteenth amendment. The Supreme Court held, in a plurality opinion written by Justice Scalia, that Michael had no liberty interest in a continuing relationship with Victoria. Justice Scalia argued that the concept of liberty is amorphous, and that to give it content one must refer to existing traditions of liberty in the United States.³ He argued that one must look to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."⁴ Thus, it was not enough for Justice Scalia that American society traditionally protected the interests of biological fathers in relationships with their children. Justice Scalia argued that there was no liberty interest in this case because society has not traditionally protected the parental rights of adulterous fathers of children born during marriage of the mother to another man.⁵ Moreover, there was a traditional interest in the protection of what Justice Scalia called the "unitary family"--one husband, one wife, one or many children.⁶ Therefore, despite the virtual certainty that Victoria was Michael's biological daughter, despite the fact that she lived with him over many months and he held her out as his own child, despite the fact that she even called him "Daddy," California was constitutionally justified in cutting off all of Michael's parental rights in the interest of preserving the unitary family.

I suspect that many people will think that this opinion is wrongheaded in the extreme. For some it will appear to be nothing more than the product of a rather intolerant jurist who apparently believes that familial relations have always been conducted according to the rules first laid down by June and Ward Cleaver. Indeed, one hardly needs all of the philosophical artillery of deconstruction to see why Justice Scalia's arguments are problematic. Nevertheless, I do think that one

²Id. at 2335-39; Cal. Evid. Code § 621 (West Supp. 1990).

³ *Michael H.*, 109 S. Ct. at 2340-41.

⁴ Id. at 2344 n.6.

⁵ Id.

⁶ Id. at 2342 & n.3.

can learn something from deconstructing this opinion. But what one will learn is as much about deconstruction--and its possible political uses--as it is about constitutional law.

We could deconstruct this opinion in many ways. We might note that Justice Scalia's opinion relies upon a distinction between more and less specific traditions, a distinction which is, as Justice Brennan points out, manipulable and difficult to maintain.⁷ I shall return to this criticism in a moment. Nevertheless, we should first take seriously the reasons why Justice Scalia wants to read the concept of tradition narrowly. He makes clear that the search for the most specific tradition is tied to his fears about the open-ended character of the concept of liberty and the great power given to judges who must interpret this concept. Justice Scalia is greatly concerned that courts will use such open ended terms to make value-laden choices inappropriate to their institutional role.⁸ The more specific the inquiry into tradition, the more likely it is that a court is protecting something that already is in place, rather than simply creating a tradition, or stretching an existing tradition further than is historically permissible.⁹ For persons with the same general philosophy as Justice Scalia, an example of such an unwarranted extension of tradition might be extending the traditional respect for the privacy of marriage to protect extramarital sexual relations. Thus, specific traditions are more reliable guides to the contours of liberty than are general traditions because they are more easily identifiable, and because they involve less danger of countermajoritarian value choices by the judiciary.

Ultimately, however, these very justifications undermine Justice Scalia's test of the most specific tradition. His test assumes that constitutionally protected liberties match or do not match existing traditions in an unproblematic way. For each asserted right there either is or is not a specific tradition associated with its protection. Yet there are many different ways of describing a liberty, and many different ways of characterizing a tradition. For example, we might point out that under his test, there has been no established tradition in California for protecting Justice Scalia's own rights to visit his children, since there is no tradition of affording protection to fathers who are children of Italian immigrants and who graduated from Ivy League law schools before 1965, were appointed to the United States Supreme Court by former governors of the state of California and have more than two children but less than thirteen. Indeed, the question has hardly ever

⁷ Id. at 2349-50 (Brennan, J., dissenting).

⁸ See id. at 2341.

⁹ See id. at 2344 n.6.

come up. Justice Scalia would no doubt respond that these are the wrong factors to consider in matching liberty to tradition. And we might reply: How do you, oh purveyor of neutral principles, know this?

To be sure, Justice Scalia has a plausible response. When Justice Scalia claims parental rights to his children, the liberty he claims is the parental right of fathers with respect to biological children born while the father was married to the child's mother. This has been traditionally protected. The rights of adulterous fathers, however, have not been traditionally protected.¹⁰

But this answer reveals that Justice Scalia's theory is not simply a preference for narrower traditions over broader traditions. It rests upon an important metaphysical set of assumptions--that traditions or (more importantly) the absences of traditions, come in discrete units with discrete boundaries. To describe a tradition accurately is to respect the preexisting boundaries of the tradition. Similarly, to describe a liberty traditionally protected is to describe its actual contours. Thus, one cannot simply divide up traditions or liberties any way one wants. Like glass bottles, traditions and liberties come in premade sizes. One cannot cut them to fit, or else one will break the glass. Thus, there is a tradition of protecting marital privacy but not a tradition of protecting the marital privacy of a narrower class--for example, middle class persons, and certainly not a tradition of protecting the privacy of a broader class of persons that would include unmarried couples. Yet, under this logic, it is also historically clear that there is a tradition of protecting the marital right of privacy, but not a historical tradition of protecting married couples' right to purchase contraceptives. *Griswold v. Connecticut*¹¹ is thus a potential embarrassment for Justice Scalia.¹²

Moreover, Justice Scalia's vision of tradition assumes that traditions are not only discrete, but presumptively normatively correct. What is traditional is worthy of constitutional protection, and what is not traditional is not, whether it be marital privacy, the rights of married fathers to visit their children, sexual harassment in the workplace or racial segregation. This, too, is a potential source

¹⁰ Indeed, they have been historically abridged by statutes such as California's. Thus, Justice Scalia argues, there can be no tradition of protecting these rights, for although "[t]he protection need not take the form of an explicit constitutional provision or statutory guarantee, . . . it must at least exclude . . . a societal tradition of enacting laws *denying* the interest." *Id.* at 2341 n.2 (emphasis in original).

¹¹ 381 U.S. 479 (1965) (state prohibition of sale of contraceptives held an unconstitutional abridgement of marital privacy).

¹² As five of his fellow Justices pointed out. See *Michael H.*, 109 S. Ct. at 2346 (O'Connor, J., joined by Kennedy, J., concurring in part); *id.* at 2350 (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting).

of embarrassment. Justice Scalia's metaphysics of tradition produces sufficiently troublesome counter-examples that we must pause and consider whether we have stumbled upon a serious difficulty concerning the concept of tradition itself. What is tradition? How do we determine its boundaries or entailments, and what is its normative status? If there is a tradition of protecting marital privacy, but not a more specific tradition protecting marital purchase of contraceptives, how do we know whether the latter situation is nevertheless subsumed under the former for purposes of constitutionally protected liberty? Might one not conclude instead that the *real* historical tradition was protection of marital privacy in the home, so that the purchase of contraceptives in the open marketplace could be regulated or even proscribed consistent with the tradition? Would this not be more consistent with the experiences of Margaret Sanger and her followers, who publicly advocated birth control in the early twentieth century, and were met with incredible resistance?¹³ Again, if sexual harassment directed toward women in the workplace and respect for marital privacy are both traditions, but only one is worth protecting, how do we tell the difference? If back alley abortions are a tradition in response to the "traditional" prohibition on abortion in America, does this make abortion (in or out of a back alley) a tradition worth protecting and sustaining? In short, what normative status should be assigned to a set of values given the fact that many people have held these values at one point or another in our nation's history?¹⁴

One of Justice Scalia's predecessors on the Supreme Court, the second Justice Harlan, was also enamored of tradition as an aid to understanding the content of the liberty protected by the due process clause. But he was more aware of its problems. In his dissent in *Poe v. Ullman*,¹⁵ he spoke of the need for "regard to what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke."¹⁶ In alluding to the traditions from which America broke, Justice Harlan thus recognized, in a way that Justice Scalia appears not to, that the existence of a tradition may be a reason for rejecting it as

¹³ See D. Kennedy, *Birth Control in America: The Career of Margaret Sanger* (1970); M. Sanger, *An Autobiography* (1938).

¹⁴ John Hart Ely's arguments against using tradition as a source of fundamental values are still among the most powerful. See J. Ely, *Democracy and Distrust* 63-69 (1980). Ely also quotes Gary Wills for the proposition that "[r]unning men out of town on a rail is at least as much an American tradition as declaring unalienable rights." *Id.* at 60 (quoting G. Wills, *Inventing America* xiii (1978)).

¹⁵ 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

¹⁶ *Id.* at 542.

controlling. Just as Learned Hand rejected the defense of custom in tort law on the ground that "a whole calling may have unduly lagged,"¹⁷ so too the existing customs of the American people may not be appropriate for constitutional perpetuation. This is especially true, one might think, when they are impositions of values by a majority on a political, cultural, ethnic, religious, or ideological minority.

In fact, what is most troubling about Justice Scalia's call for respecting the most specific tradition available is that our most specific historical traditions may often be opposed to our more general commitments to liberty or equality. Curiously, then, different parts of the American tradition may conflict with each other. And indeed, this is one of the untidy facts of historical experience. The fourteenth amendment's abstract commitment to racial equality was accompanied by simultaneous acceptance of segregated public schools in the District of Columbia¹⁸ and acquiescence in antimiscegenation laws.¹⁹ The establishment clause and the principle of separation of church and state have coexisted with presidential proclamations of national days of prayer,²⁰ official congressional chaplains,²¹ and national Christmas trees.²² Traditions do not exist as integrated wholes. They are a motley collection of principles and counterprinciples, standing for one thing when viewed narrowly and standing for another when viewed more generally. Tradition never speaks with one voice, although, to be sure, persons of particular predilections may hear only one.

Moreover, as the quote from Justice Harlan suggests, tradition is not an unmitigated good or an unalloyed source of constitutional wisdom. There are good and bad traditions, and one must choose between them. Nevertheless, a more realistic approach to tradition, along the lines of Justice Harlan, is cold comfort to Justice Scalia. It undermines the very reasons he has attempted to hew to tradition. It leads us back to the very value-laden inquiry that Justice Scalia sought to avoid by his theory of tradition. To follow tradition because it reflects the values of the many is insufficient--one must also believe that these values are justified, or not

¹⁷ *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.), cert. denied, 287 U.S.662 (1932).

¹⁸ See, e.g., R. Berger, *Government by Judiciary the Transformation of the Fourteenth Amendment* 123-24 (1977).

¹⁹ See *id.* at 161-63.

²⁰ See *Lynch v. Donnelly*, 465 U.S. 668, 675 (1983).

²¹ See *Marsh v. Chambers*, 463 U.S. 783, 787-88 (1982).

²² See *Allegheny v. ACLU*, 109 S. Ct. 3086, 3112-15 (1989).

so unjustified that they must be contradicted. Inquiry into tradition leads us back, in other words, to the basic problem of constitutionalism all over again. It does not solve the problem of determining the boundaries of constitutionally protected liberty, but merely phrases the same question in a different way.

Tradition, it thus appears, rather than solving our problems, has proven to be a very troublesome concept. Traditions may be worthy or pernicious. Traditions may conflict. Traditions at a more abstract level may contradict traditions at a more concrete level. Here, perhaps, a deconstructive analysis might come to our aid. We might try to understand the logic of tradition, and its place in this opinion, and in constitutional law generally, by employing a familiar deconstructive technique etymological analysis.

The word "tradition" is derived from the Latin *traditio*, which in turn is derived from the verb *tradere*, meaning to deliver or hand over.²³ Tradition is the delivery of something into the hands of another, as one might deliver a deed or an object, or even a set of teachings that are passed down from generation to generation. For the same reason, however, *tradere* also means to deliver someone into another's hands, from which we get the word "betrayal."²⁴ From *tradere* and *traditio* we also get "treason,"²⁵ and "extradite"--that is, to hand someone over to the authorities.²⁶

This etymology leads us naturally to the word "traitor," and its alternative form, "traditor," both of which also come from *tradere*. Thus, "tradition" also means the crime of being a traitor or traditor. The term "traditor" was used by the early Christians, especially during the Diocletian era, to describe persons who delivered holy vessels, or scripture, or more often, their fellow Christians, into the hands of the Romans.²⁷ Thus, Judas Iscariot is the first great traditor of Christian theology, which is also to say that he is the first great Christian traditionalist, the founder of the tradition of Christian tradition--that is, the handing over of Christians.

Indeed, Dante's ninth circle of hell--the lowest circle is specifically reserved for betrayers (Dante uses the word *traditor*--the modern Italian

²³ Webster's New International Dictionary of the English Language 2684 (2d ed. 1951).

²⁴ *Id.* at 260.

²⁵ *Id.* at 2698.

²⁶ *Id.* at 902.

²⁷ *Id.* at 2685.

equivalent is *traditore*)²⁸ He includes in the ninth circle those who have betrayed their friends, family, country, or (worst of all) their lords and benefactors. There one will find Judas Iscariot, joined by Brutus and Cassius, who earned their place in Dante's *Inferno* by betraying Julius Caesar. Dante apparently thought that tradition--in the sense of betrayal--was the most grievous of sins, for in the ninth circle, Beelzebub himself gnaws at the heads of the *traditores*, the great traditionalists.²⁹

It does not take us long to discover that tradition and betrayal are closely linked, and not only etymologically. To respect tradition is also to betray in at least three senses. First, it is to forsake other alternatives for the future, to hand them over to their enemies, to hinder and eliminate them in the name of social solidarity, propriety, order, or other goals. Tradition is always extradition. Second, to respect tradition is also to betray other existing and competing traditions, to submerge and extinguish them. It is to establish through this suppression the hegemony of a particular way of thinking, just as in *Michael H.* Justice Scalia tried to write 1950's white middle class theories of the family into the Constitution--thus establishing the hegemony of Ozzie and Harriet, if you will. There are, of course, other traditions of family life in this country. There are traditions of extended families, of spousal separations, of common law marriage and unmarried cohabitation--but apparently they don't count, since we didn't see them on "I Love Lucy."

Third, a tradition is often, in an uncanny way, a betrayal of itself. For Scalia's vision of the unitary family, as exemplified by television situation comedies of the 1950's, portrays a theory of the family that was hypocritical even in its own time since even what white middle class families in the 1950's said one should do and not do sexually was not in fact what they always did, as we all found out later on. To establish and enshrine a tradition is thus at the same time to establish a countertradition--a seamy underside consisting of what society also does and perhaps cannot help but do, but will not admit to doing. The overt, respectable tradition depends upon the forgetting of its submerged, less respectable opposite, even as it thrives and depends on its existence in unexpected ways. For example, in the television and movies of the 1950's, one sees Rock Hudson and other homosexual or bisexual males playing the parts of monogamous heterosexual males, and implicitly endorsing a heterosexual lifestyle. These roles served to support and define the very tradition of sexual

²⁸ Dante, *The Divine Comedy, Inferno, Canto XXXII*, line 110 (J. Sinclair trans. 1961.).

²⁹ *Id.* at Canto XXXIV.

practices of which Justice Scalia speaks.³⁰ They furthered and reinforced a tradition of values that the persons playing these roles owed no fealty to-- a tradition that indeed, made each of them a traitor, and required of each of them a particular form of self-betrayal.

Michael H. v. Gerald D., in this sense, is all about tradition and betrayal. It is about the sexual betrayal that led to the conception of Victoria. It is about the emotional betrayal of Michael H. by the mother, Carole, who, after living with him and allowing him to foster a relationship with his own daughter, denied him the right to continue that relationship. It is about the legal tradition and betrayal--that is, the handing over--of a child from her biological father to another man, a tradition and betrayal enforced in the name of protecting the tradition of the family--the raising of children by their parents.

Finally, *Michael H.* is about the tradition and the betrayal of the concept of liberty protected by the due process clause. For here, Justice Scalia, preaching about the great traditions that the clause protects, and the obligations of previous precedents, believes he is following those traditions and those precedents at the same time that his colleagues on the Court argue that he is betraying them. As Justice Brennan succinctly states, "[i]t is ironic that an approach so utterly dependent on tradition is so indifferent to our precedents."³¹ When one thinks of tradition in

³⁰ There is a particularly interesting exchange, alternatively amusing and disturbing, in the movie *Pillow Talk* (Universal-International 1959), a veritable icon of 1950's cultural sensibilities. Rock Hudson plays a bachelor with a seemingly inexhaustible supply of girlfriends who shares a party line with Doris Day. He teases Day about another man she is dating (who is actually Hudson, although Day does not realize this). Hudson suggests to Day that "[t]here are some men who just, uh, they're very devoted to their mothers. You know, the type that likes to collect cooking recipes, exchange bits of gossip." Hudson thus simultaneously establishes his own heterosexual manliness while suggesting the homosexuality of the other; moreover, this is done through the use of insulting stereotypes about gays. Yet this, in turn, is merely a ruse designed to goad Doris Day into permitting heterosexual overtures by the other man (who is really Hudson). One wonders what went through Hudson's mind as he performed his lines. Watching this movie today, the ironies of self-reference seem potentially endless.

³¹ *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2350 (1989) (Brennan, J., dissenting). Justice O'Connor and Kennedy, although concurring in most of the plurality opinion, specifically refuse to endorse fully Justice Scalia's arguments concerning tradition for this very reason. *Id.* at 2346 (O'Connor, J., concurring in part). In particular, Justice O'Connor states that she would not "foreclose the unanticipated by the prior imposition of a single mode of historical analysis." *Id.* at 2347. Of course, the whole point of Justice Scalia's theory of tradition is that it does foreclose certain future decisions by the judiciary--it is specifically designed to rein in what he sees as dangerous opportunities for judicial discretion. and moreover, "to prevent future generations from lightly casting aside important traditional values." *Id.* at 2341 n.2. And yet Justices O'Connor and Kennedy, no less traditionalists in their own ways, recognize that flexibility is necessary in the application of tradition to constitutional issues. Fixed rules set out in advance are, surprisingly, the enemy of tradition and respect for tradition. For a sophisticated and subtle defense of precedential

law, one thinks naturally of the principle of *stare decisis*--the development of law through precedent and reasoning by analogy. Yet is this particular tradition--this handing down of precedential rules from one case to the next--not also a form of betrayal? And is not every betrayal also the beginning of a new tradition? When a judge produces a reading of preceding cases, her reading is always similar to and different from what came before.

Sometimes this is deliberate sometimes it is simply a result of the alterations produced by reading authoritative materials in new contexts. As the tradition grows and develops, it alters itself. And as it alters itself, it is both true and false to itself. It is both a handing down and a modification, however slight or subtle, of what came before. It is the simultaneous production of similarity and difference. It is both tradition and betrayal.

When we think of the traditions of American constitutional law, we think of the landmark precedents of the Supreme Court--*Marbury v. Madison*,³² *McCulloch v. Maryland*,³³ *Brown v. Board of Education*,³⁴ and *United States v. Darby*,³⁵ to name a few. Yet the curious interrelation of tradition and betrayal is present even here. *Brown v. Board of Education* is, from one standpoint, the beginning of a great tradition of protection of civil rights. But from another perspective, it was a betrayal of the Court's proper institutional role, and of the intentions of the framers of the fourteenth amendment.³⁶ The same could be said of *Darby*, and even of *Marbury* or *McCulloch*--betrayals that nonetheless spawned a grand and glorious tradition. Do these cases create traditions of constitutional law, or betray earlier ones? Or are these not two different ways of saying the same thing?

From these remarks, it should be clear that I, too, am unsatisfied with Justice Scalia's opinion in *Michael H.*, and in particular with his reliance on tradition, which smacks of sexual and cultural intolerance and an almost wilful blindness to the many different layers of tradition and countertradition in

reasoning based on the values of tradition, see Kronman. Precedent and Tradition, 99 Yale L.J. 1029 (1990).

³² 5 U.S. (1 Cranch) 137 (1803).

³³ 17 U.S. (4 Wheat.) 316 (1819).

³⁴ 347 U.S. 483 (1954).

³⁵ 312 U.S. 100 (1941).

³⁶ See R. Berger. *supra* note 18; Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1(1959).

American society. And it should also be fairly clear that one could use deconstruction to critique Justice Scalia's opinion on many different levels showing how, in his attempt to protect traditional family values, he destroys the possibility of a bond between a child and her biological father.³⁷ One might also note that while the Court appears to be the protector of family values, it does so by allowing parent-child relations to be severed by legal technicalities. Here the supreme law of the land (the Constitution) is claimed to reflect general traditional values, but in fact destroys particular parental bonds. The acknowledgement of one story about family relations is at the expense and exclusion of other, less "respectable" but no less extant versions.

Of course, Justice Scalia does not believe that the behavior of Michael H. and Carole D. is commonplace in his America. He even states at the beginning of his opinion that he "hopes" that this case is "extraordinary."³⁸ But his "hope" is a curious one. It is less a hope than a command--an assertion of authority. It is the same type of "hope" a schoolteacher expresses when she states that she hopes that her students are not chewing gum behind her back. It is the not too disguised assertion of the need for the cultural hegemony of a particular point of view, achieved by assuming other views out of existence.

Indeed, one might point to the irony of Justice Scalia's statement that this case is extraordinary, when it is used to make a general point about how all cases construing the due process clause should be decided. This irony is particularly pointed since it is well known that other substantive due process questions--for example, those involving abortion³⁹ and gay rights⁴⁰--have been much on the Court's mind in recent years. The effort to stop the spread of constitutionally mandated sexual freedom has been a rallying point for the Court's conservative wing. One might feel moved to express the hope that the situation in *Michael H.* was extraordinary only if one believed--or rather, feared--that the country would at any moment be overrun by a veritable army of fornicators, homosexuals, and other

³⁷ We should note that this is not a case in which a putative father was attempting to avoid his paternal obligations or child support. The disapproval that one might have for unmarried fathers (or divorced fathers) who abandon their children is totally misplaced here. Nor is this a case of an absentee father who indicated no previous interest in his biological offspring, and who suddenly was seized with the desire (whether real or merely strategic) to make up for lost time. Rather, here was a situation in which, at least on its face, a father was attempting to preserve a bond to his child, and to strengthen an already existing parent-child relationship.

³⁸ *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2337 (1989).

³⁹ See, e.g., *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989).

⁴⁰ See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

sexual miscreants.

Our deconstruction has hardly seemed to buttress the logic of Justice Scalia's opinion. And, given the embrace of deconstructive techniques by the political left, this might not seem a surprising result. Nevertheless, (and here is the point upon which I particularly insist) could we not turn right around and do the same thing with Justice Brennan's dissenting opinion? Does Justice Brennan's opinion become immune from deconstructive technique merely because it is more "politically correct" to the left?

First, one might note the irony of Brennan's call for listening to the marginalized voices and practices of the poor, appearing as it does in a case involving persons apparently enjoying fairly affluent lives in Southern California.⁴¹ Justice Brennan tells us that the atmosphere surrounding Justice Scalia's opinion is "one of make-believe."⁴² Yet Justice Brennan too, engages in his own manufacture of tradition, his own form of "make-believe." As he heaps scorn on "the suggestion that the situation confronting us here [in *Michael H.*] does not repeat itself every day in every corner of the country,"⁴³ Justice Brennan implicitly invokes a different tradition or countertradition, a tradition of children born to adulterous parents. We could find a source in popular culture for this tradition as well. It is depicted in the many fascinating accounts of American sexual mores on daytime television. Indeed, it is represented by one of the most popular plot devices in the modern American soap opera: X, married to Y, is in fact carrying Z's baby. In fact, this plot device greatly predates such epic dramas as *The Edge of Night* or *As the World Turns*--Christianity itself is based upon a similar scenario.

Second, Brennan's castigation of Scalia's use of tradition involves its own not too subtle dependence on tradition. Justice Brennan argues that

certain interests and practices--freedom from physical restraint, marriage, childbearing, childrearing, and others--form the core of our definition of "liberty." . . . In deciding cases . . . therefore, we have considered whether the concrete limitation under consideration impermissibly impinges upon one of these more generalized interests.⁴⁴

For Justice Brennan, tradition can only be described abstractly.

⁴¹*Michael H.*, 109 S. Ct. at 2351 (Brennan, J., dissenting).

⁴² *Id.* at 2359.

⁴³ *Id.*

⁴⁴ *Id.* at 2350.

Nevertheless, its specific content can be determined from case-by-case adjudication, from judgments of similarity and difference to what has gone before--in short, from the tradition of readings and rereadings of authoritative materials that constitute the practice of constitutional *stare decisis*. Hence, Justice Brennan accuses Justice Scalia of "reinvent[ing] the wheel,"⁴⁵ because Justice Scalia deliberately avoids reasoning from similarities to previous precedent.

Justice Scalia uses tradition as a substitute for value choices--as a sort of congealed or immanent source of values, for which the Justices are not responsible. Their responsibility only arises if they deviate from its commands. Yet Justice Brennan makes an identical argument about precedent--that Justice Scalia is constrained by his institutional role to obey the Court's past decisions, and that he is lawless, or inserting his own values into the Constitution, if he fails to do this.⁴⁶ Just as Justice Scalia asks us to look to the narrowest and most specific traditions of our culture, Justice Brennan demands of Justice Scalia that he follow the most specific holding available--the precedents closest to the case at hand--as the appropriate source of authority.⁴⁷ Thus, while Scalia takes a broad view of precedent and a narrow view of tradition, Brennan does precisely the opposite, with predictably opposite results.

Third, and most important, we might marvel at Brennan's manipulation of the concept of tradition, as he miraculously discovers that the traditions protected by the Constitution--adultery, homosexuality, and fornication--are precisely those traditions to which majoritarian society objects the most.⁴⁸ The general description of society's traditions proves the undoing of their most specific manifestations. It is tradition used against itself. Perhaps if Justice Brennan is right, the Constitution never fails to protect tradition, no matter what the Supreme Court decides.

⁴⁵ Id. at 2352.

⁴⁶ Id. at 2352.

⁴⁷ Thus, according to Justice Brennan, the proper question to ask is "whether the specific parent-child relationship under consideration is close enough to the interests that we already have protected to be deemed an aspect of 'liberty' as well." Id. He argues that previous cases have held that "although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so." Id. The issue in each case is whether the biological father "act[s] as a father toward his children." Id. (citing *Lehr v. Robertson*, 463 U.S. 248, 261(1983) (quoting *Caban v. Mohammed*, 441 U.S. 380, 389 n.7 (1979))). Interestingly, Justice Brennan's doctrinal definition of fatherhood is parasitic on the traditional role of the father in the unitary family.

⁴⁸ See id. at 2352-53; *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ. dissenting).

In this way, both Justices Brennan and Scalia prove to be traditionalists of the first order. Justice Scalia seeks to enforce his view of "tradition," establishing the hegemony of his vision of culture, thus betraying other values and other traditions in the process. But Justice Brennan is equally a betrayer. For he seeks to use a general concept of tradition to subvert tradition, thus betraying it. If Scalia's use of tradition is a betrayal, Brennan's use of tradition against itself is a betrayal of a betrayal. And in so doing Brennan attempts to elevate a countertradition-- which rejects Justice Scalia's views of socially appropriate behavior--to constitutional importance.

II. DECONSTRUCTION AND POLITICS

From the above, it should be clear that one can perform a deconstruction of *Michael N.* in either direction. And this brings us to the central issue in understanding the relation of deconstruction to ethics and politics, and to questions of value in general. This text--whether by "this text" I refer to the plurality opinion, the dissent, the Constitution, tradition, the family, or the history and culture of American sexual and domestic values--is potentially reinterpretable and deconstructible. And this phenomenon raises an embarrassing question for deconstruction. What can deconstruction possibly tell us about our choice of values if all texts are deconstructible, and there is nothing outside of the text? What is the relationship of deconstruction to justice, if it can be used to deconstruct (for example) both apartheid and the anti-discrimination principle? In short, what is the source of moral authority to deconstruct in one way rather than another--what tells us that we must explode the logic of Justice Scalia's opinion but not Justice Brennan's?

These are difficult questions for deconstructive theory. To answer them we must recall an important feature of deconstructive practice. Deconstruction poses a continuous critique of a certain metaphysical error, an error usually referred to as "logocentrism." There are many different versions of logocentrism, but each involves a search for "presence"--for the most true, real, valuable, or appropriate. Priority and ordering, evaluation and categorization are the primordial logocentric acts. They tell us what is more real, more privileged, more valued, more important. And deconstruction intervenes in this picture to lay low what was once high, to reverse and resituate the conceptual priorities and orderings upon which all the various forms of logocentrism thrive.

Yet when we view deconstruction and its purported enemy, logocentrism, in this light, we arrive at a paradoxical conclusion. Deconstruction, in and of itself, has nothing particular to tell us about justice, or ethics, or any questions of value. For any such conclusions we might reach would be by their nature ordering,

prioritizing, evaluative, in a word, logocentric. Deconstruction thus becomes important to questions of value to the extent that it is not fully deconstructive to the extent that it depends upon and nourishes itself upon some form of preexisting logocentric practice.

The best way to see this point is by asking the following question: How do we know when it is appropriate to deconstruct? After all, we deconstruct Rousseau, or Saussure, or Justice Scalia's opinion, but we do not deconstruct laundry lists, or the backs of cereal boxes, or the instructions that the flight attendant gives you before a plane takes off. Yet, of course, as each of these are texts, they could all be deconstructed.

We deconstruct a particular text because we think that the text has a particular form of richness that speaks to us, either for good or for ill. Thus, one deconstructs Plato because Plato appears to have a vision of philosophy very different from deconstruction. One deconstructs Saussure because Saussure has got it almost right, but the point at which his theory misfires is very revealing. One deconstructs the concept of apartheid because apartheid is evil. One deconstructs Justice Scalia's opinion because it is misguided.

What do each of these examples have in common? I believe that in each case, one deconstructs because one has a particular ax to grind, whether it be a philosophical, ideological, moral, or political ax. One does not, in contrast, have any such feelings about a cereal box. On the other hand, one might well decide to deconstruct the back of a cereal box if one had already decided that one was going to investigate the culture of mass consumerism, or the role of the child in modern American society, or what have you. In other words, even in the case in which one deals with a seemingly insignificant text, one is choosing that text for a reason, and that reason is one's particular ax.

I should note parenthetically that having read a number of works of Jacques Derrida, I have noted that Derrida himself is quite circumspect about the texts he chooses to deconstruct, and in the way he goes about reading them. I mean this as the highest compliment. A deconstructor does not seize upon every word in the text as the source of a deconstructive reverie, nor does she choose a text at random. Yet if one always deconstructs for a reason, then there is a *logos* or rationale behind such a decision, a method to this textual madness. The deconstructionist may appear crazy, but she is crazy like a fox. Her practice is a logocentric practice at its inception even as it seeks to subvert the logocentrism of the particular text.

Not only does a deconstructionist begin deconstructing for a reason, she also ends her deconstruction for a reason. The reason may be complex or simple. She may stop because she has demonstrated to her own satisfaction that Justice Scalia's opinion is incoherent, or that apartheid is evil, or because she realizes that

she is beating a dead horse by looking at the back of cereal boxes. She may cease deconstructing because her editor told her that the article had to be twenty thousand words and no more, or because she has run out of bond paper, or even because she is in a hurry and needs to get to the grocery store before it closes. In theory, however, one could go on. One could go on forever. In fact, of course, we always do stop. We decide, at some point, that there is nothing more to be decided about

this undecidable text. If we always have an ax to grind when deconstructing, at some point we do find it necessary to bury the hatchet.

Thus, curiously, both the starting and the ending of deconstruction are not simply given by the act of deconstruction. But if the beginning and ending of deconstruction are logocentric, if a practice of deconstruction can only exist because of this logocentrism--this starting and this ending--then why do we think that the portion in the middle the deconstruction itself--is any less filled with, infected with, established throughout by, a certain form of logocentrism? Are we not still grinding our ax? Are we not testing the metaphors and signifiers with our instruments of deconstruction, just as a dentist might scratch the plaque of her patient's teeth in search of a cavity or fissure that could be exposed and corrected?

We thus see that deconstruction, as a political practice, or as a pragmatics (that is, a theory of use or action) cannot avoid logocentrism, either at its beginning, its middle, or its end. To deconstruct is always to engage in a form of logocentrism. It is always to obey a certain law of where to begin and where to end, which turns of phrase to subvert and which to leave untouched. For after we have ground our ax, it directs what we shall execute with it. Moreover, each deconstruction bears the traces of the intellectual roads *not* taken, the metaphors and arguments not questioned. Our deconstruction of Justice Scalia's opinion bears the traces of our failure to deconstruct Justice Brennan's dissent, or our failure to deconstruct the previous three Supreme Court cases on the issue of parental rights, or indeed, any of the other opinions appearing in the United States Reports. Our deconstruction of apartheid bears the traces of our failure to question the anti-discrimination principle, or a libertarian conception of free speech, or of the market, and so on. Deconstruction, therefore, does not alleviate the need for the existence of a set of political commitments that preexist the deconstructive act. These commitments may change as one deconstructs, and the deconstructor may change with them--but they must already be present for the deconstruction even to get off the ground. Thus, deconstruction turns out to be instrumental, rather than a source of ethical or political value. Indeed, it would be strange if deconstruction were a *source* of anything.

One might object that describing deconstruction as guided by the preexisting commitments and values of the individual deconstructor mistakenly

assumes a relatively autonomous subject who controls what to deconstruct and what to leave untouched.⁴⁹ Yet deconstruction also requires us to question the existence of this relatively autonomous self.⁵⁰ Perhaps, then, deconstruction has a distinctive politics which nevertheless escapes logocentrism--it would be a politics that denies the full coherence and autonomy of subjects, and sees subjects as largely or even wholly constructed by the intersection of various cultural and political forces. In contrast, viewing deconstruction as an instrument employed by a subject reasserts logocentric assumptions about the self that deconstruction is designed to explode.

Yet this is not an objection to my argument. Rather, it is my argument--that deconstruction, as actually performed by individuals, is always and already parasitic on some form of logocentric practice. This is every bit as true of critics of the autonomy of the self as it is of critics of any other subject of deconstruction. The deconstructor of the self is still picking her targets she is still writing about the illusion of the self and not about the errors of Justice Scalia's opinion, or the wickedness of apartheid. And this choice (for we can find no other word to describe it) is still the grinding of a particular ax, whether its real motivations are conscious or unconscious, whether the self who makes this choice is wholly autonomous or wholly constructed. And the more cleverly and skillfully the deconstructor of the self argues her case, the more overtly she displays her mastery and her purposefulness in doing so--thus uncannily subverting her own position. In short, deconstructive technique must also apply to itself. Deconstruction, which seems to efface the self, ultimately depends upon what it deemphasizes or denies--that is, the self. For only selves can put the self in question--there is quite literally no one else to do it. And only selves with preexisting commitments (political or otherwise) would engage in such a project. My conclusion thus remains untouched: Without preexisting values, purposes, or commitments, deconstruction cannot begin. With them, it can never be other than logocentric.

I am sure that I am not the first person to note the curious relationship between deconstruction and an earlier French import existentialism. Both approaches envision a sort of freedom--for the existentialist it is the freedom to act, for the deconstructionist it is the freedom of the text to signify endlessly. If we see life itself as the general text, the textual freedom of the deconstructionist becomes quite similar to the pragmatic (action-oriented) freedom of the

⁴⁹ See Schlag, "L'hors de Texte, C'est Moi"--The Politics of Form and the Domestication of Deconstruction, 11 *Cardozo L. Rev.* 163 (1990).

⁵⁰ *Id.*

existentialist. By sufficient deconstruction one can transform the general text into what one wants it to mean, just as for the existentialist one can make one's life mean what one wants it to mean. But in both cases there is a price to pay. For the deconstructionist, the text always means more than what one wants it to mean, just as for the existentialist one's moral choices have consequences that one could not predict or did not wish but that one is nevertheless responsible for.

This symmetry and ultimate agreement is quite curious, because deconstruction and existentialism would appear to be based upon completely opposed theories of the thinking subject. Existentialism exalts the freedom of the subject, and deconstruction, like much poststructuralist thought, tends to deemphasize or even efface the subject. But I suggest that this similarity is really not as surprising as it might at first appear. Both approaches are seeking answers to the same set of philosophical problems, albeit from different directions. Thus, both philosophical practices end at the same point--with the need for preexisting moral and political commitment in the face of an undecidable text--the general text, the text of life in which ethical choice is inscribed.