AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 10: The Reagan Era—Individual Rights/Personal Freedom of Public Morality

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Michael H. v. Gerald D., 491 U.S. 110 (1989)

Michael H. had an affair with Carole D. while Carole was married to and living with Gerald D. in Playa del Rey, California. While the affair was taking place, Carole had a daughter, Victoria D. Although Gerald was listed as the father on the birth certificate, a paternity test demonstrated to a 98 percent certainty that Michael H. was the actual father. Carole and Michael lived together on and off, and during that time period Michael both supported Victoria and developed a strong relationship with her. The relationship finally ended, but not before Carole signed a document that Michael was Victoria's father. When Michael sought visitation rights after the break-up, Gerald intervened. He pointed to a California law that established a presumption that any child born of a married woman who was living with her husband is the child of the husband. The presumption could be rebutted only by blood tests performed within two years of the child's birth. Michael claimed that this law violated his right to establish his paternity and Victoria's right to maintain a relationship with her natural father. A state court sided with Gerald and that decision was sustained by higher state courts in California. Michael H. appealed to the Supreme Court of the United States.

The Supreme Court by a 5–4 vote ruled that Michael H. had no constitutional right to visitation. Justice Scalia and three other justices maintained that an adulterous father had no rights with respect to any alleged child born of a woman married to another man. Justice Stevens, who cast the deciding vote, maintained that adulterous fathers had constitutional rights, but that the trial court had adequately considered Michael H.'s rights. The justices in Michael H. *disputed how to determine constitutional liberty interests and whether an adulterous father could have a liberty interest in this case. What different approaches did the justices use to determine constitutional liberty interests? How did these approaches constrain judicial decision making? Which approaches do you think are most appropriate for a justice? What reasons did Justice Brennan give for thinking that Michael H. had constitutional interests that warranted some protection? Are those reasons sound?*

JUSTICE SCALIA announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE joins, and in all but footnote 6 of which JUSTICE O'CONNOR and JUSTICE KENNEDY join.

. . .

Michael raises two related challenges to the constitutionality of [the California law presuming the husband is father of any child born during the marriage]. First, he asserts that requirements of procedural due process prevent the State from terminating his liberty interest in his relationship with his child without affording him an opportunity to demonstrate his paternity in an evidentiary hearing. We believe this claim derives from a fundamental misconception of the nature of the California statute. While § 621 is phrased in terms of a presumption, that rule of evidence is the implementation of a substantive rule of law. California declares it to be, except in limited circumstances, *irrelevant* for paternity purposes whether a child conceived during, and born into, an existing marriage was begotten by someone other than the husband and had a prior relationship with him. As the Court of Appeal phrased it:

> 'The conclusive presumption is actually a substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy, that given a

certain relationship between the husband and wife, the husband is to be held responsible for the child, and that the integrity of the family unit should not be impugned.'

. . . We therefore reject Michael's procedural due process challenge and proceed to his substantive claim.

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It is an established part of our constitutional jurisprudence that the term "liberty" in the Due Process Clause extends beyond freedom from physical restraint. Without that core textual meaning as a limitation, defining the scope of the Due Process Clause "has at times been a treacherous field for this Court," giving "reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court."

In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a "liberty" be "fundamental" (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

. . .

Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts.

The presumption of legitimacy was a fundamental principle of the common law. Traditionally, that presumption could be rebutted only by proof that a husband was incapable of procreation or had had no access to his wife during the relevant period. . . . Even though, as bastardy laws became less harsh, "[j]udges in both [England and the United States] gradually widened the acceptable range of evidence that could be offered by spouses, and placed restraints on the 'four seas rule' . . . [,] the law retained a strong bias against ruling the children of married women illegitimate."

We have found nothing in the older sources, nor in the older cases, addressing specifically the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man. Since it is Michael's burden to establish that such a power (at least where the natural father has established a relationship with the child) is so deeply embedded within our traditions as to be a fundamental right, the lack of evidence alone might defeat his case. But the evidence shows that even in modern times—when, as we have noted, the rigid protection of the marital family has in other respects been relaxed—the ability of a person in Michael's position to claim paternity has not been generally acknowledged. . . .

Moreover, even if it were clear that one in Michael's position generally possesses, and has generally always possessed, standing to challenge the marital child's legitimacy, that would still not establish Michael's case. . . . What Michael asserts here is a right to have himself declared the natural father *and thereby to obtain parental prerogatives*. What he must establish, therefore, is not that our society has traditionally allowed a natural father in his circumstances to establish paternity, but that it has traditionally accorded such a father parental rights, or at least has not traditionally denied them. What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made.[1]

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[1] [Footnote 6 by Justice Scalia] We do not understand why, having rejected our focus upon the societal tradition regarding the natural father's rights vis-à-vis a child whose mother is married to another man, Justice BRENNAN would choose to focus instead upon "parenthood." Why should the relevant category not be even more general—perhaps "family relationships"; or "personal relationships"; or even "emotional attachments in general"? Though the

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We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here because, even assuming that such a right exists, Victoria's claim must fail. Victoria's due process challenge is, if anything, weaker than Michael's. Her basic claim is not that California has erred in preventing her from establishing that Michael, not Gerald, should stand as her legal father. Rather, she claims a due process right to maintain filial relationships with both Michael and Gerald. This assertion merits little discussion, for, whatever the merits of the guardian ad litem's belief that such an arrangement can be of great psychological benefit to a child, the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country. Moreover, even if we were to construe Victoria's argument as forwarding the lesser proposition that, whatever her status vis-à-vis Gerald, she has a liberty interest in maintaining a filial relationship with her natural father, Michael, we find that, at best, her claim is the obverse of Michael's and fails for the same reasons.

JUSTICE O'CONNOR, with whom JUSTICE KENNEDY joins, concurring in part.

I concur in all but footnote 6 of Justice SCALIA's opinion. This footnote sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in this area. See *Griswold v. Connecticut* (1965); *Eisenstadt v. Baird* (1972). On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be "the most specific level" available. See *Loving v. Virginia* (1967). I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.

JUSTICE STEVENS, concurring in the judgment.

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. . . I . . . would not foreclose the possibility that a constitutionally protected relationship between a natural father and his child might exist in a case like this. Indeed, I am willing to assume for the purpose of deciding this case that Michael's relationship with Victoria is strong enough to give him a constitutional right to try to convince a trial judge that Victoria's best interest would be served by granting him visitation rights. I am satisfied, however, that the California statute, as applied in this case, gave him that opportunity.

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JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

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Apparently oblivious to the fact that this concept can be as malleable and as elusive as "liberty" itself, the plurality pretends that tradition places a discernible border around the Constitution. The pretense is seductive; it would be comforting to believe that a search for "tradition" involves nothing more idiosyncratic or complicated than poring through dusty volumes on American history. Yet, as Justice WHITE observed, . . . "What the deeply rooted traditions of the country are is arguable." Indeed, wherever I would begin to look for an interest "deeply rooted in the country's traditions," one thing is

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

certain: I would not stop (as does the plurality) at Bracton, or Blackstone, or Kent, or even the American Law Reports in conducting my search. Because reasonable people can disagree about the content of particular traditions, and because they can disagree even about which traditions are relevant to the definition of "liberty," the plurality has not found the objective boundary that it seeks.

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It is ironic that an approach so utterly dependent on tradition is so indifferent to our precedents. Citing barely a handful of this Court's numerous decisions defining the scope of the liberty protected by the Due Process Clause to support its reliance on tradition, the plurality acts as though English legal treatises and the American Law Reports always have provided the sole source for our constitutional principles. They have not. . . . On the contrary, "'[l]iberty' and 'property' are broad and majestic terms. They are among the '[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience. . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.'"

It is not that tradition has been irrelevant to our prior decisions. Throughout our decisionmaking in this important area runs the theme that certain interests and practices—freedom from physical restraint, marriage, childbearing, childrearing, and others—form the core of our definition of "liberty." Our solicitude for these interests is partly the result of the fact that the Due Process Clause would seem an empty promise if it did not protect them, and partly the result of the historical and traditional importance of these interests in our society. In deciding cases arising under the Due Process Clause, therefore, we have considered whether the concrete limitation under consideration impermissibly impinges upon one of these more generalized interests.

Today's plurality, however, does not ask whether parenthood is an interest that historically has received our attention and protection; the answer to that question is too clear for dispute. Instead, the plurality asks whether the specific variety of parenthood under consideration—a natural father's relationship with a child whose mother is married to another man—has enjoyed such protection.

If we had looked to tradition with such specificity in past cases, many a decision would have reached a different result. Surely the use of contraceptives by unmarried couples, *Eisenstadt v. Baird* (1972), or even by married couples, *Griswold v. Connecticut* (1965) . . . were not "interest[s] traditionally protected by our society," at the time of their consideration by this Court.

The plurality's interpretive method is more than novel; it is misguided. It ignores the good reasons for limiting the role of "tradition" in interpreting the Constitution's deliberately capacious language. In the plurality's constitutional universe, we may not take notice of the fact that the original reasons for the conclusive presumption of paternity are out of place in a world in which blood tests can prove virtually beyond a shadow of a doubt who sired a particular child and in which the fact of illegitimacy no longer plays the burdensome and stigmatizing role it once did. Nor, in the plurality's world, may we deny "tradition" its full scope by pointing out that the rationale for the conventional rule has changed over the years, instead, our task is simply to identify a rule denying the asserted interest and not to ask whether the basis for that rule—which is the true reflection of the values undergirding it—has changed too often or too recently to call the rule embodying that rationale a "tradition." Moreover, by describing the decisive question as whether Michael's and Victoria's interest is one that has been "traditionally *protected by* our society," rather than one that society traditionally has thought important (with or without protecting it), and by suggesting that our sole function is to "*discern* the society's views," the plurality acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States. Transforming the protection afforded by the Due Process Clause into a redundancy mocks those who, with care and purpose, wrote the Fourteenth Amendment.

In construing the Fourteenth Amendment to offer shelter only to those interests specifically protected by historical practice, moreover, the plurality ignores the kind of society in which our Constitution exists. We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncracies. Even if we can agree, therefore, that "family" and "parenthood" are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do. In a community such as ours, "liberty" must include the

freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty.

The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This* Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations. I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.

The plurality's reworking of our interpretive approach is all the more troubling because it is unnecessary. This is not a case in which we face a "new" kind of interest, one that requires us to consider for the first time whether the Constitution protects it. On the contrary, we confront an interest—that of a parent and child in their relationship with each other—that was among the first that this Court acknowledged in its cases defining the "liberty" protected by the Constitution, see, *e.g., Meyer v. Nebraska* (1923).

Thus, to describe the issue in this case as whether the relationship existing between Michael and Victoria "has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection" is to reinvent the wheel. The better approach—indeed, the one commanded by our prior cases and by common sense—is to ask whether the specific parent-child relationship under consideration is close enough to the interests that we already have protected to be deemed an aspect of "liberty" as well. On the facts before us, therefore, the question is not what "level of generality" should be used to describe the relationship between Michael and Victoria, but whether the relationship under consideration is sufficiently substantial to qualify as a liberty interest under our prior cases.

On four prior occasions, we have considered whether unwed fathers have a constitutionally protected interest in their relationships with their children. Though different in factual and legal circumstances, these cases have produced a unifying theme: although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so.

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The plurality's exclusive rather than inclusive definition of the "unitary family" is out of step with other decisions as well. This pinched conception of "the family," crucial as it is in rejecting Michael's and Victoria's claims of a liberty interest, is jarring in light of our many cases preventing the States from denying important interests or statuses to those whose situations do not fit the government's narrow view of the family. From *Loving v. Virginia* (1967) . . . to *Moore v. East Cleveland* (1977), we have declined to respect a State's notion, as manifested in its allocation of privileges and burdens, of what the family should be. Today's rhapsody on the "unitary family" is out of tune with such decisions.

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. . . What Michael wants is a chance to show that he is Victoria's father. By depriving him of this opportunity, California prevents Michael from taking advantage of the best-interest standard embodied in § 4601 of California's Civil Code, which directs that *parents* be given visitation rights unless "the visitation would be detrimental to the best interests of the child."

[The California Statute] as construed by the California courts thus cuts off the relationship between Michael and Victoria—a liberty interest protected by the Due Process Clause—without affording the least bit of process. This case, in other words, involves a conclusive presumption that is used to terminate a constitutionally protected interest—the kind of rule that our preoccupation with procedural fairness has caused us to condemn.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

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Like Justices BRENNAN, MARSHALL, BLACKMUN, and STEVENS, I do not agree with the plurality opinion's conclusion that a natural father can never "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." Prior cases here have recognized the liberty interest of a father in his relationship with his child. In none of these cases did we indicate that the father's rights were dependent on the marital status of the mother or biological father. The basic principle enunciated in the Court's unwed father cases is that an unwed father who has demonstrated a sufficient commitment to his paternity by way of personal, financial, or custodial responsibilities has a protected liberty interest in a relationship with his child.

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In the case now before us, Michael H. is not a father unwilling to assume his responsibilities as a parent. To the contrary, he is a father who has asserted his interests in raising and providing for his child since the very time of the child's birth. . . . Michael had begun to develop a relationship with his daughter. There is no dispute on this point. Michael contributed to the child's support. Michael and Victoria lived together (albeit intermittently, given Carole's itinerant lifestyle). There is a personal and emotional relationship between Michael and Victoria, who grew up calling him "Daddy." Michael held Victoria out as his daughter and contributed to the child's financial support. . . . "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." . . .

"The emphasis of the Due Process Clause is on 'process.'" I fail to see the fairness in the process established by the State of California and endorsed by the Court today. Michael has evidence which demonstrates that he is the father of young Victoria. Yet he is blocked by the State from presenting that evidence to a court. As a result, he is foreclosed from establishing his paternity and is ultimately precluded, by the State, from developing a relationship with his child. "A fundamental requirement of due process is 'the opportunity to be heard.' I fail to see how Michael was granted any meaningful opportunity to be heard when he was precluded at the very outset from introducing evidence which would support his assertion of paternity. Michael has never been afforded an opportunity to present his case in any meaningful manner.