

Tradition and the Law: A Response to Wax

DANA NELKIN*

Professor Wax's paper begins with the observation that there is no unified, systematic exposition of the anti-gay-marriage position.¹ It then makes a subtle and skillful attempt to develop such a position by appeal to a conservative line of thought that rests on respect for tradition in assessing political and social change.² Wax points to Edmund Burke and Michael Oakeshott as leading representatives of this general approach,³ while exploring the ways in which their views might be understood to apply to an issue that they themselves did not discuss. Although I am skeptical that the position Wax presents succeeds in its aim, I do believe that she provides a great service in bringing a case of this kind to the table. Only when we have a real, developed position in hand, can we do justice to the issue in evaluating it. The following provides a brief overview of some key points in Wax's paper and the start of an evaluation.

In the first part of Wax's paper, the conservative approach is spelled out, and it is made clear that both Edmund Burke and Michael Oakeshott advocate adherence to traditional ways of doing things as the result of

* Associate Professor of Philosophy, University of California, San Diego, and Affiliated Scholar, University of San Diego Institute for Law and Philosophy. I would like to thank Larry Alexander for organizing the conference for which this paper was written, and all of the conference attendees for an interesting and illuminating discussion of the issues raised by Professor Wax's paper. I am very grateful to Sam Rickless, Maimon Schwarzschild, and Amy Wax for their thoughtful and helpful comments on the paper.

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

2. *Id.* at 1071-1101.

3. *Id.* at 1064-71.

accumulated wisdom based on experience.⁴ Further, both Burke and Oakeshott are distrustful of basing attempts at change on abstract reasoning.⁵ Burke worries that we are more likely to go wrong if we leave tradition behind, because we cannot possibly predict the consequences of our decisions if we stick to reason alone.⁶ Oakeshott worries that trying to justify ourselves at “the bar of reason” will lead to an attempt at perfection and so ultimately to paralysis,⁷ and he also worries that reason demands consistency and exceptionless principles which are too simple for the real complex world we inhabit.⁸ Both acknowledge, however, that change happens organically, and that some change is good.⁹

The second part of Wax’s paper seeks a heuristic, based on these considerations, for when we should accept change.¹⁰ As Wax makes clear, Burke offers a very explicit one: for legislative change, it is at least necessary that a majority of people want change and that—despite their reverence for tradition—they see the status quo as intolerable.¹¹ It appears less certain that Oakeshott offers as clear a criterion.

In the third part of the paper, Wax seeks to apply the line of reasoning developed so far to the case of gay marriage, and identifies aspects of the pro-gay-marriage movement that Burke’s and Oakeshott’s reasoning would lead us to resist.¹² For example, she argues, on this line of reasoning, the fact that only a minority is pushing for change and the fact that the movement is driven by principles provide strong reasons to resist change in favor of gay marriage.¹³ Further, in response to demands that opponents provide evidence that change would bring destruction in its wake, Burke and Oakeshott would respond that such demands places the burden of proof in exactly the wrong corner.¹⁴

After this, the conclusion of the paper is a bit surprising, since Wax does not quite answer whether Burke and Oakeshott’s reasoning leads to a rejection of gay marriage. She seems to hesitate for at least two reasons. First, circumstances have changed in certain ways. For example, there is a need for adult care as we human beings live longer and participation in gay marriage can increase the number of caregivers.¹⁵ Second, it is

4. *Id.* at 1064–67.

5. *Id.* at 1066.

6. *Id.* at 1064.

7. *Id.* at 1065.

8. *Id.*

9. *Id.* at 1067.

10. *Id.* at 1067–71.

11. *Id.* at 1069.

12. *Id.* at 1071–1101.

13. *Id.* at 1073.

14. *Id.* at 1080.

15. *Id.* at 1100–01.

unclear that marriage will survive if it does not adapt to the movement in support of gay marriage.¹⁶

Professor Wax has provided a very helpful elucidation of a traditional line of thought and addressed the fascinating question of whether this line provides the answer conservatives are seeking in the case of gay marriage. It may be, of course, that most actual opponents of gay marriage base their views on religious beliefs, or on beliefs that are secular and inchoate, and so do not adopt the well-developed, secular, and traditional line of thought developed in this paper. However, it is a great benefit to have such a view on the table. Naturally, her paper raises a few questions.

While it is not clear *why* Burke adopts the particular heuristic that he does, it seems pretty clear that some of his necessary conditions, such as majority approval for endorsing change, are simply not met when it comes to gay marriage in the United States in 2005. For example, recent elections have shown that the majority—at least in many states—is disinclined toward social change in this area. Given Burke's heuristic, it seems pretty clear that Burke should reject gay marriage. Thus, it is puzzling that Wax hesitates at the end of her paper. The following hypothesis might resolve the puzzle: she is giving more weight to Burke's general rationale—his faith in tradition over reason—than to the particular heuristic that is supposed to arise from it. The heuristic simply does not match the general rationale, and it is reasonable to favor the general rationale over the heuristic.

Wax sets out to construct a respectable case for opposition to gay marriage. Does the reasoning of Burke and Oakeshott meet that standard? For Burke, at least, the whole point is that respecting tradition and making slow incremental changes is less likely to have disastrous consequences than sudden change divorced from tradition. It is interesting that we now have as part of our history some rather large and fairly fast principle-driven changes. Moreover, these are precisely the sort of principles to which gay marriage advocates now appeal. Consider, for example, the *principled* end to slavery in the South. Thus, some principled changes fared well, even though perhaps some have not. Nevertheless, these changes themselves provide experience for us to draw on. One might argue that we have a toss-up, then, between slow change and fast, principled change, with different experiences supporting each course of

16. *Id.* at 1097.

action. Or perhaps principled change comes out ahead. There is quite a record to examine. This is not a criticism that the conservative line gets the wrong outcome in the case of slavery, although it does. It is rather that, given accumulating tradition, it is not at all clear that tradition itself speaks in favor of only small, slow, unprincipled changes. All this is consistent with the kinds of considerations Wax raises at the end of her paper.

It appears, then, that if Burke's majority requirement is bracketed, his ultimate rationale, together with the data, might not lead to a rejection of gay marriage, after all. In contrast, Oakeshott's reasoning seems to lead more directly to an anti-gay-marriage stance because Oakeshott seems motivated more directly by a distrust of principle. He associates principle with exceptionlessness, and this, in turn, with oversimplification of a complex world. With principle thus tainted, it seems that we should be suspicious of principle-driven change all by itself, whether the majority is behind it or not.¹⁷ But this is a mistake. Proponents of change are happy to countenance exceptions, just so long as they are principled ones. (Whether we have a single exceptionless principle or a principle with a variety of principled exceptions is a matter of presentation in the end.) What matters is overall consistency, of course, but consistency need not be simple. Once we distinguish consistency from simplicity, Oakeshott's phobia about principle and reasoning is revealed. At this point, the question of hypocrisy looms large, as Oakeshott tries to convince us of the rightness of his view. Wax alludes to this worry at one point, calling it a "paradox," but perhaps lets him off too easily. In the end, Oakeshott's argument might turn out to be more promising in *entailing* an opposition to gay marriage than Burke's, but at a significant cost in the plausibility of its premise.

Finally, both Burke and Oakeshott acknowledge that some change can be good. Further, both are interested in recommending the conservative course because they think it will lead to better outcomes. Yet, it is important to ask, what measure is being used in assessing outcomes? Is an outcome better when more people have more well-being, or when they are more autonomous, or something else? If any of the above, then perhaps they are less averse to principle than first appears.

17. *Id.* at 1075.