Michael H. v. Gerald D.: Due Process and Equal Protection Rights of Unwed Fathers

Introduction

As marriage and divorce patterns have changed, unmarried parents have called upon the United States Supreme Court to consider the constitutional rights of unmarried parents in relation to their children.[1] Unwed fathers, in particular, have petitioned the Court to establish constitutional protection for their relationships with their illegitimate children[2] under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[3]

The Supreme Court first recognized that an unwed father's legal relationship with his out-of-wedlock child may be constitutionally protected in *Stanley v. Illinois*.[4] In three subsequent cases decided between 1979 and 1983, the Court further defined the circumstances under which the rights of unwed fathers merit constitutional protection.[5] In the most recent of these cases, *Lehr v. Robertson*,[6] the Court applied what appeared to be the test that courts should use to determine whether an unwed father has a constitutionally protected interest in personal contact with his child. The court looked to whether the father had developed a "substantial relationship"[7] with his child. If, in addition to the biological relationship, a "substantial" personal relationship existed between father and child, the Court would uphold constitutional protection of the father-child relationship.[8]

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1. *See* E. RUBIN, THE SUPREME COURT AND THE FAMILY 11-12, 21-22, 27-47 (1986).

2. *See* Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972). For a review of the Supreme Court cases considering the constitutional rights of unwed fathers to develop a relationship with their illegitimate children, see Atwater, *A Modern-Day Solomon's Dilemma: What of the Unwed Father's Rights?*, 66 U. DET. L. REV. 267, 275-85 (1989).

3. U.S. CONST. amend. XIV.

4. 405 U.S. at 658 (holding on procedural due process and equal protection grounds that an unwed father who lived intermittently with his children over a period of 18 years was entitled to a hearing on his fitness as a parent before his children could be taken from him and made wards of the state).

5. *Quilloin*, 434 U.S. 246; *Caban*, 441 U.S. 380; *Lehr*, 463 U.S. 248.

6. 463 U.S. 248 (1983).

7. *Id.* at 267.

8. *Id.* at 261, 266-67. After reviewing the facts and holdings in the three previous Supreme Court unwed father cases, the *Lehr* Court found that the decisive factor in determin-

In 1989, however, the Supreme Court affirmed a California Court of Appeal decision denying constitutional protection to an unwed father who had developed a personal relationship with his illegitimate daughter.[9] Justice Scalia, writing for the plurality in the case of *Michael H. v. Gerald D.*,[10] declined to apply this "biological fatherhood plus" standard to the due process claim of an unwed father.[11] Instead, Justice Scalia tested the viability of the unwed father's asserted constitutionally protected "liberty"[12] interest by asking whether his relationship with his child was one that "ha[d] been treated as a protected family unit under historic practices of our society."[13]

In *Michael H.*, an unwed father sought to establish his paternity and, thereby, to establish his right to court-ordered visitation with a daughter conceived through an adulterous relationship with a married woman.[14] As proof of his paternity the unwed father offered blood test evidence establishing his paternity to a 98.07% probability.[15] Despite this near-conclusive proof, the California Court of Appeal affirmed a lower court holding that refused to recognize the father's paternity.[16] The court based its decision on California Evidence Code section 621,[17] which creates a conclusive presumption that a child born into an extant marriage is the offspring of the husband of that marriage.[18]

The unmarried biological father and his then-six year old daughter petitioned the Supreme Court, challenging the constitutionality of section 621 on procedural and substantive due process grounds.[19] Father and daughter also appealed on equal protection grounds.[20] Michael H., the putative father, and Victoria, his daughter, separately claimed that, by permitting termination of their parent-child relationship without granting Michael a fair hearing at which to rebut the marital presumption, the section 621 presumption had deprived them of their procedural

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ing the legitimacy of an unwed father's constitutional claim was the existence of a substantial relationship with his illegitimate offspring. *See id.* at 258-61, 266-67.

9. Michael H. v. Gerald D., 109 S. Ct. 2333 (Scalia, J., plurality opinion), *reh'g denied*, 110 S. Ct. 22 (1989).

10. 109 S. Ct. 2333 (1989).

11. *Id.* at 2342.

12. *Id.* at 2341.

13. *Id.* at 2342.

14. *Id.* at 2337-38.

15. *Id.* at 2337.

16. Michael H. v. Gerald D., 191 Cal. App. 3d 995, 236 Cal. Rptr. 810 (1987), *aff'd*, 109 S. Ct. 2333 (1989).

17. CAL. EVID. CODE § 621(a) (West Supp. 1989) ("(a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.").

18. *Michael H.*, 109 S. Ct. at 2338 (Scalia, J., plurality opinion).

19. *Id.* at 2338. A court-appointed guardian *ad litem* appealed on the daughter's behalf. *Id.* at 2337.

20. *Id.* at 2338.

and substantive due process rights.[21] Victoria's equal protection challenge contended that section 621 discriminated against her because she was barred from presenting evidence to rebut the paternal presumption and yet either her mother or her mother's husband was free to present the same kind of evidence.[22]

The Supreme Court affirmed in a plurality decision, dismissing all of Michael and Victoria's constitutional claims.[23] Justice Scalia, writing for the four-vote plurality,[24] rejected Michael and Victoria's procedural due process claims,[25] reasoning that the issues surrounding an irrebuttable presumption of the type found in section 621 are substantive, not procedural, in nature.[26] Proceeding to Michael's substantive due process claim, Justice Scalia found that Michael failed to establish that his claimed liberty interest was a "fundamental" interest traditionally protected by our society,[27] and that, "quite to the contrary, our [society's] traditions have protected the marital family . . . against the sort of claim Michael asserts."[28]

Justice Scalia waved aside Victoria's due process claims as being merely "the obverse" of Michael's claim.[29] Justice Scalia also summarily dismissed Victoria's equal protection claim that the statute discriminated against her based on her illegitimacy.[30] The plurality opinion did not reach Michael's equal protection claim because it had been neither raised nor passed on below.[31]

Justice Stevens, writing the swing-vote opinion, concurred in the judgment only.[32] In contrast to the plurality opinion, he found that Michael had raised a valid procedural due process issue.[33] Justice Ste-

21. *Id.*

22. *Id.*; CAL. EVID. CODE § 621(c), (d) (West Supp. 1989). Under section 621, either the mother or the husband can rebut the presumption in the first two years of the child's life, but the presumption is otherwise conclusive.

23. *Michael H.*, 109 S. Ct. at 2338, 2346 (Scalia, J., plurality opinion).

24. Justice Scalia wrote the plurality opinion, in which Chief Justice Rehnquist concurred in the entirety. Justice O'Connor wrote a separate opinion, in which Justice Kennedy joined, concurring in the plurality opinion except footnote 6. Justice Stevens wrote a separate opinion concurring in the judgment only. Justice Brennan, joined by Justices Marshall and Blackmun, dissented. Justice White, joined by Justice Brennan, filed a separate dissent. *See generally Michael H.*, 109 S. Ct. 2333.

25. *Id.* at 2341 (Scalia, J., plurality opinion).

26. *Id.* at 2340-41.

27. *Id.* at 2341.

28. *Id.* at 2342.

29. *Id.* at 2346.

30. *Id.*

31. *Id.* at 2338.

32. *Id.* at 2347 (Stevens, J., concurring in the judgment).

33. *See id.* at 2347-49; *see also id.* at 2349 (Brennan, J., dissenting). Justice Brennan, in summarizing the five opinions filed in *Michael H.*, pointed out that Justice Stevens had agreed that the flaw inherent in a conclusive presumption was procedural.

vens was also willing to assume, for the sake of argument, that Michael had a liberty interest in his relationship with his daughter.[34] Justice Stevens argued that Michael's procedural due process claims failed, not because Michael had no constitutionally protected interest, but instead, because California courts gave Michael a fair hearing on his paternal rights and thus accorded him the process he was due.[35]

Justice Brennan, writing in dissent, argued vigorously that the plurality erred in casting the constitutionality of the section 621 conclusive presumption as a question of substantive rather than procedural due process rights.[36] In separate dissenting opinions, Justice Brennan and Justice White asserted that Michael did indeed have an identifiable liberty interest in his parental relationship with Victoria.[37] Justice Brennan was particularly critical of the analytical method Justice Scalia advanced as the correct technique for determining whether an individual right has traditionally been protected by society. Justice Brennan found that Justice Scalia's reliance upon a narrowly confined[38] search of the "dusty volumes on American history"[39] converted the Constitution from a "living charter" to a "stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past."[40]

Part I of this Comment presents the facts and holding of the plurality opinion in *Michael H. v. Gerald D.*[41] Part I also outlines the individual Justices' arguments regarding both the utility of the irrebuttable presumption doctrine in procedural due process analysis and the proper use of tradition to limit the scope of substantive due process rights.[42] Part II examines the present state of unwed fathers' due process rights as affected by the decision in *Michael H.*[43] Part II also argues that application of equal protection review in *Michael H.* would have yielded a fairer result and a more flexible constitutional precedent.[44] Part III concludes that the opinion in *Michael H.* cuts back only narrowly on the reach of unwed fathers' rights as established by the Court's previous unwed father cases. Part III further concludes that intermediate level equal protection review, not substantive due process review, is the preferred ground for decision when an unwed father seeks constitutional protection for his parental right to a relationship with his child.

34. *Id.* at 2347 (Stevens, J., concurring in the judgment).
35. *Id.* at 2347-49.
36. *Id.* at 2349, 2355-58 (Brennan, J., dissenting).
37. *Id.* at 2352; *id.* at 2360-61 (White, J., dissenting).
38. *Id.* at 2351-53 (Brennan, J., dissenting).
39. *Id.* at 2349.
40. *Id.* at 2351.
41. *See infra* notes 45-77 and accompanying text.
42. *See infra* notes 78-190 and accompanying text.
43. *See infra* notes 191-204 and accompanying text.
44. *See infra* notes 205-248 and accompanying text.

I. *Michael H. v. Gerald D.*

A. Facts and Holding

In the summer of 1978, Carole D., a married woman, began an adulterous affair with Michael H., her neighbor in Playa Del Rey, California.[45] Soon after the May 1981 birth of her first child, Victoria D., Carole informed Michael that she believed he might be the father of her daughter.[46] In October 1981 Carole and Michael had blood tests taken that revealed a 98.07% probability that Michael was Victoria's father.[47]

Victoria's home life in her first three years was far from stable.[48] Until June of 1984, Carole and Victoria resided with three different men on an intermittent basis: Michael; Carole's husband, Gerald D.; and Carole's second lover, Scott K.[49] During this three year period Victoria lived with Michael on two separate occasions which together totalled eleven months.[50] In January 1982 Carole took Victoria to visit Michael at his place of business in St. Thomas in the Virgin Islands. Mother and daughter remained there for a period of three months before returning to California.[51] From March 1982 through July 1983 Carole and Victoria alternated their residence between Scott's home in California and Gerald's home in New York.[52] Then, in August 1983, they returned to Carole's apartment in Los Angeles where Michael lived with them for the next eight months whenever he was not away on business trips to St. Thomas.[53] In May of 1984 Carole again left Michael, taking her then-three year old daughter to live with her husband in New York. Carole and Victoria remained with Gerald thereafter, continuing to reside with him throughout the ensuing court proceedings.[54]

Michael was not an unwilling father.[55] From the time of Victoria's birth he asserted his interest in raising his daughter.[56] Michael held Victoria out as his child,[57] he contributed to her financial support,[58] and, within the limits set by Carole's transience and choice of companions, he attempted to establish a relationship with his daughter.[59] In November

45. Michael H. v. Gerald D., 109 S. Ct. 2333, 2337 (1989) (Scalia, J., plurality opinion).
46. *Id.*
47. *Id.*
48. *See infra* notes 49-54 and accompanying text.
49. *Michael H.*, 109 S. Ct. at 2337 (Scalia, J., plurality opinion).
50. *See id.*
51. *Id.*
52. *Id.*
53. *See id.*
54. *Id.* at 2337.
55. *Id.* at 2361 (White, J., dissenting).
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*

1982, after Carole's departure from St. Thomas and Carole's subsequent refusal to allow him access to Victoria, Michael filed suit in California Superior Court to establish his paternity and his right to visitation.[60] Victoria, through a court-appointed guardian *ad litem*, also sought visitation rights for Michael.[61]

Michael based his claim on California Civil Code section 4601,[62] which allows reasonable visitation rights to a parent "unless it is shown that the visitation would be detrimental to the best interests of the child."[63] Section 4601 also provides that "[i]n the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child."[64]

1. Procedural History

In January 1985, the Superior Court granted summary judgment to Gerald on the issue of Michael's paternity. The court held that there was no triable issue of fact concerning Michael's paternity because, under California Evidence Code section 621, a child born to a married woman who lives with her husband, and whose husband is neither impotent nor sterile, is presumed to be the child of the husband.[65] The presumption is conclusive unless either the husband or the mother rebut the presumption within the first two years of the child's life.[66]

The Superior Court also dismissed, without trial, both Michael and Victoria's claims for visitation rights under section 4601.[67]

On appeal, Michael claimed that section 621, as applied by the Superior Court, violated his procedural and substantive due process rights under the Fourteenth Amendment.[68] Victoria also appealed, claiming that her procedural and substantive due process rights to maintain an established psychological relationship with her biological parent had been violated by the application of section 621.[69] Victoria asserted as well that the statute violated her equal protection rights because section 621 allows the husband and the mother, but not the affected child, to

60. *Id.* at 2337. (Scalia, J., plurality opinion).

61. *Id.*

62. CAL. CIV. CODE § 4601 (West Supp. 1989).

63. *Michael H.*, 109 S. Ct. at 2339 (Scalia, J., plurality opinion) (quoting CAL. CIV. CODE § 4601 (West Supp. 1989)).

64. *Id.* at 2347 (Stevens, J., concurring in the judgment) (quoting CAL. CIV. CODE § 4601).

65. *See id.* at 2339 (Scalia, J., plurality opinion) (quoting CAL. EVID. CODE § 621(a) (West Supp. 1989)).

66. *Id.* (quoting CAL. EVID. CODE § 621(c), (d)).

67. *Id.* at 2338; Michael H. v. Gerald D., 191 Cal. App. 3d 995, 1012-13, 236 Cal. Rptr. 810, 820-21 (1987).

68. 109 S. Ct. at 2338 (Scalia, J., plurality opinion).

69. 191 Cal. App. 3d at 1008, 236 Cal. Rptr. at 817.

rebut the presumption of the husband's paternity.[70] Finally, in addition to her constitutional challenge to section 621, Victoria asked the California appellate court to overturn the lower court's dismissal of Michael's plea for visitation rights under section 4601.[71]

The California Court of Appeal affirmed, upholding section 621 and denying both Michael and Victoria's due process claims and Victoria's equal protection challenge to the statute.[72] The Court of Appeal also upheld the lower court's dismissal, without trial, of Michael's plea for the right to visit his daughter.[73]

2. *Holding*

Michael and Victoria appealed to the Supreme Court after the California Supreme Court denied review. In addition to the procedural and substantive due process claims he had raised below, Michael challenged section 621 on equal protection grounds.[74] The Supreme Court noted probable jurisdiction,[75] and, in a five-vote plurality decision, affirmed the lower court holding.[76] In so doing the Court upheld California's use of a conclusive paternal presumption to terminate the parental rights of Victoria's natural father.[77]

B. Procedural Due Process Analysis

1. *The Irrebuttable Presumption Doctrine*

Prior to consideration of *Michael H. v. Gerald D.*,[78] the Supreme Court had invalidated statutes on constitutional grounds when the statute created a conclusive presumption that acted to deny the plaintiff a hearing prior to legal termination of his or her rights.[79] Legal commentators named the Court's analytical method in these cases the "irrebuttable presumption doctrine."[80]

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70. *Id.*
71. *Id.* at 1012, 236 Cal. Rptr. at 820.
72. *Id.* at 1013, 236 Cal. Rptr. at 821.
73. *Id.* at 1012-13, 236 Cal. Rptr. at 820-21.
74. 109 S. Ct. 2333, 2338 (1989) (Scalia, J., plurality opinion).
75. *Id.*
76. 109 U.S. 2333.
77. *See supra* notes 65-73 and accompanying text.
78. 109 S. Ct. 2333.
79. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); United States Dep't of Agric. v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971).
80. *See* Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449, 449-56 (1975) [hereinafter Note, *Illusory Analysis*] (identifying the Supreme Court's analytical method when faced with statutorily created irrebuttable presumptions as the "irrebuttable presumption doctrine," and describing the Court's modern revival of the doctrine in cases decided in the period between 1972 and 1975); *see also* Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534, 1534-44 (1974) [hereinafter Note, *Irrebuttable*

The effect of the doctrine was to apply strict or intermediate scrutiny to a statute which employed a conclusive presumption to cut off access to a hearing on a plaintiff's rights.[81] The validity of the doctrine's analytical approach and its applicability outside the realm of equal protection review had, however, been the subject of controversy amongst both Supreme Court commentators[82] and the members of the Court themselves.[83] Opposition to the doctrine derived from the belief that use of the doctrine for procedural due process analysis resulted in unwarrantedly strict scrutiny of statutes when the factual situation actually required the more relaxed "rational basis" scrutiny under the Equal Protection Clause.[84]

Although the Court abandoned the use of the irrebuttable presumption doctrine during the post-1937 period of disenchantment with the

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Presumption Doctrine] (describing the irrebuttable presumption doctrine and tracing its modern evolution in Bell v. Burson, 402 U.S. 535 (1971), Stanley v. Illinois, 405 U.S. 645 (1972), Vlandis v. Kline, 412 U.S. 441 (1973), United States Dep't of Agric. v. Murry, 413 U.S. 508 (1973), and Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974)).

81. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1618-25 (2d ed. 1988) (describing the irrebuttable presumption doctrine and the way the Supreme Court has applied it to state statutes).

82. *See* Note, *Illusory Analysis*, *supra* note 80, at 450, 462-73 (1975) (arguing that the doctrine is the "conceptual equivalent" of *equal protection* rather than *due process* review, *id.* at 450, and further arguing that irrebuttable presumptions are the equivalent of substantive rules of law and that application of the irrebuttable presumption doctrine permits improper application of a close scrutiny test to situations involving neither a fundamental right nor a suspect classification, and asserting that, as a consequence, "the doctrine opens the door to the use of nonneutral principles of constitutional adjudication," *id.* at 473); *see also* Note, *Irrebuttable Presumption Doctrine*, *supra* note 80, at 1544-56 (characterizing irrebuttable presumptions as substantive rules of law rather than as rules of evidence, and also arguing that analysis under the irrebuttable presumption doctrine results in an extremely strict standard of statutory scrutiny which has no basis in articulated constitutional theory); L. TRIBE *supra* note 81, at 1618-25 (characterizing use of the irrebuttable presumption doctrine as an intermediate remedy used by the court in intermediate level equal protection analysis and discussing criticism of the doctrine).

83. Justice Rehnquist called the potential expansion of the irrebuttable presumption doctrine a "virtual engine of destruction for countless legislative judgments." Weinburger v. Salfi, 422 U.S. 749, 772 (1975). In his dissenting opinion in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), Justice Rehnquist was even more adamant in his opposition to the use of irrebuttable presumption analysis. Accusing Justice Stewart of "enlist[ing] the Court in another quixotic engagement in his apparently unending war on irrebuttable presumptions," Justice Rehnquist pointed out that "countless" state statutes could be threatened by application of the irrebuttable presumption doctrine to statutes in which the statutory classifications were less than perfectly drawn. 414 U.S. 632, 657 (1974) (Rehnquist, J., dissenting). Justice Powell also expressed his misgivings about the Court's application of the irrebuttable presumption doctrine in *LaFleur*. *Id.* at 652 (Powell, J., concurring in the judgment). Justice Powell argued that the "concept at root" in the court's irrebuttable presumption cases was often the Equal Protection Clause "masquerading as a due process doctrine." *Id.*; *see also* Note, *Irrebuttable Presumption Doctrine*, *supra* note 80, at 1540 n.36 (1974) (summarizing the Justices' views on irrebuttable presumptions as illustrated by cases decided between 1971 and 1974).

84. *See supra* notes 82-83.

interventionist aspects of substantive due process review,[85] the Court expressly revived irrebuttable presumption analysis in *Stanley v. Illinois*.[86] In *Stanley*, the Court recognized an unwed father's due process right to a hearing on his fitness prior to termination of his parental rights.[87] Despite this previous application of the irrebuttable presumption doctrine when considering unwed fathers' due process rights to relationships with their children and despite Justice Brennan's objections,[88] Justice Scalia elected not to apply irrebuttable presumption analysis to decide the constitutionality of the statutory conclusive presumption challenged in *Michael H.*[89]

2. *Three Methods of Analysis in* Michael H. v. Gerald D.

a. The Plurality Opinion: Section 621 Not a Procedural Rule

Justice Scalia, writing for the plurality, rejected Michael's contention that the conclusive presumption of paternity in California's Evidence Code[90] violated his procedural due process rights.[91] In a two-part analysis, Justice Scalia first asserted that the California statute, although phrased in terms of a presumptive rule of evidence, is not a procedural rule but is, instead, a substantive rule of law. Justice Scalia argued that California Evidence Code section 621 is actually the implementation of an " 'overriding social policy' "[92] enacted through a substantive rule of law by which "California declares it to be, except in limited circum-

85. Note, *Irrebuttable Presumption Doctrine*, *supra* note 80, at 1539-40.

86. *See* 405 U.S. 645 (1972); Note, *Irrebuttable Presumption Doctrine*, *supra* note 80, at 1542 (analyzing the facts and holding in *Stanley*).

87. 405 U.S. at 657. Stanley, an unwed father whose children's mother had died, challenged an Illinois statutory scheme permitting the state to make his children wards of the state in circumstances where they had no surviving parent who wanted to care for them. The effect of the Illinois law was to take Stanley's three children from his custody without making an individualized determination that he was an unfit parent. In contrast, both unwed mothers and married parents were entitled to a hearing on their parental fitness before the state could terminate their parental rights. The difference in treatment of the parties stemmed from an Illinois statute which defined "parent" to include both married parents and unwed mothers, but not unwed fathers. *See id.* at 646-50. Although the Supreme Court in *Stanley* based its ultimate holding on the Equal Protection Clause, the Court rested its equal protection holding upon a finding that the statute's irrebuttable presumption had violated the Due Process Clause. *See id.* at 647-49, 657-59; *see also* Note, *Irrebuttable Presumption Doctrine*, *supra* note 80, at 1542 (pointing out that jurisdictional constraints in *Stanley* required the court to base the ultimate holding on equal protection grounds, but that the Court has subsequently treated the case as a due process decision).

88. Michael H. v. Gerald D., 109 S. Ct. 2333, 2356-58 (1989) (Brennan, J., dissenting).

89. *Id.* at 2340-41 (Scalia, J., plurality opinion).

90. CAL. EVID. CODE § 621 (West Supp. 1989).

91. *Michael H.*, 109 S. Ct. at 2341 (Scalia, J., plurality opinion).

92. *Id.* at 2340 (quoting Michael H. v. Gerald D., 191 Cal. App. 3d 995, 1005, 236 Cal. Rptr. 810, 816 (1987) (quoting Vincent B. v. Joan R., 126 Cal. App. 3d 619, 623, 179 Cal. Rptr. 9, 10 (1981))).

stances, *irrelevant* for paternity purposes whether a child conceived during and born into an existing marriage was begotten by someone other than the husband . . . ."[93]

Having declared section 621 to be a substantive rather than a procedural rule, Justice Scalia further asserted that the Court's previous holdings striking down irrebuttable presumptions did not mandate procedural due process analysis of Michael's challenge to the conclusive presumption[94] contained in section 621.[95] Justice Scalia argued that the Court's previous irrebuttable presumption cases did not rest on procedural due process grounds, and that, in any case, the ultimate practical effect of a rule phrased in terms of a "procedural" conclusive presumption is no different than a rule framed in terms of a "substantive" classification.[96] In other words, even if California's Evidence Code substituted a rule stating that an "adulterous natural father shall not be recognized as a legal father,"[97] this restatement of the rule as a substantive classification would have yielded the same result in Michael's case as a rule of evidence conclusively presuming another man's paternity. Both the procedural and substantive formulations of the rule would have the effect of denying Michael a hearing at which to present blood test evidence as proof of his paternity.[98] From this absence of a difference in the ultimate effect of alternative phrasings of the rule, Justice Scalia concluded that the Court should analyze its irrebuttable presumption cases in substantive rather than in procedural due process terms.[99]

b. Dissenting Opinions and Justice Stevens's Concurrence: Procedural Due Process Analysis Applies

Three Justices subscribed to Justice Scalia's contention that Michael

93. *Id.* at 2340 (emphasis in original).

94. The Supreme Court has used the terms "conclusive presumption" and "irrebuttable presumption" interchangeably. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 644 (1974).

95. *Michael H.*, 109 S. Ct. at 2340-41 (Scalia, J., plurality opinion). Justice Scalia identified Stanley v. Illinois, 405 U.S. 645 (1972), Vlandis v. Kline, 412 U.S. 441 (1973), and Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), as examples of the Court's previous irrebuttable presumption cases.

96. *Michael H.*, 109 S. Ct. at 2340-41 (Scalia, J., plurality opinion).

97. *Id.* at 2340.

98. *Id.*

99. *See id.* at 2340-41 ("[O]ur 'irrebuttable presumption' cases must ultimately be analyzed as calling into question not the adequacy of procedures but—like our cases involving classifications framed in other terms—the adequacy of the 'fit' between the classification and the policy that the classification serves." (citations omitted)). In determining that irrebuttable presumptions should not trigger procedural due process analysis, Justice Scalia relied in part on previous criticism in Supreme Court opinions of the potential for harsh effects on legislative judgments arising from irrebuttable presumption analysis.

raised no valid procedural due process issue.[100] In contrast, the remaining five Justices agreed that Michael's challenge to section 621 merited procedural due process analysis.[101] Although Justice Stevens and Justice White did not explicitly argue with the plurality's analysis, they impliedly disagreed by subjecting Michael's claim to procedural due process analysis.[102]

Justice Brennan, joined by Justice Marshall and Justice Blackmun, expressly challenged the dismissal of Michael's procedural due process claim.[103] Although conceding that "all conclusive presumptions [may], in a sense, [be] substantive rules of law,"[104] Justice Brennan pointed out that section 621 falls into the special category of substantive rules that, by presuming a fact relevant to a certain class of litigation, takes both the form and the effect of a procedural rule.[105] Justice Brennan viewed the argument that California deems the paternity of the child to be irrelevant when the child's mother is married to another man as "patently false"[106] because "California cares very much about paternity when the husband is impotent or sterile."[107]

Justice Brennan also disputed Justice Scalia's argument that the Court could not properly apply procedural due process analysis to conclusive presumptions.[108] Justice Brennan asserted that, to the contrary, a conclusive presumption "declare[s] a certain fact relevant, indeed controlling[, and, at the same time, denies] a particular class of litigants a hearing to establish that fact . . . . [It thus contains] precisely the kind of flaw that procedural due process is designed to correct."[109]

c. Analysis of Unwed Fathers' Procedural Due Process Rights: Justice Stevens's Concurrence and Dissenting Opinions

Although Justice Stevens agreed with the dissenting Justices that Michael's challenge required procedural analysis,[110] he concurred with

100. Justice Rehnquist concurred in the entirety of the plurality opinion. Justice O'Connor and Justice Kennedy also concurred in all portions of the plurality opinion with the exception of the "tradition" analysis in footnote 6. *See id.* at 2346-47 (O'Connor, J., concurring in all but footnote 6).

101. *Id.* at 2349 (Brennan, J., dissenting) ("Five Justices agree that the flaw inhering in a conclusive presumption that terminates a constitutionally protected interest without any hearing whatsoever is a *procedural* one." (emphasis in original)).

102. *See id.* at 2347-48 (Stevens, J., concurring in the judgment); *see also id.* at 2360-63 (White, J., dissenting).

103. *Id.* at 2355 (Brennan, J., dissenting).

104. *Id.* at 2357.

105. *Id.*

106. *Id.*

107. *Id.* (citing CAL. EVID. CODE ANN. § 621(a) (West Supp. 1988)).

108. *See id.* at 2357-58.

109. *Id.* at 2358.

110. *See supra* note 33 and accompanying text.

the plurality opinion in upholding the validity of the California statute.[111] Justice Stevens, however, rested his concurrence upon an analysis that expressed considerable disagreement with Justice Scalia's plurality opinion. Unlike Justice Scalia, Justice Stevens applied procedural due process analysis to Michael's claim,[112] and he was also willing to assume that Michael had a constitutionally protected interest in his relationship with Victoria.[113] Justice Stevens disagreed as well with the plurality's interpretation of the effect section 621 exerted on Michael's bid for visitation rights.[114] Justice Stevens argued that, although application of the section 621 presumption denied Michael visitation rights as a "parent" under California's child visitation statute, Michael had been given the opportunity to prove that he should be granted visitation rights as an "*other person having an interest in the welfare of the child.*"[115] Thus, according to Justice Stevens, Michael received the evidentiary hearing mandated by the Due Process Clause.[116]

Both Justice Brennan and Justice White, writing in separate dissents, agreed that Michael's procedural due process rights had been violated by California's application of California Evidence Code section

111. *Michael H.*, 109 S. Ct. at 2347-49 (Stevens, J., concurring in the judgment).

112. *See id.* at 2347-49; *see also id.* at 2349 (Brennan, J., dissenting). Justice Brennan, in summarizing the five opinions filed in *Michael H.*, pointed out that Justice Stevens had agreed that the flaw inherent in a conclusive presumption was procedural.

113. *Michael H.*, 109 S. Ct. at 2347 (Stevens, J., concurring in the judgment).

114. *See id.* at 2347-48.

115. *Id.* at 2347. Justice Stevens pointed out that California Civil Code § 4601 provides that " '[r]easonable visitation rights [shall be awarded] to a *parent* unless it is shown that the visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted *to any other person having an interest in the welfare of the child.*' " *Id.* (emphasis added by Justice Stevens) (quoting CAL. CIV. CODE § 4601 (West Supp. 1989)).

116. *See id.* at 2347-49. Justice Stevens was alone among the members of the Court in his interpretation of California law. Justice Scalia, Justice Brennan, and Justice White agreed that application of the section 621 presumption created an absolute bar preventing the California trial judge from granting Michael visitation with Victoria. *See also id.* at 2339-40 (Scalia, J., plurality opinion); *id.* at 2355-56 (Brennan, J., dissenting); *id.* at 2361-62 (White, J., dissenting). The source of this disagreement between Justice Stevens and the other Justices lay in differing interpretations of both the trial court holding in Michael's case and of the underlying California case law applying the section 621 presumption. *See id.* at 2347-48 (Stevens, J., concurring in the judgment); *id.* at 2355-56 (Brennan, J., dissenting).

Unlike the other Justices, Justice Stevens believed that existing California case law interpreting section 621 gave the trial judge discretion to determine that Victoria's interests would be best served by granting Michael reasonable visitation rights as an "other person having an interest in the welfare of the child" as permitted by the second sentence of California Civil Code § 4601. *See id.* at 2347-48 (Stevens, J., concurring in the judgment); *id.* at 2355-56 (Brennan, J., dissenting). Justice Stevens also believed that the trial judge in Michael's case had actually exercised that discretion by evaluating the relationship between Michael and Victoria before deciding to permanently deny Michael visitation rights with his child. *See id.* at 2348 (Stevens, J., concurring in the judgment).

621.[117]

C. Substantive Due Process Analysis

1. Historical Recognition of Unwed Fathers' Family Rights: A "Substantial Relationship" Test

In the search to discover "[w]here, beyond the [specific text of] the Bill of Rights, is the 'substance' of due process to come from,"[118] the Supreme Court has struggled with the problem of finding a workable theory for identifying rights deemed so "fundamental" as to require protection under the Due Process Clause of the Fourteenth Amendment.[119] The Supreme Court has identified the family unit as a context in which constitutionally protected interests often arise.[120] Rights relating to " 'freedom of personal choice in matters of . . . family life' "[121] springing from within the "integrity of the family unit"[122] have been found to deserve "deference and, absent a powerful countervailing [state] interest, protection"[123] under the Due Process Clause.

With regard to unmarried fathers' rights to " 'the companionship, care, custody, and management of [their] children,' "[124] the Court has specifically recognized as "cognizable and substantial"[125] the "liberty"

117. *Id.* at 2358-59 (Brennan, J., dissenting); *id.* at 2362-63 (White, J., dissenting). Justice Brennan focused the bulk of his opinion on a critique of the plurality's analytical method. In contrast, Justice White did not expressly argue with the plurality's *analytical method*, but, instead, devoted his opinion to a detailed analysis demonstrating that the Court's previous unwed father cases provided ample precedent for a finding that Michael's efforts at developing a relationship with Victoria entitled him to constitutional protection of his parental interest in a relationship with his child. *See id.* at 2360-63 (White, J., dissenting). Justice Brennan joined in Justice White's opposition to the plurality opinion, but Justice White, unlike the other dissenting Justices (Justices Marshall and Blackmun), chose not to join in Justice Brennan's critique of the plurality's analytical methodology.

118. L. TRIBE, *supra* note 81, at 777.

119. *Id.* at 774-80 (outlining the problems confronting the Court in defining the scope of the "liberty" guaranteed by the Due Process Clause, and briefly describing the theories the Court has employed to identify interests that, although not described specifically in the text of the Constitution, are nevertheless deserving of constitutional protection).

120. *See* Lehr v. Robertson, 463 U.S. 248, 256-58 (1983); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Stanley v. Illinois, 405 U.S. 645, 651 (1972).

121. *Quilloin*, 434 U.S. at 255 (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974)). "[I]t is now firmly established that 'freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' " *Id.* (quoting *LaFleur*, 414 U.S. at 639).

122. *Stanley*, 405 U.S. at 651 ("The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment and the Ninth Amendment." (citations omitted)); *Lehr*, 463 U.S. at 258 ("[T]he Court has found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection.").

123. *Stanley*, 405 U.S. at 651.

124. *Id.* (quoting Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

125. *Id.* at 652.

interest of an unwed father in a relationship with his child.[126] The fact that the relationship is "unlegitimized by a marriage ceremony"[127] has not precluded recognition of the father's liberty interest, but it has meant that the father must do more than merely sire his child.[128] Thus, in the absence of the legal parental relationship created by marriage, the Court has recognized a biological father's due process liberty interest in the parent-child relationship only when the father has established a "substantial relationship"[129] with his illegitimate offspring.[130]

2. *Tradition as a Limit on the Substantial Relationship Test*

In the four unwed father cases preceding the decision in *Michael H.*, the Court consistently found a constitutionally protected interest when a significant personal relationship existed between the biological father and his child.[131] However, in *Caban v. Mohammed*,[132] the dissenters argued

126. *Lehr*, 463 U.S. at 257-58; Quilloin v. Walcott, 434 U.S. 246, 255 (1983); *Stanley*, 405 U.S. at 651.

127. *Stanley*, 405 U.S. at 651.

128. *See Lehr*, 463 U.S. at 261 ("When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child' his interest in personal contact with his child acquires substantial protection under the Due Process Clause." (quoting Caban v. Mohammed, 441 U.S. 380, 392 (1979))); *see also Stanley*, 405 U.S. at 651-52 (finding that an unwed father who had lived intermittently with his three children over a period of eighteen years had a constitutionally protected interest under the Due Process Clause); *Quillion*, 434 U.S. at 255 (denying due process protection to an unwed father objecting to adoption of his illegitimate child without his consent). The Court in *Quillion v. Walcott* found no requirement to look beyond the best interests of the child when the father has made no attempt to develop a relationship with his child:

> this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child . . . . Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the "best interests of the child."

Quillion, 434 U.S. at 255.

129. Justice Powell, writing for the Court in a case decided on equal protection grounds, first used the words "substantial relationship" to describe an unwed father's constitutionally protected relationship with his illegitimate child. Caban v. Mohammed, 441 U.S. 380, 392-93 (1979).

130. *Stanley*, 405 U.S. at 651-52 (finding a "cognizable and substantial" interest in an unwed father who had "sired and raised" his children); *Lehr*, 463 U.S. at 261 (denying due process protection to an unwed father who had not "demonstrat[ed] a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child.' " (quoting *Caban*, 441 U.S. at 392)); *Quilloin*, 434 U.S. at 256 (denying an unwed father protection under both the Due Process and Equal Protection Clauses because he had "never exercised actual or legal custody over his child, and thus [had] never shouldered any significant responsibility with respect to the daily supervision, education, protection or care of [his] child").

131. *See supra* notes 129-130 and accompanying text; *Caban* 441 U.S. at 392-94 (finding a valid equal protection claim when the biological father had both established a substantial relationship with his child and admitted his paternity).

132. 441 U.S. 380 (1979).

that, under some circumstances, the Court should limit the substantive due process rights of unwed fathers even when they have established the requisite "substantial relationship" with their illegitimate children.[133]

In the past, the Court has looked to "tradition" as a method of limiting the scope of constitutional rights accorded to family relationships under the Due Process Clause.[134] The efficacy and appropriateness of this technique, however, has previously been the subject of dispute between the members of the Court.[135] The Court returned to this debate[136] when the facts in *Michael H. v. Gerald D.* forced the Justices to consider whether to limit use of the substantial relationship test to confer constitutional rights on an unwed father under circumstances in which the unwed father's biological child was "conceived within and born into an extant marital union that wishes to embrace the child."[137]

3. *Finding the Tradition Limiting Fundamental Rights: The Plurality's Method*

Justice Scalia, writing for the plurality,[138] discounted the use of the "substantial relationship" test and thereby disposed of Michael's reliance on that test as set out in the Court's previous unwed father cases.[139] Establishment of a protected liberty interest in the Court's previous unwed

133. *See id.* at 397 (Stewart, J., dissenting) ("It seems to me that the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father's actual relationship with the children."); *see also id.* at 414-15 (Stevens, J., dissenting) (arguing that, although the unwed father had developed a relationship with his child, in the context of adoption, a father's rights could be denied on the grounds that the child's best interests would thereby be better served).

134. Moore v. City of East Cleveland, 431 U.S. 494, 495 (1977) (Powell, J., plurality opinion) (striking down a zoning ordinance defining the type of "family" permitted to live in single-family residential neighborhoods to exclude extended family groups, and pointing out that "[a]ppropriate limits on substantive due process come not from drawing arbitrary lines, but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.' " (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring))).

135. *See id.* at 549 (White, J., dissenting). Justice White criticized Justice Powell's attempts to limit the potential scope of substantive due process rights by according constitutional protection only to rights that are deeply rooted in the nation's history and tradition. For Justice White, this reliance on history and tradition suggested a "far too expansive charter" for the Court, which provided little meaningful guidance to the Court's substantive due process review because "[w]hat the deeply rooted traditions of this country are is arguable; which of them deserve the protection of the Due Process Clause is even more debatable." *See also* L. TRIBE *supra* note 81, at 778 n.5 (analyzing the Justices' debate in *Moore v. City of East Cleveland* over the appropriate way to find a fundamental right).

136. *See infra* notes 138-190 and accompanying text.

137. Michael H. v. Gerald D., 109 S. Ct. 2333, 2344 (1989) (Scalia, J., plurality opinion).

138. Justice Scalia was joined by Justice Rehnquist and joined by Justices O'Connor and Kennedy in all but footnote 6.

139. *See supra* notes 10-13 and accompanying text.

father cases, Justice Scalia argued, depended not upon the "isolated factors" of biological fatherhood plus an established parental relationship standard, but, instead, upon the "historic respect [and even] sanctity . . . accorded to the relationships that develop within the unitary family."[140] The test of Michael's liberty interest, therefore, was not merely whether Michael had developed a parental relationship with Victoria, but whether the type of relationship he had with Victoria traditionally had been treated as a "protected family unit under the historic practices of our society."[141]

Having thus declared that the Court should look to "tradition" to identify a constitutionally protected liberty interest, Justice Scalia continued by demonstrating the proper way to determine whether society had traditionally protected that interest.

a. The Historical Search

Justice Scalia looked first to English common law treatises dating from both the sixteenth and nineteenth centuries[142] for evidence of an historic tradition granting unwed fathers standing to rebut the marital presumption of paternity.[143] Finding no evidence of such protection in the "older sources [or] cases,"[144] Justice Scalia next reviewed a 1952 American Law Reports annotation[145] on state statutes that granted rights to dispute the marital presumption.[146] Justice Scalia searched for evidence that the formerly "rigid protection of the marital family" had been relaxed in "modern times" to allow for the protection of the rights of putative fathers.[147] When the American Law Reports annotation contained no mention of statutes expressly granting unwed biological fathers standing to rebut the marital presumption,[148] Justice Scalia concluded that not only have the nation's traditions not protected the rights of fathers in Michael's position, but that "quite to the contrary, our traditions have protected the marital family . . . against the sort of claim Michael asserts."[149]

140. *Michael H.*, 109 S. Ct. at 2342 (Scalia, J., plurality opinion). Justice Scalia defined the "unitary family" as the family unit as "typified . . . by the marital family, but also includ[ing] the household of unmarried parents and their children." *Id.* at n.3.

141. *Id.* at 2342.

142. Chief Justice Burger, concurring in Bowers v. Hardwick, 478 U.S. 186, 196-97 (1986), also resorted to conducting a search of English common law treatises as a way of demonstrating that society had not traditionally protected an asserted right.

143. *Michael H.*, 109 S. Ct. at 2342-43 (Scalia, J., plurality opinion).

144. *Id.* at 2343.

145. *Id.* (citing 53 A.L.R. 2d 572 (1952)).

146. Justice Scalia examined the statutes of California, Louisiana, Florida, Texas, Illinois, and New York. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 2342.

Justice Scalia did concede that the law in some states "currently appears to allow" natural fathers to obtain legal recognition of their parenthood by rebutting the paternal presumption.[150] He maintained, however, that even if the Court found a universal tradition permitting unwed fathers to rebut the marital presumption, that finding would be "ultimately irrelevant"[151] to the establishment of Michael's liberty interest because the right to obtain "*parental prerogatives*"[152] such as visitation rights, not the right to a *legal declaration of parenthood*, was the right at issue in Michael's case.[153] Hence, Justice Scalia concluded, the tradition that 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 the child."[154] Having redefined the relevant traditional interest, Justice Scalia asserted that the Court was not aware of "a single case, old or new"[155] that protected this specific type of interest. He then declared that Michael's claim was "not the stuff of which fundamental rights qualifying as liberty interests are made."[156]

b. Confining the Search for Tradition to the Specific Constitutional Right at Issue

In the face of criticism from both dissenting[157] and concurring[158] Justices, Justice Scalia acknowledged that, before searching for historical evidence of traditional protection of Michael's asserted right, the plurality had used a mode of analysis that had the effect of defining that right at the most specific level possible.[159] Thus, instead of looking for traditional protection of parenthood, the plurality looked for "historical traditions relating specifically to the parental rights of adulterous biological fathers who find themselves in circumstances where the marital family wants to care for the child."[160] Justice Scalia asserted that defining the constitutional right at issue more generally would result in "imprecise guidance" to judges. This imprecision in the constitutional precedent, would, in turn, permit arbitrary decision-making processes wherein

150. *Id.* at 2344 (citing Note, *Rebutting the Marital Presumption: A Developed Relationship Test*, 88 COLUM. L. REV. 369, 373 (1988)).

151. *Id.*

152. *Id.* at 2343 (emphasis in original).

153. *Id.*

154. *Id.* at 2344.

155. *Id.*

156. *Id.*

157. *Id.* at 2350-51 (Brennan, J., dissenting, joined by Marshall and Blackmun, JJ.).

158. *Id.* at 2346-47 (O'Connor, J., concurring in all but footnote 6, joined by Kennedy, J.).

159. *Id.* at 2344 n.6 (Scalia, J., plurality opinion) ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.").

160. *Id.*

judges would "dictate" rather than "discern" society's views.[161] Justice Scalia argued that this result could be avoided if the Court consulted tradition by referring to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[162]

Responding to Justice Brennan's assertion that the plurality's method for identifying a protected liberty interest was "novel,"[163] and to Justice O'Connor's observation that Justice Scalia's search for traditionally protected interests was inconsistent with the level of generality used in the Court's previous due process cases,[164] Justice Scalia argued that the Court had used the same method of analysis in its opinions in both *Bowers v. Hardwick*[165] and *Roe v. Wade*.[166] Justice Scalia further noted that the Court's holdings in *Griswold v. Connecticut*[167] and *Eisenstadt v. Baird*[168] did not preclude the Court from rejecting Michael's claim when there was a "longstanding and still extant societal tradition withholding the very right pronounced [by Michael] to be the subject of [his] liberty interest."[169]

c. Limiting Potential Expansion of Unwed Fathers' Rights

In addition to using his "specific historic tradition" analysis to limit the rights of unwed fathers who have developed substantial relationships with their natural children, Justice Scalia, in dicta, employed the same "historic tradition" analysis to limit the right of unwed fathers *to develop* a relationship with their children.[170] In *Lehr v. Robertson*,[171] the Court stated that the biological connection of an unwed father to his offspring affords the natural father a unique, and possibly a constitutionally pro-

161. *Id.*

162. *Id.*

163. *Id.* at 2351 (Brennan, J., dissenting).

164. *Id.* at 2347 (O'Connor, J., concurring in all but footnote 6).

165. 478 U.S. 186 (1986); *Michael H.*, 109 S. Ct. at 2344 n.6 (Scalia, J., plurality opinion) (arguing that in *Bowers v. Hardwick* the Court had conducted its search of old records based on a similarly specific focus on the precise type of sexual conduct at issue).

166. 410 U.S. 113 (1973); *Michael H.*, 109 S. Ct. at 2344 n.6 (Scalia, J., plurality opinion) ("In *Roe v. Wade*, we spent about a fifth of our opinion negating the proposition that there was a longstanding tradition of laws proscribing abortion." (citation omitted)).

167. 381 U.S. 479 (1965) (striking down application to married persons of a state statute forbidding both the use of contraceptives and assistance given in aid of their use, on the ground that the statute invaded the constitutionally protected right to privacy).

168. 405 U.S. 438 (1972) (invalidating a statute forbidding distribution of contraceptives except to married persons on grounds that individuals, whether married or single, have a constitutional privacy right to decide, without government interference, whether or not to conceive a child).

169. *Michael H.*, 109 S. Ct. at 2344 n.6. (Scalia, J., plurality opinion).

170. *See id.* at 2345 n.7 and accompanying text.

171. 463 U.S. 248 (1983).

tected, opportunity to *develop a relationship* with his offspring.[172] The *Lehr* Court also observed, however, that the lack of the marital tie may, in some circumstances, justifiably limit constitutional rights that might otherwise exist.[173]

Justice Scalia asserted that such limiting circumstances were present when the natural father's unique opportunity to develop a relationship with his child conflicted with the "similarly unique" opportunity of the mother's husband to develop a relationship with his wife's child.[174] Accordingly, Justice Scalia declared that Michael's parental rights are limited by circumstances in which "the mother is, at the time of the child's conception and birth, married to and cohabitating with another man" and, in addition, both the mother and her husband "wish to raise the child as the offspring of their union."[175]

4. Criticism of the Plurality's Analytical Method

The plurality's analytical method for finding a protected liberty interest received only limited support from the three concurring Justices[176] and vigorous opposition from three of the four dissenting Justices.[177]

Although Justice O'Connor's concurring opinion did not disagree with the plurality's reliance on tradition to dispose of Michael's constitutional claim, Justice O'Connor doubted the wisdom of Justice Scalia's assertion that the Court should consult " 'the most specific level' " of tradition available.[178] Justice O'Connor worried that the plurality's mode of analysis was "somewhat inconsistent" with both the results[179]

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172. *Michael H.*, 109 S. Ct. at 2345 (Scalia, J., plurality opinion) (citing *Lehr*, 463 U.S. at 262-65).

173. *Id.* (citing *Lehr*, 463 U.S. at 260).

174. *Id.*

175. *Id.* at n.7 and accompanying text. Justice Scalia expressly limited the reach of his opinion to the relevant facts of Michael's case because "it is at least possible that our traditions lead to a different conclusion with regard to adulterous fathering of a child whom the marital parents do not wish to raise as their own." *Id.*

176. *Id.* at 2346-47 (O'Connor, J., concurring in all but footnote 6, joined by Kennedy, J.); *id.* at 2347 (Stevens, J., concurring in the judgment); *id.* at 2360 (White, J., dissenting). Justice White impliedly disagreed with the plurality's analytical method by arguing against the plurality's finding that a natural father in Michael's position could never have a constitutionally protected relationship with his child.

177. *Id.* at 2349-54 (Brennan, J., dissenting, joined by Marshall and Blackmun, JJ.). Although Justice White did not argue at length with the plurality's analytical method, the implication of his arguments in support of Michael's liberty interest was that he also disagreed with the plurality's appeal to tradition as a way of limiting the scope of an unwed father's liberty interest in a relationship with his child. *See id.* at 2347-48 (Stevens, J., concurring in the judgment); *see also id.* at 2360-63 (White, J., dissenting).

178. 109 S. Ct. at 2346 (O'Connor, J., concurring in all but footnote 6) (quoting the plurality opinion at 2344 n.6).

179. *See id.* at 2346 (citing Griswold v. Connecticut, 381 U.S. 479 (1965), and Eisenstadt v. Baird, 405 U.S. 438 (1972)).

and the analytical method employed[180] in the Court's previous cases. Furthermore, Justice O'Connor was unwilling to "foreclose the unanticipated by the prior imposition of a single mode of historical analysis."[181]

Justice Brennan was more adamant in his opposition. Calling Justice Scalia's method for analyzing due process questions "a significant and unfortunate departure from [the Court's] prior cases and from sound constitutional decision-making,"[182] Justice Brennan devoted over half of his dissenting opinion[183] to criticism of the plurality's "exclusively historical"[184] method of analysis. Justice Brennan first disputed the efficacy of the plurality's reliance upon tradition to achieve the plurality's stated goal of placing an objective limit on judicial recognition of constitutionally guaranteed interests.[185] Justice Brennan further argued that the plurality's exclusive reliance upon tradition,[186] and particularly its focus on the very specific level of tradition advocated by Justice Scalia,[187] "ignores the good reasons for limiting the role of 'tradition' in interpreting the Constitution's deliberately capacious language."[188] Finally, Justice Brennan contended that, by looking to tradition for evidence of protection of the unitary family, the plurality not only waves aside precedent set by the Court's previous cases considering the rights of unwed fathers,[189] but also extinguishes Michael's liberty interest by prematurely balancing Michael's parental interest against the state's interest in pro-

180. *See id.* at 2346-47 (citing Loving v. Virginia, 388 U.S. 1, 12 (1967), Turner v. Safley, 482 U.S. 78, 94 (1987), and United States v. Stanley, 483 U.S. 669, 709 (1987)).

181. *Id.* at 2347.

182. *Id.* at 2349 (Brennan, J., dissenting).

183. *Id.* at 2349-54.

184. *Id.* at 2349.

185. *Id.* at 2349 (arguing that the concept of tradition cannot be used to place a "discernible border around the Constitution" because it is "as malleable and as elusive as 'liberty' itself," and because it is impossible to agree as to the content of a particular tradition, the significance of that tradition for defining a liberty interest, the requisite strength of the tradition, or even *where to look* for the relevant tradition).

186. *Id.* at 2349.

187. *Id.* at 2350-51.

188. *Id.* at 2351. Justice Brennan argued that the plurality's analytical formula was "misguided" because it did not allow the Court to adapt to a changing world by noticing that the rationale for the paternal presumption had been rendered obsolete by use of modern blood tests to prove paternity with virtually complete accuracy. Justice Brennan further argued that the plurality's reliance upon merely identifying rights "traditionally *protected by* our society" (emphasis in original) rather than upon identifying rights "traditionally . . . *thought important*" (emphasis added) corrupted the Fourteenth Amendment's intended purpose of protecting the rights of unpopular minorities whose needs for constitutional protection arise precisely because their rights have not traditionally been protected. *Id.*

189. *Id.* at 2352 (arguing that the plurality chose to "reinvent the wheel" instead of examining the specific parent-child relationship under consideration as "commanded by our prior cases and by common sense" (citing Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 463 U.S. 248 (1983))).

tecting the marital family.[190]

II. The Future of Unwed Fathers' Rights

The complex and lengthy arguments[191] in *Michael H. v. Gerald D.* concerning the irrebuttable presumption doctrine and the proper use of tradition must not be allowed to obscure the minimal effect of the case's result upon future adjudication of unwed fathers' claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[192]

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190. *See id.* at 2353-54. Justice Brennan argued that the plurality opinion departed from the Court's established method of analysis under the Due Process Clause by conflating the question whether Michael has a constitutionally protected liberty interest with the inquiry into what procedures the state could permissibly use to restrict or terminate that interest. Justice Brennan contended that Justice Scalia looked first at the "relationship that the unwed father seeks to disrupt, rather than the one he seeks to preserve," and, in so doing, erroneously allowed the State's interest in terminating Michael's relationship with Victoria to play a role in deciding whether that relationship is a constitutionally protected interest. *Id.* at 2353.

Justice White also accused the plurality of "balancing away" Michael's interest in establishing his paternity. *Id.* at 2362 (White, J., dissenting). In *Lehr v. Robertson*, an earlier unwed father case, Justice White explained the error behind premature balancing of the private and state interests at issue in a procedural due process claim:

> [A]lthough "a weighing process has long been a part of any determination of the *form* of hearing required in particular situations . . . to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake . . . to see if the interest is within the Fourteenth Amendment's protection . . . ."

Lehr v. Robertson, 463 U.S. 248, 270 (1983) (quoting Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972) (emphasis in original)).

Justice Scalia, arguing in rebuttal to Justice Brennan's criticism of the plurality's analysis, denied having relied on any independent balancing of the competing state and private interests. Instead, Justice Scalia asserted that the plurality rested its decision upon the absence of traditional protection for the parental interests of adulterous biological fathers. According to Justice Scalia, that tradition merely reflected a balancing that society itself, not the plurality, had already done. *Michael H.*, 109 S. Ct. at 2345 n.7 (Scalia, J., plurality opinion).

191. Justice Brennan provides a useful summary of the Justices' votes on the multiple issues and modes of analysis addressed in *Michael H.*:

> In a case that has yielded so many opinions as has this one, it is fruitful to begin by emphasizing the common ground shared by a majority of this Court. Five Members of the Court refuse to foreclose the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to and cohabiting with another man at the time of the child's conception and birth. Five Justices agree that the flaw inhering in a conclusive presumption that terminates a constitutionally protected interest without any hearing whatsoever is a *procedural* one. Four Members of the Court agree that Michael H. has a liberty interest in his relationship with Victoria, and one assumes for purposes of this case that he does . . . .

Michael H., 109 S. Ct. at 2349 (Brennan, J., dissenting) (citations to other parts of the opinion omitted) (emphasis in original).

192. U.S. CONST. amend. XIV.

A. Minimal Impact on Unwed Fathers' Substantive Due Process Rights

At the time that *Michael H. v. Gerald D.* was argued before the Supreme Court, the success of an unwed father's substantive due process challenge appeared to rest on whether he had formed a "substantial relationship" with his child.[193] Furthermore, the Court appeared to have assumed in its opinion in *Lehr v. Robertson*[194] that an unwed father has a constitutionally protected interest in an opportunity to establish that substantial relationship.[195] Although the Supreme Court hinted in *Lehr* that the unwed father's lack of a legal tie to the mother might, in some circumstances, " 'appropriately place a limit' "[196] on the substantive due process claims a father might otherwise have by virtue of his developed relationship with his child,[197] the Court did not specifically define these potentially limiting circumstances.

In *Michael H.*, Justice Scalia undertook the task of identifying these limiting circumstances. Justice Scalia asserted that due process protection should be limited to father-child relationships arising from within a "unitary family."[198] It is important, however, to be aware that Justice Scalia was unable to persuade a majority of the Court to thus modify the substantial relationship test, and that the scope of the holding in *Michael H.*, as applicable to an unwed father's rights, is consequently extremely narrow.

The Court's holding in *Michael H.* rests on the votes of five Justices cast in three separate opinions employing quite different analytical methods.[199] For this reason, even a slight deviation from the facts of *Michael H.* might well result in a different decision in a subsequent unwed father case. For example, the holding in *Michael H.* does not support the proposition that an adulterous father will always be denied parental rights.

193. *See supra* notes 124-130 and accompanying text. An unwed father's equal protection claim also apparently rested on the same test. *See* Lehr v. Robertson, 463 U.S. 248, 266-68 (1983); Caban v. Mohammed, 441 U.S. 380, 392-93 (1979); Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

194. 463 U.S. 248 (1983).

195. *See id.* at 262-65; *see also Michael H.*, 109 S. Ct. at 2345 (Scalia, J., plurality opinion) ("In *Lehr v. Robertson* . . . we observed that '[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring,' and we assumed that the Constitution might require some protection of that opportunity." (quoting *Lehr*, 463 U.S. at 262 (citations omitted))).

196. *Lehr*, 463 U.S. at 260-61 n.16 and accompanying text (quoting Justice Stewart's dissent in *Caban*, 441 U.S. at 397) (quoted approvingly in *Michael H.*, 109 S. Ct. at 2345 (Scalia, J., plurality opinion)). Justice Stewart thought such circumstances could arise in situations where the " 'wishes [of the mother and of the unwed father] are in conflict, and the child's best interests are served by a resolution in favor of the mother.' " *Lehr*, 463 U.S. at 260-61 (quoting *Caban*, 441 U.S. at 397)).

197. *Lehr*, 463 U.S. at 260-61.

198. *Michael H.*, 109 S. Ct. at 2342 (Scalia, J., plurality opinion).

199. *See supra* note 191.

Justice Scalia expressly left open the possibility that an adulterous father might be accorded constitutional protection in cases where the marital parents do not want to raise the child as their own.[200]

Furthermore, even in cases where the marital family wants to raise the child, the decision in *Michael H.* should be read very narrowly because Justice Stevens did not concur with the plurality's finding that Michael did not assert a constitutionally protected interest.[201] Instead, Justice Stevens rested his swing vote opinion on his belief that, prior to the termination of Michael's rights, California courts had given Michael an opportunity to show that termination of his parental rights was not in the best interests of his child.[202] Thus, according to Justice Stevens, Michael had not been denied his constitutional right to a hearing prior to the termination of his right to visitation with his daughter.

Justice Stevens did not agree with the plurality's argument that an unwed father in Michael's situation could not possibly have a constitutionally protected interest under the Due Process Clause. He concurred with the plurality's result only because he, unlike all of the other Justices, believed that California's statutory scheme, *as interpreted by California courts*, did not deny Michael his due process right to a hearing at which to present evidence showing that Victoria's best interests would be served by granting him visitation as an "other person" pursuant to California's child visitation statute.[203]

The consequence of Justice Stevens's disagreement with the plurality's due process analysis is that *Michael H. v. Gerald D.* cannot be used as authority to deny an adulterous unwed father's substantive due process right to a fair hearing prior to termination of his parental rights.[204]

200. *Michael H.*, 109 S. Ct. at 2345 n.7 (Scalia, J., plurality opinion).

201. *Supra* notes 32-34 and accompanying text.

202. *Supra* note 35 and accompanying text.

203. *See supra* notes 32-35 and accompanying text. Justice Stevens believed that California case law interpreting California Evidence Code § 621 did not create an absolute bar preventing the California trial court judge from allowing an adulterous biological father an opportunity to prove that he should be granted visitation as an "other person" under California Civil Code § 4601. Justice Stevens also believed that the trial court had, in fact, given Michael this opportunity. CAL. CIV. CODE § 4601 (West Supp. 1989).

204. *Michael H.* does, however, have a significant effect in California on an adulterous father's parental rights. Whereas a legal parent has a right to visitation under section 4601 unless a showing has been made that it is not in the child's best interests for the court to grant visitation, Justice Stevens's opinion supports the proposition that an adulterous biological father may be treated differently than a legal parent. According to Justice Stevens, there is no constitutional barrier preventing the state from denying an adulterous natural father visitation as an "other person" unless the father can *prove to the court* that visitation is in the child's best interests. Thus, the decision in *Michael H.* authorizes California to shift to an adulterous father, as distinguished from all other fathers, the burden of proving that the child's best interests are served by parental visitation.

B. Equal Protection Rights of Unwed Fathers

In *Michael H.*, the Court avoided considering the unwed father's equal protection claim.[205] Consequently, the holding in *Michael H.* should in no way be relied upon to foreclose a future unwed father's equal protection claim brought on similar facts. On the contrary, in future unwed father cases, the Court should use existing Supreme Court precedent concerning unwed fathers' rights to craft a narrowly tailored equal protection holding that is protective of adulterous natural fathers' parental rights. Reliance on equal protection grounds, rather than on due process grounds, would enable the Court to protect the interests of biological fathers and their children without addressing the difficult issue of the proper scope of an unwed father's liberty interest in a relationship with his child. Thus, if another unwed father who has developed a "substantial relationship" with his illegitimate child challenges a statute similar in effect to California Evidence Code section 621, the Court could avoid the quagmire of argument over which type of parental rights are "traditionally protected"[206] by holding that the Equal Protection Clause[207] restricts the states' ability to employ sex-based statutory distinctions to terminate parental rights.

1. Advantages of Equal Protection Analysis

In *Michael H. v. Gerald D.*, the Supreme Court faced the difficult task of deciding which of two competing family interests should receive priority treatment when both of those interests arguably merited substantive due process protection. Although not expressly raised by either the Court or the parties, the need to make this choice was impliedly raised by the factual circumstances of the suit. For example, Victoria's mother and her husband could have tried to argue that Supreme Court precedent supports the proposition that, as members of a constitutionally protected *family unit*,[208] their interests should be paramount. Michael's suit, on the other hand, relied on constitutional precedent protecting the right of *individual parents* to maintain relationships with their children.[209] Underlying Michael's express reliance on his individual parental rights was

205. Michael H. v. Gerald D., 109 S. Ct. 2333, 2338 (1989) (Scalia, J., plurality opinion) (asserting that jurisdictional considerations precluded addressing Michael's equal protection claim).

206. *See supra* notes 140-190 and accompanying text.

207. U.S. CONST. amend. XIV.

208. *See* Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

209. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 651 (1972). "The rights to conceive and to raise one's children have been deemed 'essential' (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)), 'basic civil rights of man' (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)), and '[r]ights far more precious . . . than property rights' (quoting May v. Anderson, 345 U.S. 528 (1953)). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . .' " (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

an implied argument that Michael's constitutionally protected interest in caring for his child deserved priority over the conflicting interests of the members of Carole and Gerald's family unit. The Court thus faced the prospect that, if its decision in *Michael H.* recognized an adulterous unwed father's absolute substantive due process right to a relationship with his child, the resulting precedent would eventually force the Court to expressly balance a natural father's constitutional right to a father-child relationship against conflicting constitutionally protected rights residing in an adulterously conceived child's mother and her husband.

a. Equal Protection Review as a Flexible Tool for Protecting Individuals Without Creating New Protected Rights

When faced with this prospect of engaging in a Solomon-like balancing of the interests of family members, the Court can appropriately turn to equal protection review in place of the more judicially controversial substantive due process review.[210] Equal protection review is appropriate in circumstances like those present in *Michael H.* because it enables the Court to protect individuals like the unwed father in *Michael H.* from unfair and arbitrary state action without, at the same time, creating wholly new rights in all of the nation's citizens.[211]

This special flexibility of equal protection analysis as a tool for avoiding the controversy surrounding the identification of fundamentally protected rights is in the "means-focused"[212] or "intermediate scru-

210. *See, e.g.*, Wright, *Judicial Review and Equal Protection*, 15 HARV. C.R.-C.L. L. REV. 1, 16-18 (1980) (briefly describing the dangers that restraint-oriented judges see in allowing activist judges to use non-text-based substantive due process review as a weapon with which to "impose their notions of good policy on the citizenry," *id.* at 16, and arguing that the Equal Protection Clause, unlike the Privileges and Immunities Clause and the Due Process Clause, does not permit "unchecked judicial activism" because "however expansively read, the equal protection clause has only a limited utility as a tool for imposing judicial views on the legislative process." *Id.* at 17).

211. *See* Wright, *supra* note 210, at 17-18. The author argues that the judiciary cannot misuse the Equal Protection Clause as a tool for imposing policy on the legislatures because "it speaks in relative, not absolute terms. Unlike the privileges and immunities clause and the due process clause, the equal protection clause cannot be invoked to require either the national government or the states to create wholly new rights in their residents." *Id.* The author also pointed out that the Equal Protection Clause "merely commands that governmental benefits and immunities shall be available to all, if granted to any." *Id.* at 18; *see also* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-24 (1972) (advocating the use of equal protection analysis to make a modest but real inquiry into the rationality of state statutes rather than employing inherently value-laden substantive due process intervention).

212. *See* Gunther, *supra* note 211, at 20-24. In 1972 Professor Gunther identified the then-emerging trend in equal protection cases to evaluate the appropriateness of the statutory means used to achieve state objectives. Professor Gunther distinguished this new "means-focused" analytical method from both the "ends-focused" method involved in fundamental rights-based equal protection and the "old equal protection" method. He argued that the distinction lay in the type of statutory analysis done in each of the three modes. He pointed out that "old equal

tiny"[213] branch. Whereas decisions founded upon either the "fundamental rights" branch of equal protection review[214] or upon substantive due process review do not relieve the Court of the task of making broad precedent-setting determinations as to which individual rights merit constitutional protection,[215] intermediate-level equal protection scrutiny avoids this difficult issue.[216] Rather than focusing on whether the plaintiff in the suit possesses a constitutionally protected right, intermediate equal protection review focuses, instead, on an inquiry into the legitimacy of the state's regulatory methods when state regulation affects plaintiff's rights.[217] Thus, applying intermediate equal protection analysis to the claim of the unwed father in *Michael H.* would not have entailed a head-on decision as to whether Michael possessed a "liberty" interest in his relationship with Victoria. Instead, by applying the Equal Protection Clause,[218] the Court could have protected Michael and Victoria from the harsh effects of the section 621 presumption without triggering Justice Scalia's concern that fundamental rights would be created or expanded

protection" review merely required a rational relationship between the statutory classification scheme and the asserted state purpose, whereas the "ends-focused" method required the state to show the statute furthered a "compelling" state purpose. In contrast with both of these earlier forms of equal protection review, the emerging "means-focused" equal protection model required a "substantial relation" between the legislative classification and the legislative purpose. Thus the new "means-focused" review limited, not the ends a state sought to achieve, but instead, the statutory means the state could use to achieve those ends.

213. *See* L. TRIBE, *supra* note 81, at 1561-65, 1601-18. Professor Tribe identifies gender discrimination as a "sensitive" but not "suspect" criterion for statutory classifications, the use of which attracts an "intermediate" level of statutory scrutiny which, unlike "strict scrutiny" and "rational relation scrutiny," provides a "middle tier" of analysis which is sometimes, but not always, fatal. *Id.* at 1610, 1613.

214. Cohen, *Is Equal Protection Like Oakland? Equality as a Surrogate for Other Rights*, 59 TUL. L. REV. 884, 885 (1985) (identifying the "fundamental-rights-equal-protection" branch of equal protection analysis). See generally L. TRIBE, *supra* note 81, at 1454-65, for a description of the fundamental rights branch of equal protection.

215. *See* Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 361-65 (1949) (equating the substantive rights protected under fundamental rights-based equal protection and under substantive due process analysis and pointing out that "shifting a right from the protection of due process to the protection of the equal protection clause neither clarifies nor simplifies the problem of the 'absolute' character of a right nor eases the problem of determining what particular rights are to be regarded as enjoying equal protection." *Id.* at 364).

216. *See* L. TRIBE, *supra* note 81, 1601-16. *See generally* Cohen, *supra* note 214. Professor Cohen examined Supreme Court decisions employing both substantive due process and "fundamental rights" equal protection review and compared them with decisions employing the intermediate level of equal protection review. Professor Cohen found that the Court used intermediate-level equal protection to avoid considering difficult issues and to avoid the broader sweep of the precedent which would otherwise result from substantive due process or fundamental rights-based equal protection review.

217. *See supra* note 212.

218. U.S. CONST. amend. XIV.

without an adequate constitutional basis.[219] The Court could thereby have avoided the lengthy debate between Justice Brennan and Justice Scalia in the opinion in *Michael H.* over the correct technique for identifying constitutionally protected fundamental rights.[220]

b. Intermediate Level Scrutiny Based on Gender-Based Discrimination in Section 621

Had jurisdictional considerations not precluded equal protection scrutiny, the result in *Michael H. v. Gerald D.* could have been different. If the Supreme Court had been able to consider Michael's equal protection claim, the Court could properly have applied intermediate-level equal protection scrutiny to strike down the application of California Evidence Code section 621.[221] Application of intermediate level scrutiny to section 621 would have been proper because section 621 discriminates against unwed fathers,[222] and equal protection doctrine requires that the state have constitutionally legitimate reasons for such discrimination.[223] Under the intermediate standard of review invoked by gender-based discrimination, a gender-based statutory distinction " 'must serve important governmental objectives and must be substantially related to achievement of those objectives.' "[224] Thus, the Court could have used gender-based equal protection analysis to protect Michael and Victoria's parent-child relationship from unjustifiable statutory discrimination without finding that Michael had a constitutional right to preserve that relationship.

2. Application of Supreme Court Precedent Restricting Gender-Based Discrimination

Existing Supreme Court precedent supports the invalidation of California's use of section 621 to terminate Michael's parental rights. The

219. *See* Michael H. v. Gerald D., 109 S. Ct. 2333, 2341 (1989) (Scalia, J., plurality opinion)

> "That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. 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."

(quoting Moore v. City of East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting)).

220. *See supra* notes 140-190 and accompanying text.

221. CAL. EVID. CODE § 621 (West Supp. 1989).

222. Section 621 grants different rights to the mothers and fathers of children born as the result of adulterous affairs. If the mother is married, the adulterous biological father will have parental status only if the mother chooses to rebut the presumption of paternity, whereas the mother always has parental status and the resulting rights accorded to parents by the state. CAL. EVID. CODE § 621.

223. Caban v. Mohammed, 441 U.S. 380, 388 (1979); *see also* Craig v. Boren, 429 U.S. 190, 197 (1976).

224. *Caban*, 441 U.S. at 388 (quoting *Craig*, 429 U.S. at 197); *see also* Lehr v. Robertson, 463 U.S. 248, 266 (1983).

decision in *Caban v. Mohammed*[225] supports Michael's claim that section 621 impermissibly discriminates against him on the basis of gender. In *Caban*, the Court used equal protection review to strike down the application of a New York statute that required the consent of the mother prior to the adoption of a child born out of wedlock without requiring the same consent of the child's father.[226] The Court held that, when the unwed father has developed a substantial relationship with his offspring,[227] this sex-based classification is an "overbroad generalization"[228] that creates an "undifferentiated distinction between unwed mothers and unwed fathers."[229] The Court said that such overbroad sex-based classifications cannot be upheld when they do not "bear a substantial relationship to the State's asserted interests"[230] in the welfare of the child.[231]

a. Gender-Based Discrimination in Section 621

The effect of the California statute challenged in *Michael H. v. Gerald D.* is to draw an impermissible sex-based distinction between the rights accorded adulterous mothers and their male paramours because section 621 allows a married, adulterous mother standing to rebut the presumption of paternity[232] while denying this same opportunity to the adulterous father.[233]

The statute's differential effects on the members of the adulterous pair are twofold. First, the mother alone among the two has the power to defeat the conclusive presumption[234] and thereby to open the door to legal recognition of the natural father's parental status and the rights which flow from that status.[235] Second, the mother, unlike the biological

225. 441 U.S. 380 (1979).
226. *Id.* at 385-87, 394.
227. *Id.* at 392-93.
228. *Id.* at 394.
229. *Id.*
230. *Id.*
231. *Id.* at 390-91. The Court identified the state interest as the promotion of the adoption of illegitimate children.
232. CAL. EVID. CODE § 621(d) (West Supp. 1989) ("The notice of motion for blood tests under subdivision (b) *may be raised by the mother* of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child." (emphasis added)).
233. *See* CAL. EVID. CODE § 621(a) (presuming paternity in a husband who cohabitates with his wife unless he can be shown to be impotent or sterile).
234. The mother's husband is also permitted under California Evidence Code § 621(c) to rebut the presumption. His right of rebuttal differs slightly from his wife's in that he can act alone, whereas the mother cannot rebut the presumption without evidence that the biological father has filed an affidavit with the court acknowledging his paternity. *Compare* CAL. EVID. CODE § 621(c) *with* CAL. EVID. CODE § 621(d).
235. Only the mother and her husband have standing under California Evidence Code § 621(b) to move for the introduction of expert testimony based on blood tests to rebut the

father, is never without parental rights because she is always presumed to be a legal parent. In contrast, the adulterous natural father can never assert his parental rights without the cooperation of the mother or the mother's husband.[236]

b. Impermissible Gender-Based Discrimination When Mother and Father Are "Similarly Situated"

The Supreme Court has held that statutes drawing gender-based distinctions "may not constitutionally be applied in that class of cases where [unmarried] mother[s] and [unmarried] father[s] are in fact similarly situated with regard to their relationship with their child."[237] Although a mother's relationship with her child is inherently different from the father's because she carries and gives birth to the child, the Court found in *Caban* that this inherent difference becomes insignificant when the father has "established a substantial relationship with the child and has admitted his paternity."[238] Under these circumstances, the Court held that the challenged New York statute granting differing adoption-veto rights to unmarried mothers and fathers did not bear a substantial relationship to the proclaimed state interest in promoting the adoption of illegitimate children.[239]

As in *Caban*, the biological parents in *Michael H.* were situated similarly in relation to their child. Michael had established a parent-child relationship with Victoria, and he had admitted his paternity.[240] Although Michael and Carole's personal circumstances were admittedly

otherwise conclusive presumption of the husband's paternity, thus removing the bar against introduction of blood test evidence proving the biological father's paternity. *See* CAL. EVID. CODE § 621(c), (d).

236. The practical result of this difference in treatment of the adulterous parents in *Michael H.* was that, under California Civil Code § 4601, Michael, as a non-parent, was deprived of parental rights to visitation without any determination that it was *not* in Victoria's best interest for the biological father to have visitation rights. In contrast, Carole's status as a legal parent guaranteed that she could only be deprived of entitlement to visitation rights based on a court determination that she was an unfit parent or that, for some other reason, it would be in Victoria's best interests to cut off her mother's visitation rights. *See* CAL. CIV. CODE § 4601 (West Supp. 1989). Although Justice Stevens, in his due process analysis, did not recognize that classification as an "other person" rather than as a "parent" under section 4601 resulted in a significant change in Michael's substantive rights, *see supra* notes 114-116 and accompanying text, under an equal protection analysis it would be difficult to deny that the shift in the burden of persuasion regarding proof of the best interests of the child constitutes different treatment of the adulterous parents.

237. Lehr v. Robertson, 463 U.S. 248, 267 (1983) (holding that the Equal Protection Clause did not guarantee an unwed father notice prior to termination of his parental rights by adoption because, unlike the mother, who had established a custodial relationship with the child, the father had never " 'come forward to participate in the rearing of his child.' " *Id.* (quoting Caban v. Mohammed, 441 U.S. 380, 392 (1979))).

238. Caban v. Mohammed, 441 U.S. 380, 393 (1979).

239. *Id.*

240. *See supra* notes 55-60 and accompanying text.

different because Carole was married and Michael was single, their marital circumstances were the same as in *Caban*; in both *Caban* and *Michael H.* the biological parents were not married to each other at the time of conception and, at the time of the suit, the mother was married to a man who was not the biological father.[241]

c. Constitutional Requirement of "Substantial Relationship to Important State Purpose"

A state is not prevented from enacting gender-based statutory classifications that substantially relate to important state purposes.[242] Section 621, however, could not have met this standard. California's asserted purpose for the section 621 conclusive presumption is to hold the husband responsible for the child and to protect the integrity of the family unit by "excluding inquiries into the child's paternity that would be destructive of family integrity and privacy."[243] Additionally, the state claimed the purpose of the paternal presumption is to protect "the innocent child from the social stigma of illegitimacy."[244]

Section 621 serves none of these objectives. Justice White pointed out the irrelevancy of the state's asserted objective in the circumstances present in *Michael H.* He observed that "[t]he interest in protecting a child from the social stigma of illegitimacy lacks any real connection to the facts of a case where a father is seeking to establish, rather than repudiate, [his] paternity."[245]

Moreover, section 621 itself undermines the state's asserted purpose by permitting the husband to rebut the marital presumption without identifying the biological father. Section 621 thus departs from its asserted purpose, not only by failing to protect the child from the stigma of illegitimacy, but also by failing to achieve the state interest in providing for the child's continuing support. Rather than obligating the mother's husband to support the child unless there is some guarantee that the natural father will take over these duties, section 621 permits the husband to disclaim responsibility for the child even in circumstances where the natural father has not agreed to support the child himself.

241. In *Caban*, the unwed mother had left the biological father and married another man. The issue in the case arose from the stepfather's attempts to adopt the children. 441 U.S. at 382-84.

242. Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

243. Michael H. v. Gerald D., 109 S. Ct. 2333, 2340 (1989) (Scalia, J., plurality opinion); Michael H. v. Gerald D., 191 Cal. App. 3d 995, 1005, 236 Cal. Rptr. 810, 816 (1987).

244. *Michael H.*, 191 Cal. App. 3d at 1005, 236 Cal. Rptr. at 816; *Michael H.*, 109 S. Ct. at 2362 (White, J., dissenting).

245. *Michael H.*, 109 S. Ct. at 2362 (White, J., dissenting).

Section 621 also falters in its purpose of preserving the marital family from outside claims. Although the marital presumption does reduce the likelihood that the father will succeed on his claim, the statute does not prevent him from bringing his claim.[246] Even more corrosive of the state objective of preserving family privacy is the reality that section 621 forces the natural father to use the most intrusive means possible to attempt to prove his paternity. Instead of being permitted to present blood tests that prove his paternity with almost complete certainty, the biological father must initiate an invasive factual inquiry into the husband's fertility or virility.[247]

More important than the statute's failure to serve its expressly stated objectives of preserving the marital family and protecting the child from the stigma and loss of paternal financial support associated with illegitimacy is the statute's failure to achieve its much more critical underlying goal of protecting the best interests of the child. Section 621 does not serve Victoria's interests well. Instead of allowing Michael to continue his established relationship with Victoria, the section 621 presumption effectively cuts Victoria off forever from the financial and emotional support of a man she calls "Daddy."[248]

Critical examination of the effects of section 621 reveals that the statute discriminates on the basis of gender in circumstances when, by virtue of the father's substantial relationship with the child, the biological mother and father are actually similarly situated with respect to the child.

Furthermore, the gender-based classification in section 621 does not advance the asserted state interest in the welfare of the family and the child. For these reasons, courts should apply intermediate level equal protection review to strike down statutes like California Evidence Code section 621 and, by so doing, extend constitutional protection to unwed fathers whose parental rights are otherwise unprotected by substantive due process review.

III. Conclusion

In *Michael H. v. Gerald D.*, the Supreme Court refused constitutional due process protection to an adulterous unwed father despite his determined pursuit of the parental rights denied him by California's statutory marital presumption of paternity. In so doing, the Justices used the unhappy facts of the case to debate at length, but without definitive

246. *Id.*

247. *See* CAL. EVID. CODE § 621 (disallowing submission of blood test evidence except by the mother or her husband but creating an exception to the marital presumption in cases where the husband is impotent or sterile, or where the couple does not live together).

248. *Michael H.*, 109 S. Ct. at 2361 (White, J., dissenting).

results, the proper scope of fundamental rights protected by the Due Process Clause.

At the end of the debate the Court found itself split into two equal camps of four Justices over the dual question of the efficacy of looking to tradition for guidance as to the scope of fundamental rights and as to the proper way to search for that tradition. Justice Stevens declined to join the debate, however, thus leaving resolution of the argument to another day.

As a consequence of this failure to resolve the central issue of the case, the decision in *Michael H.* should be construed very narrowly to apply only to cases with facts nearly identical to those considered by the Court. The decision thus creates little change in the due process rights of unwed fathers.

Finally, the decision in *Michael H.* should not be construed to foreclose an equal protection claim by an adulterous unwed father who has a substantial relationship with his child. On the contrary, judges should use intermediate level equal protection analysis to construct a narrower ground for decision that enables courts to protect individual unwed fathers from unfair deprivation of their parental rights without requiring further expansion of the scope of constitutionally protected fundamental rights.

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