BYU Law Review

Volume 1991 | Issue 1 Article 9

3-1-1991

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Recommended Citation

Earl M. Maltz, *The State, the Family, and the Constitution: A Case Study in Flawed Bipolar Analysis*, 1991 BYU L. Rev. 489 (1991).
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The State, the Family, and the Constitution: A Case Study in Flawed Bipolar Analysis

*Earl M. Maltz**

I. Introduction

While the precise details vary considerably, most mainstream theories of constitutional adjudication are variations of an approach that might be described as bipolar analysis. Under bipolar analysis, the Supreme Court compares the constitutional value of the right asserted by the party challenging a governmental action with the interests of the governmental entity taking the action. If the challenging party's claim is sufficiently weighty in comparison to the governmental interest, the governmental action is found unconstitutional; otherwise, the Court leaves the action undisturbed.[1]

The viability of bipolar analysis is particularly critical to judicial interventionists—those who argue that the Court should intervene actively even in cases where no clear textual or historical warrant for judicial activism exists. By its nature, judicial interventionism calls upon the Court to make accurate assessments of the various rights and interests implicated by a particular constitutional challenge. Indeed, many of the most prominent defenses of interventionism rest on the view that the Court often occupies the best institutional position to make such assessments.[2] In contrast, noninterventionists argue that the

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1. *E.g.*, Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943 (1987) (describing and criticizing balancing methodology); Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy—Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463, 553 (1983) (central conflict in constitutional family law cases occurs between individual and social interests).

2. *E.g.*, Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469, 517-18 (1981); Fiss, *Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 9-10 (1979); Richards, *Moral Philosophy and the Search for Fundamental Values in Constitutional Law*, 42 Ohio St. L.J. 319, 328-30 (1981); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 246-49 (1973); *see also* J.H. Ely, Democracy and Distrust: A Theory of Judicial Review (1980) (courts are well placed to protect groups whose interests are likely to be undervalued in democratic

Court should simply defer to the decisions made by other branches of government and the drafters of the Constitution. Thus, noninterventionists do not require the judges to make the interest assessments and comparisons implicit in judicial interventionism; instead, they challenge the ability of the Court to perform these assessments and comparisons.[3]

Using the Court's approach to family-related issues as a case study,[4] this article challenges the basic premises of bipolar analysis.[5] Part II briefly outlines several points of conflict between judicial interventionists and noninterventionists in the family law area, demonstrating that interventionist justices have relied primarily on bipolar analysis in making their arguments. Using further examples from the family law field, part III then argues that bipolar analysis is inherently flawed because it tends to blind the Court to the interests of parties other than those challenging the governmental action. Part III also reveals that judicial interventionism in the family law context frustrates rather than furthers pluralism. The article concludes in part IV by discussing the implications of these insights in the debate over the desirability of interventionism generally.

II. INTERVENTIONISM AND THE RIGHTS OF BIOLOGICAL PARENTS

The theory that the biological parents of a child have a constitutionally protected right to exercise legal control of their child's affairs has been the cornerstone of the interventionists' constitutional critique of state family law regulation.[6] Histori-

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process).

3. *E.g.*, R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

4. For an extensive survey of the Court's family law cases, see *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980).

5. Bipolar analysis in the family law context is also criticized in Schneider, *Rights, Discourse, and Neonatal Euthanasia*, 76 CALIF. L. REV. 151, 151-58 (1988).

6. The widely-publicized case of *Cruzan v. Director, Missouri Department of Health*, 110 S. Ct. 2841 (1990), provides an excellent example of interventionist arguments in the family rights area. In *Cruzan*, a thirty year old woman sustained severe injuries in an automobile accident, leaving her in a persistent vegetative state. Her parents sought to have her artificial feeding and hydration tubes removed, which would have led to her death. Her parents contended that they had a constitutional right to have the tubes removed. They claimed that, given the incompetence of their daughter, the state was required to "accept the 'substantial judgment' of close family members, even in the absence of substantial proof that their views reflect the views of the patient." *Id.* at 2855. The noninterventionist majority in *Cruzan* explicitly rejected this argument. *Id.* at 2855-56; *see also* cases discussed *infra* notes 8-45.

cally, the right to regulate the relationship between parents and children has been one of the most closely-guarded prerogatives of state government; thus, any effort by the Court to restrict local autonomy in this area faces formidable federalism-related obstacles.[7] The Court's recognition of a fundamental right of biological parents to rear their children provides a means to circumvent these obstacles and create a judicially prescribed federal family law. Judicial interventionists would define the rights of biological parents quite broadly and place strong procedural due process restraints on state efforts to divest biological parents of these family rights.

A. *Defining the Scope of the Right*

Stanley v. Illinois[8] is the seminal decision establishing biologically-based family rights that prevail over state regulations. *Stanley* involved a dispute over the status of the children of an unwed mother after her death. Stanley was the biological father of the children who had lived with them and their mother intermittently over an eighteen year period. He challenged the Illinois statute which automatically made the children of unwed fathers wards of the state upon the death of their mother. Relying on a procedural due process analysis, the Court found the statute unconstitutional.

The majority began by weighing the interest of the individual against the interest of the state. The Court stated: "The . . . interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."[9] Contending that the Illinois statute in essence irrebuttably presumed that Stanley was an unfit parent,[10] the Court concluded that he was entitled to a hearing on his fitness and, presumably, parental rights if he was in fact a fit parent.

Despite *Stanley*'s edict that states must recognize the importance of the biological relationship between an unwed father and his child, even the most interventionist members of the Court recognize some limits to this principle. For example, in

7. *E.g.*, Sosna v. Iowa, 419 U.S. 393, 404 (1975). *See generally* Maltz, *Individual Rights and State Autonomy*, 12 HARV. J.L & PUB. POL'Y (discussing federalism-related considerations in individual rights cases generally).

8. 405 U.S. 645 (1972).

9. *Id.* at 651.

10. *Id.* at 647-49.

Quilloin v. Walcott,[11] the Court unanimously held that an unwed father who had never lived with his child nor attempted to live with the child's mother had no constitutionally protected right to block the adoption of the child by the child's stepfather. In other circumstances, however, interventionists have made strong efforts to expand the constitutional protections created by biological relationships. *Lehr v. Robertson*[12] and *Moore v. City of East Cleveland*[13] exemplify the clash between the interventionist and noninterventionist perspectives.

In *Lehr*, the putative biological father of a child born out of wedlock sought to reopen an order providing for adoption of the child by the child's stepfather. Throughout the child's life, the putative father had consistently acknowledged paternity and had made repeated efforts to contact the child. Moreover, he had both offered to establish a trust fund to support the child and initiated an independent paternity action after the original adoption proceeding had been instituted.[14] At the same time, however, he had neither filed for custody nor registered on New York's "putative father registry."[15] As a result, he did not receive notice of the adoption proceeding until it was too late for him to actively participate in the hearing.[16] The putative father argued that the New York court had deprived him of liberty without due process of law by terminating his parental rights in the adoption proceeding.[17]

Taking a noninterventionist perspective, the Court rejected this argument. Speaking for the majority, Justice Stevens first emphasized the primary responsibility of the states in defining the rights of parents and children.[18] He recognized that at times the parental rights of a biological father of a child born out of wedlock might receive "substantial" protection under the due process clause, particularly "when an unwed father demonstrates a full commitment to the responsibilities of parenthood."[19] However, the majority contended that, because the putative father never had a "significant custodial, personal

11. 434 U.S. 246 (1978).
12. 463 U.S. 248 (1983).
13. 431 U.S. 494 (1977).
14. 463 U.S. at 268-69 (White, J., dissenting).
15. *Id.* at 250 & n.4.
16. *Id.* at 253.
17. *Id.* at 255.
18. *Id.* at 256-57.
19. *Id.* at 261.

or financial relationship" with the child, they were not assessing the constitutional adequacy of New York's procedures for terminating a developed relationship, but only an inchoate right to form such a relationship.[20] In those circumstances, the majority concluded, New York was not required to listen to the objections of the biological father.[21]

Justice White's interventionist dissent was joined by Justices Marshall and Blackmun.[22] Justice White argued that the biological relationship between parent and child itself created a protected interest.[23] Thus, in the dissent's view, the state was required to adopt procedures that "at least represent a reasonable effort to determine the identity of the putative father and to give him adequate notice."[24]

Moore v. City of East Cleveland[25] brought the interventionist view of the importance of biological relationships into even sharper focus. *Moore* was a challenge to a city ordinance which limited occupancy of a dwelling unit to members of a single family unit and defined "family" very narrowly.[26] Under the ordinance, a grandmother was convicted for living with her son and two grandsons, who were first cousins rather than brothers.[27] Three justices argued that the relationship between the grandmother and grandchildren was entitled to no special constitutional protection and voted to uphold the ordinance and the judgment of the lower court.[28] A majority of the Court rejected this view, however, and the conviction was reversed by a five-four margin.

Justice Powell's plurality opinion took an interventionist approach, contending that the ordinance should be subject to stringent judicial scrutiny. Powell rested this conclusion on the view that the rights protected by substantive due process analy-

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20. *Id.* at 262-63.

21. The majority also rejected the claim that the New York statute embodied unconstitutional gender-based discrimination. *Id.* at 265-68.

22. *Id.* at 268-76 (White, J., dissenting).

23. *Id.* at 271-72 (White, J., dissenting).

24. *Id.* at 272-73 (White, J., dissenting).

25. 431 U.S. 494 (1977).

26. *Id.* at 496.

27. *Id.* at 496-98.

28. *Id.* at 531-41 (Stewart, J., dissenting, joined by Rehnquist, J.); *id.* at 541-52 (White, J., dissenting). Chief Justice Burger would have dismissed the challenge on procedural grounds. *Id.* at 521-31 (Burger, C.J., dissenting).

sis extend beyond the protection of the traditional nuclear family to other biological relationships.

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition . . . . Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom . . . that supports a larger conception of the family.[29]

After considering state interests in preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue burden on the local school system, Powell concluded that these state interests were insufficient to justify the ordinance.[30]

Moore defines the outer limits of interventionist success in establishing constitutional protections for family rights based upon biological relationships. However, interventionists have also had some success in imposing procedural constraints on the ability of the state to terminate those rights for cause.

B. *Procedural Due Process and Family Rights*

The primary battleground over purely procedural constraints in family law centers on the process due in proceedings to terminate parental rights. All sides of the controversy agree that pre-existing parental rights can only be terminated after a hearing establishing the unfitness of the parent. The question of constitutional constraints on the form of the hearing, however, has generated considerable controversy. The two critical cases examining this issue are *Lassiter v. Department of Social Services*[31] and *Santosky v. Kramer*.[32]

The issue in *Lassiter* was whether the state was required to pay for appointed counsel for an indigent woman who was threatened with the termination of her parental rights for neglect. All agreed that the relevant standard for evaluating her claim was the balancing test established by *Mathews v. El-*

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29. *Id.* at 504-05 (Powell, J., plurality opinion) (footnote omitted).

30. *Id.* at 499-500. While not joining the plurality opinion, Justice Stevens concluded that the ordinance was an unreasonable restraint on the grandmother's right to use her property. *Id.* at 513-21 (Stevens, J., concurring in the judgment).

31. 452 U.S. 18 (1981).

32. 455 U.S. 745 (1982).

dridge.[33] *Mathews* is a classic example of bipolar analysis, requiring the Court to weigh

> [f]irst, the private interest [of the party challenging government standards] that will be affected by the official action; second, the risk [borne by the challenging party] of an erroneous deprivation of such interest through the procedures used, and the probable value . . . of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[34]

Disagreeing with four dissenters who argued that it undervalued the interest of the parent,[35] the *Lassiter* Court held that the state was not required to provide counsel in all cases. Justice Stewart's majority opinion conceded that the parent's interest was "extremely important"[36] and that the state had only a weak pecuniary interest in refusing to provide counsel.[37] Nonetheless, the majority concluded that the determination of the need for counsel was best made on an ad hoc basis and that an indigent was presumptively entitled to appointed counsel only when faced with the risk of being deprived of physical liberty.[38]

One year later, in a slightly different context, the four *Lassiter* dissenters were able to convince Justice Powell to join them to create a quite different result in *Santosky v. Kramer.*[39] Like *Lassiter*, *Santosky* began as a proceeding to terminate the parental rights of a natural parent over her child on the grounds of permanent neglect. The issue, however, was the standard of proof to be applied. State law provided that termination could take place upon a showing of unfitness by a preponderance of the evidence.

Speaking for the five interventionists, Justice Blackmun de-

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33. 424 U.S. 319 (1976).

34. *Id.* at 335. The *Mathews* formulation has been widely criticized, primarily by those who argue that in theory and practice it is insufficiently protective of the challenger's interests. *E.g.*, Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978).

35. 452 U.S. at 38-42 (Blackmun, J., dissenting, joined by Brennan, and Marshall, JJ.).

36. *Id.* at 31.

37. *Id.* at 34.

38. *Id.* at 25-27.

39. 455 U.S. 745 (1982).

clared that the due process clause required a showing of parental unfitness by clear and convincing evidence.[40] Dismissing the dissent's argument against the federalization of family law, Justice Blackmun relied heavily on the importance of parental rights in the constitutional calculus. He declared that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents."[41] Although noting the state's important interest in "preserving and promoting the welfare of the child,"[42] the majority concluded that the preponderance of the evidence standard created an unacceptable risk of erroneously depriving the natural parents of their rights.[43] By coming to this conclusion, the majority rejected the state legislature's assessment of the rights and interests of the parent, the child, and the state in favor of their own assessment of the various interests involved. Thus, *Santosky* stands as a clear example of judicial interventionism in the creation of procedural safeguards for biologically-based family rights.

III. The Inherent Flaws of Bipolar Analysis

Cases such as *Santosky* and *Moore* obviously represented significant victories for the interventionists on the Court. However, the reasoning in these interventionist opinions also reveals the weaknesses of the bipolar model that undergirds interventionist analysis. For in both cases, strict adherence to the bipolar approach led the interventionists to ignore substantial interests of other parties not represented directly before the Court.

Santosky is a simple example. As the dissent pointed out, the state and the parent were not the only interested parties in the case; the child in whom the parent was claiming rights had an independent interest in the case.[44] The child would be denied the opportunity to enter another permanent family relationship if the hearing determined erroneously that the biological parent's rights should not be terminated. The majority opinion in *Santosky* simply ignored this point.

In *Moore*, the interventionist plurality ignored the rights of

40. *Id.* at 747-48.
41. *Id.* at 753.
42. *Id.* at 766.
43. *Id.* at 764.
44. *Id.* at 788 n.13.

the remaining residents of the city. Justice Powell characterized the issue in *Moore* as whether a city could "standardiz[e] its children—and its adults—by forcing all to live in certain narrowly defined family patterns."[45] While this description of the issue is accurate in a broad theoretical sense, it tends to obscure the major, immediate effect of striking down the ordinance as unconstitutional—the effect on East Cleveland neighborhoods. Whatever the result in *Moore*, Mrs. Moore and her two grandsons could have no doubt maintained themselves as a living unit somewhere in the Cleveland metropolitan area; the only question in the case was whether they would be allowed to do so in East Cleveland. Thus the real issue in *Moore* was not whether Mrs. Moore and her grandsons would be forced into a standardized pattern, but rather whether a small segment of society—the residents of East Cleveland—could decide that they wished to live in an area characterized by the presence of nuclear families and protect that preference by defining their community to exclude those whose lifestyle did not fit the nuclear family pattern.[46] Justice Powell's discussion of congestion and the burden on the school system touches on this question only tangentially, if at all.

The flaws in bipolar analysis revealed by *Santosky* and *Moore* affect a wide variety of cases. In the family law context, the flaws emerge even more clearly in disputes between family members.

A. *Conflicts Between Parents and Children*

If the interests of third parties are sufficiently obvious and pressing, even the most interventionist justices have occasionally modified the bipolar model to address these interests directly. The clearest examples arise when the right to exercise parental control conflicts with the fundamental rights of the children themselves. The potential for such conflicts was implicit in cases such as *Stanley*, *Lehr*, *Lassiter* and *Santosky*. By labeling the parental right at issue in these cases as constitutionally "fundamental," interventionists necessarily implied that the parents' continuing ability to invoke state authority in support of their

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45. 431 U.S. at 506 (Powell, J., plurality opinion).

46. This argument is derived from Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U.L. REV. 811, 828 (1983).

wishes was an interest of considerable constitutional magnitude.[47] But if the parents seek to invoke state power to force children to relinquish other fundamental rights, an unavoidable conflict ensues.[48] In these situations, it is virtually impossible to analyze the problem without recognizing directly the interests of both parent and child.[49] Even in this context, however, the analysis of the conflict between the rights of parents and children typically plays a less important role than standard bipolar analysis in interventionist opinions.

The interventionist approach to the issues of parental consent and notification in the abortion context provides clear examples of this phenomenon. The judicial debate over parental consent and notification took place in the aftermath of the interventionist victory in *Roe v. Wade*.[50] The *Roe* Court struck down virtually all existing state-created restrictions on abortion rights by a seven-two margin, holding that regulation of access to abortions was constitutionally acceptable only if justified by a compelling state interest. The majority noted the existence of state interests in protecting the life and health of the mother as well as the "potential life" represented by the fetus.[51] While the Court conceded that these interests justified severe restrictions on abortions performed in the third trimester of pregnancy, it sharply curtailed the power of the states to regulate abortions performed in the first and second trimesters.[52]

A number of state legislatures responded by passing statutes containing restrictions that they hoped would pass muster under the standards announced in *Roe*. Prominent among these

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47. In *Stanley*, *Lehr*, *Lassiter* and *Santosky*, the Court was not concerned with the question of whether the biological parents would *in fact* be able to visit their children or influence their lives; instead, they dealt only with the issue of whether the state would have authority to terminate the parents' *legal right* to exercise control over the children's lives. In other words, the question was whether the parents would retain authority to invoke the power of the state to enforce their wishes regarding the proper course of the children's upbringing.

48. The constitutional issues raised by clashes between parents' rights and children's rights are discussed in detail in Garvey, *Children and the Idea of Liberty: A Comment on the Civil Commitment Cases*, 68 KY. L.J. 809 (1980) and Garvey, *Child, Parent, State and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769 (1978).

49. Other commentators have also recognized this point. *See e.g.*, Richards, *The Individual, the Family, and the Constitution*, N.Y.U.L. REV. 1, 40-45 (1980); Schneider, *supra* note 5, at 158-59.

50. 410 U.S. 113 (1973).

51. *Id.* at 156.

52. *Id.* at 162-67.

were statutes requiring that minors have the consent of their parents prior to obtaining abortions.[53] In *Planned Parenthood v. Danforth*,[54] the Court invalidated such a requirement by a five-four vote. Speaking for the interventionist majority, Justice Blackmun recognized "that the state has somewhat broader authority to regulate the activities of children than of adults."[55] But he questioned "whether there is any significant state interest in conditioning an abortion on the consent of a parent or person *in loco parentis* that is not present in the case of an adult."[56] In finding that no such additional state interest existed, Justice Blackmun reasoned:

> One suggested interest is the safeguarding of the family unit and of parental authority. It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination . . . to terminate the [minor's] pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of a competent minor mature enough to become pregnant.[57]

The majority opinion in *Danforth* recognized the possibility that the state might constitutionally mandate parental participation in the abortion decision under some circumstances.[58] Even some justices who accepted the *Roe/Danforth* analysis would have allowed the state to require either parental notification or a judicial determination that such notification was unwarranted.[59] Moreover, the apparent rejection of the underlying analysis of *Roe* by a majority of the currently serving justices has left the entire law of abortion unsettled.[60] The Court now

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53. *See, e.g.*, DEL. CODE ANN. tit. 24, § 1790 (1987) (enacted at 57 Del. Laws ch. 145, § 2 (1974)); IND. CODE § 35-1-58.5-2 (1985) (Act of Apr. 24, 1973, Pub. L. No. 322, § 2); MO. ANN. STAT. § 188.028 (Vernon 1983) (enacted at 1979 Mo. Laws 376 § 1); 18 PA. CONS. STAT. ANN. § 3206 (Purdon 1983 & Supp. 1990) (Act of Sept. 10, 1974, Pub. L. 639, No. 209, § 3); VA. CODE ANN. § 18.2-76 (1988) (Act of Feb. 14, 1975, ch. 14, § 2).

54. 428 U.S. 52 (1976).

55. *Id.* at 74.

56. *Id.* at 75.

57. *Id.* (citation omitted).

58. *Id.*

59. *E.g.*, H.L. v. Matheson, 450 U.S. 398 (1981).

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

seems to be taking the view that states may constitutionally require a minor to notify one parent prior to obtaining an abortion.[61] However, the position of the core interventionist group of Brennan, Marshall, and Blackmun was hardened on this issue; they clearly believe that any state-mandated parental involvement in the abortion decision is unconstitutional.[62]

Both interventionists and noninterventionists continue to recognize that parents have an interest in controlling the lives of their children. In large measure, the difference in viewpoint reflects differing perspectives on the relationship between the rights of the parents and the rights of the child. Thus, in *Hodgson v. Minnesota*,[63] Justice Stevens' generally pro-notification majority opinion was grounded largely on the view that "[p]arents have [a constitutionally protected] interest in controlling the . . . upbringing of their children."[64] In contrast, Justice Marshall's interventionist, anti-notification argument emphasized that "[p]arental authority is not limitless" and contended that "where parental involvement threatens to harm the child, the parent's authority must yield."[65] Marshall's opinion demonstates that the recognition of third party rights and interests does not necessarily prevent interventionists from making independent assessments of the rights and interests involved. At the same time, however, *Hodgson* also demonstrates that consideration of third party interests generally bolsters noninterventionist analysis.

The interventionist analysis of *Parham v. J.R.*[66] also evinced at least some concern for third party rights. *Parham* was a class action challenge to a Georgia statute providing for the civil commitment of children by their parents. Upon application of the parents, the superintendent of a state mental hospital was authorized to admit a minor child temporarily for "observation

61. *See* Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972, 2972, 2988-84 (1990); Hodgson v. Minnesota, 110 S. Ct. 2926, 2942-47 (1990); *Matheson*, 450 U.S. at 409-10.

62. *See, e.g., Akron*, 110 S. Ct. at 2984-93 (Blackmun, J., dissenting); *Hodgson*, 110 S. Ct. at 2951-60 (Marshall, J., dissenting); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 503-04 (Blackmun, J., concurring in part and dissenting in part); *Matheson*, 450 U.S. at 434-54 (Marshall, J., dissenting). However, the retirement of Justice Brennan and the appointment of Justice Souter leaves the interventionist approach in this area in question.

63. 110 S. Ct. at 2926.

64. *Id.* at 2942.

65. *Id.* at 2956 (Marshall, J., dissenting).

66. 442 U.S. 584 (1979).

and diagnosis."[67] The superintendent could then admit the child if he found "evidence of mental illness" and that the child was "suitable for treatment" in the hospital.[68] However, the superintendent was required to make an independent evaluation of the child's condition and to discharge any child hospitalized for more than five days whom the superintendent found "has recovered from mental illness or . . . has sufficiently improved . . . that hospitalization . . . is no longer desirable."[69] The class action contended that the due process clause required a preadmission, adversary hearing conducted by an impartial tribunal before parents could commit their children to the state mental hospital.

All of the justices agreed that, with respect to children whose parents had them committed, the Georgia procedures were sufficient to satisfy fourteenth amendment standards. The tenor of their opinions differed sharply, however. Justice Stewart's concurring opinion was the least interventionist in tone.[70] Stewart recognized that commitment to a mental hospital entailed a "massive curtailment of liberty."[71] However, Justice Stewart also noted that the right of parents to speak for their children was a central tenet of the common law and that this right had been given constitutional status.[72] Analogizing the case to one in which parents have control over the decision of a child to have surgery,[73] Stewart refused to conclude that the fourteenth amendment "requires Georgia to ignore basic principles so long accepted by our society."[74]

Although also recognizing the clash between individual rights in the case, Justice Brennan's opinion, in which Justices Marshall and Blackmun joined, had a far more interventionist flavor. While noting that parents have an independent interest in controlling their children, Brennan emphasized that this interest is "limited by the legitimate rights and interests of [the] children"[75] and declined to indulge in the presumption that par-

67. *Id.* at 591 (quoting GA. CODE ANN. § 88-503.1 (1975)).
68. *Id.*
69. *Id.*
70. *See id.* at 621-25 (Stewart, J., concurring in the judgment).
71. *Id.* at 622 (quoting Humphrey v. Cady, 405 U.S. 504, 507 (1972)).
72. *Id.* at 623-25.
73. *Id.* at 624.
74. *Id.* at 623.
75. *Id.* at 630 (Brennan, J., concurring in part and dissenting in part).

ents always act in the best interests of their children.[76] He emphasized instead the need for formal hearings in commitment proceedings.[77]

At this stage, the issue of parental rights simply disappeared from Brennan's opinion. He gave three reasons for allowing the state to postpone hearings, all of which relate primarily to the welfare of the children themselves.[78] Under Brennan's analysis, only these child-welfare factors could justify the state's decision to allow temporary admission based on an initial evaluation by a psychiatrist.[79]

In short, consideration of parental rights plays only a subsidiary role in the interventionist analysis of parent-child conflicts. Nonetheless, in cases such as *Hodgson* and *Parham*, interventionists must at least be credited with recognizing that persons other than the children challenging governmental action had interests at stake in the litigation. In other situations dealing with family-related conflicts, interventionists cling more stubbornly to the bipolar model. In particular, judicial interventionists fail to properly consider the interests of those family members whose rights derive from a contractual source rather than a biological relationship.

B. *Conflicts Between Contractual and Biological Rights*

1. *The source of the conflict*

The conflict between the rights of biologically and contractually-related parties arises most clearly in cases where the biological father of a child is not married to the mother at the time of the child's birth and the mother is or has been married to another person at some time relevant to the dispute. In such a case, a claim of right based on the child's relationship to the biological father may well implicate rights derived from the marriage. Marriage-related rights have generally been accorded special priority in the American political system. Indeed, the right to marry itself is perhaps the most uncontroversial of the constitutional rights that cannot be clearly derived from some specific constitutional provision.

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76. *Id.* at 631-32.

77. *Id.* at 632-33.

78. *Id.* at 633.

79. For a different perspective on *Parham*, see Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329.

Although the importance of marriage has been recognized in a number of constitutional contexts, *Zablocki v. Redhail*[80] is the clearest example. In *Zablocki*, the Court struck down a Wisconsin statute forbidding marriage by residents under court order to support minor children, unless they proved compliance with the support obligation and that the children "are not and are not likely thereafter to become public charges."[81] Speaking for the majority, Justice Marshall relied on an equal protection argument to hold that, as an aspect of constitutionally protected privacy, the right to marry was fundamental and that the statute failed the compelling state interest test.[82]

Marshall was careful to circumscribe the potential implications of his analysis,[83] and other justices filed concurring opinions of more limited scope.[84] But only Justice Rehnquist was willing to apply the traditional rational basis test and uphold the Wisconsin statute.[85] In a later case, however, even Justice Rehnquist concurred when the Court unanimously struck down an almost total governmental ban on marriage by prison inmates.[86] Thus, it seems fair to conclude that support on the Court is unanimous for at least some special constitutional scrutiny of limitations on the right to marry.

In some respects, the widespread support for constitutionalizing the right to marry is unsurprising. At first glance, special scrutiny for the right to marry seems to present an easy case to any judge or commentator even willing to consider the special protection for some nontextual interests. Few would disagree with Marshall's statements in *Zablocki* that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men" and that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[87] A closer examination, however, reveals hidden difficulties with this analysis.

Initially, it is important to emphasize what is not at stake in a case such as *Zablocki*. The Wisconsin statute did not affect the

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80. 434 U.S. 374 (1978).

81. *Id.* at 375.

82. *Id.* at 386-91.

83. *Id.* at 386-87.

84. *Id.* at 391-96 (Stewart, J., concurring in the judgment); *id.* at 396-403 (Powell, J., concurring in the judgment); *id.* at 403-06 (Stevens, J., concurring in the judgment).

85. *Id.* at 407-11 (Rehnquist, J., dissenting).

86. Turner v. Safley, 482 U.S. 78 (1987).

87. 434 U.S. at 383 (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967)).

ability of the parties to agree to form a permanent union and support one another economically, to abide by that agreement, to live together, or to have their agreement sanctified by whatever religious ceremonies the parties chose to arrange. The parties would have those rights even in the absence of the ability to enter into a marriage recognized by the state. The primary legal effect of the *Zablocki* statute in that context was to prevent the parties from invoking state power to bind one another to the particular economic and legal obligations appurtenant to a legally binding contract of marriage. Although the right to invoke state power in this regard can hardly be viewed as rising to the level of a fundamental interest, the contract of marriage is special in some other respects.[88]

First, marriage grants the parties the exclusive right to have sexual relationships with one another. This feature of the contract played a prominent role in the majority opinion in *Zablocki.* Noting that marriage was the only context in which the state of Wisconsin allowed sexual relations to take place legally, Justice Marshall argued that the right to marry was central to the right to procreate.[89]

The difficulty with this argument is that it fails to demonstrate that the right to marry *per se* should be deemed fundamental; it simply implies that the state must allow sexual relations in some contexts. The state could solve this problem simply by legalizing heterosexual relations between unmarried adults. Indeed, judicial interventionists have suggested that the state is constitutionally required to allow such sexual relations between unmarried adults even under a regime in which the right to marry also has the status of a fundamental right.[90]

However, the marriage contract does not simply allow married couples to have sexual relations with one another; it also prohibits both partners from having sexual relations with others.[91] When combined with the provisions of the marriage

88. The various aspects of the marriage contract are discussed in detail in Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663 (1976) and Weitzman, *Legal Regulation of Marriage: Tradition and Change. A Proposal for Individual Contracts and Contracts in Lieu of Marriage*, 62 CALIF. L. REV. 1169 (1974).

89. 434 U.S. at 386.

90. *See* Bowers v. Hardwick, 478 U.S. 186, 203-06 (1986) (Blackmun, J., dissenting).

91. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1408 (1989); MASS. GEN. LAWS ANN. ch. 272, § 14 (West 1990); N.Y. PENAL LAW § 255.17 (McKinney 1989); UTAH CODE ANN. § 76-7-103 (1990); VA. CODE ANN. § 18.2-365 (1988); *cf.* 434 U.S. at 386 n.11 (citing WIS. STAT. § 944.15 (1973)).

contract relating to children, this issue of exclusivity takes on particular significance.

Basically, marriage contracts provide that the husband will have parental rights over children conceived by the mother during the pendency of the marriage, together with the reciprocal obligation to provide financial support for those children. Of course, if the mother does not violate her obligation of sexual fidelity during the marriage, the husband will also be the biological father of those children. But all states have statutes contemplating that the mother might engage in an adulterous relationship and also providing for a strong (in some cases virtually irrebuttable) presumption of paternity in the husband.[92] In essence, these statutes recognize that the rights and obligations of the husband to the mother's children derive from his legal relationship to the mother, rather than his biological relationship to the children. The requirement of sexual fidelity by the husband also protects the children by ensuring that he will not father children out of wedlock that might have a competing claim on his resources. This complex relationship centering on the reciprocal rights and obligations of the parents to the wife's children provides the most plausible support for the special constitutional status of marriage.

However, the marital relationship can also bring its beneficiaries into conflict with parties whose claims are purely biological in origin. By its nature, bipolar analysis obscures this conflict, portraying the issue instead as pitting biologically-related rights against state interests. This problem emerges clearly in the interventionist approach to cases involving the rights of illegitimate children and the conflict between the rights of biological and contractual parents.

2. *Illegitimate children and intestate succession*

Beginning in 1968, the constitutionality of statutes differentiating between legitimate and illegitimate children became an issue dividing interventionist and noninterventionist justices on the Supreme Court. Initially, the Court considered the right of illegitimate children to government benefits, but the intestate

92. The different approaches to the presumption of paternity are described in H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 341-44 (2d ed. 1988).

succession cases most clearly present the problems of bipolar analysis.[93]

The Court first considered the intestate succession issue in *Labine v. Vincent*,[94] rejecting a challenge to a Louisiana statute that denied illegitimate children the right to inherit intestate. Speaking for the five-member majority, Justice Black delivered a strongly noninterventionist opinion which noted the states' historical authority and particularly strong interest in formulating rules governing the devolution of property[95] and seemed to indicate that even the deferential rational basis test was too stringent for analyzing such rules.[96] Justice Black also emphasized the importance of contractually-related family rights in creating legal obligations.

> There is no biological difference between a wife and a concubine, nor does the Constitution require that there be such a difference before the State may assert its power to protect the wife and her children against the claims of a concubine and her children. The social difference between a wife and a concubine is analogous to the difference between a legitimate and an illegitimate child. One set of relationships is socially sanctioned, legally recognized, and gives rise to various rights and duties. The other set of relationships is illicit and beyond the recognition of the law. Similarly, the State does not need biological or social reasons for distinguishing between ascendants and descendants.[97]

Justice Harlan's concurring opinion took a similar tack, concluding that "[i]t is surely entirely reasonable for Louisiana to provide that a man who has entered into a marital relationship thereby undertakes obligations to any resulting offspring beyond those which he owes to the products of a casual liaison."[98]

Justice Brennan's dissenting opinion took a quite different view of the case.[99] He argued that "the formality of marriage

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93. The cases are surveyed in Maltz, *Illegitimacy and Equal Protection*, 1980 ARIZ. ST. L.J. 831. My views on the appropriate disposition of such cases have changed significantly since that article was published. Other extended discussions of the relationship of legitimacy to equal protection analysis include L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1553-58 (2d ed. 1988) and Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, (1979).

94. 401 U.S. 532 (1971).

95. *Id.* at 539 n.16.

96. *See id.* at 536 n.6.

97. *Id.* at 538.

98. *Id.* at 540 (Harlan, J., concurring).

99. *Id.* at 541-59 (Brennan, J., dissenting).

primarily signifies a relationship between husband and wife, not between parent and child,"[100] and suggested that, because the biological relationship of the father does not vary based on legitimacy, the rights of legitimate and illegitimate children should be presumptively equal. From this perspective, Brennan concluded that "the central reality of this case [is that] Louisiana punishes illegitimate children for the misdeeds of their parents"[101] and that the majority "uphold[s] the untenable and discredited moral prejudice of bygone centuries which vindictively punished not only the illegitimates' parents, but also the hapless, and innocent, children."[102]

Six years later, the Court once again faced the intestate succession issue in *Trimble v. Gordon*.[103] In *Trimble*, like *Labine*, the relevant state statute provided that illegitimate children could not inherit intestate from their fathers. Changes in the Court's make-up created a majority for Brennan's view that contractual issues were essentially irrelevant to the proper disposition of the case. Speaking for the five-member majority that found the statute unconstitutional, Justice Powell considered three state interests. The first—promotion of legitimate family relationships—was dismissed because discrimination against illegitimate offspring was deemed "an ineffectual—as well as an unjust—way of deterring the parent."[104] Powell also rejected the second state justification—enforcing the presumed will of the intestate—as simply not a real motivating force behind the enactment of the challenged statute.[105]

The majority conceded that the third state interest—providing a method for the orderly disposition of property at death, while reducing the incidence of spurious claims—was substantial and was furthered by the challenged statute.[106] Nevertheless, the opinion suggested that this interest could be appropriately effectuated by the selection of some "middle ground between the extremes of complete exclusion and case-by-case determination of paternity."[107] Because the Court found that

100. *Id.* at 552-53.
101. *Id.* at 557.
102. *Id.* at 541.
103. 430 U.S. 762 (1977).
104. *Id.* at 769-70 (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972)).
105. *Id.* at 774-76.
106. *Id.* at 770-71.
107. *Id.* at 771.

some categories of illegitimate children could be recognized without jeopardizing the orderly settling of estates or the dependability of land titles which rest on intestate succession, the *Trimble* statute was held unconstitutional.[108]

Despite the *Trimble* holding, it soon became clear that a majority of the Court did not view the Constitution as depriving the states of the right to make distinctions between legitimate and illegitimate children in laws dealing with intestate succession. In *Lalli v. Lalli*,[109] a deeply divided Court refused to invalidate a New York statute which allowed an illegitimate child to inherit intestate from his father only if the child had obtained an order of filiation during the father's lifetime. No opinion commanded the support of the majority of the Court. While two Justices would have overruled *Trimble* outright,[110] three joined in an opinion which sought to distinguish it from *Lalli*.[111] The plurality noted that, even in *Trimble*, the Court recognized a state interest "of considerable magnitude" in providing for the just and orderly disposition of property at death.[112] The *Lalli* scheme was viewed as substantially related to this interest, as well as sufficiently "tuned to alternative considerations" to pass constitutional muster.[113] The four dissenters, by contrast, argued that the case was controlled by *Trimble*.[114] Making a classic bipolar argument, they contended that "[t]he statute . . . discriminates against illegitimates through means not substantially related to the legitimate interests that the statute purports to promote."[115]

A more sophisticated analysis of the relationship between legitimacy and intestate succession reveals the flaw in the bipolar approach. Proper analysis of the intestate succession problem begins with several fundamental propositions. First, the amount of assets to be distributed is both finite and fixed. Second, in the absence of some state-enforced regime established by either statute or common law, no person could establish a reliable, secure claim to any part of the assets. The purpose of any system of legal rules providing for the succession of property after the

108. *Id.* at 771-73.
109. 439 U.S. 259 (1978).
110. *Id.* at 276 (Rehnquist, J., concurring); *id.* at 276-77 (Blackmun, J., concurring).
111. *Id.* at 261-76 (Powell, J., plurality opinion).
112. *Id.* at 268.
113. *Id.* at 266 (quoting *Trimble*, 430 U.S. at 772).
114. *Id.* at 277 (Brennan, J., dissenting).
115. *Id.* at 279 (Brennan, J., dissenting).

death of the owner is to establish a priority among claimants. One generally-recognized source of priority is a valid will executed by the decedent before death. Such a will can in whole or in part supersede other claims based on either the biological relationship between the decedent and the claimant or pre-existing contractual arrangements between the decedent and the claimant. However, no valid will has been executed in intestate succession cases.

In intestate succession cases, the claim of the illegitimate child of the decedent is based only on the child's biological relationship with the decedent. Assuming that the legitimate child is also the biological child of the decedent, his biology-based claim is equal to that of the illegitimate. But in addition, the legitimate child also has a contractually-based claim derived from the marital contract between the child's parents, notwithstanding Brennan's view that the "primary" relationship involved in marriage excludes the child.[116] Nonetheless, interventionists argue that the state must give no greater priority to the claims of legitimate children than to those of children born out of wedlock who can prove that they are the biological children of the decedent. This approach substantially dilutes the importance of the parent's marital contract to the claim of the legitimate child. Indeed, under the interventionist view, the marriage has importance to legitimate children only as a device by which the children can prove their biological relationship to the decedent.

Moreover, including both legitimate and illegitimate children as claimants necessarily reduces the amount that the legitimate child would otherwise receive. For example, suppose the estate of the decedent is valued at $100,000 and that there are only two parties claiming the estate—one legitimate child and one illegitimate child. If only legitimate children are allowed to inherit intestate from their fathers, the legitimate child will receive the full $100,000. If illegitimate children are given the same intestate share as their legitimate counterparts (as the interventionists would require), the legitimate child will receive only $50,000.

In some situations, recognition of the rights of illegitimate children can also reduce the value of the claim of the spouse of an intestate. Under the Uniform Probate Code, the estate of an intestate is divided equally between the wife and children of the

116. *See supra* note 100 and accompanying text.

decedent.[117] Consider the case in which an intestate has a wife and two children, neither of whom is legitimate. If the system recognizes only contractually-based relationships for the purpose of intestate succession, then the wife will be heir to all of the assets of the decedent. On the other hand, if biologically-based relationships also give rise to intestate succession rights, then the wife will be forced to divide the estate with the children.[118]

The point of the foregoing analysis is not to demonstrate that illegitimate children should be barred from intestate inheritance. A governmental decisionmaker might conceivably conclude that the biological tie between parent and child is so important that it should always be the predominant concern in intestate succession cases. But a contrary conclusion is also perfectly plausible. Morever the bipolar approach, which underlies interventionist arguments, distorts the analysis by focusing the attention of the justices solely on the conflict between the illegitimate child and the government. As a result, the impact of the interventionist theory on the marriage-related claims of third parties is ignored entirely.

The interventionists were never forced to confront this problem in the intestate succession cases themselves. Rather than challenge the core assumptions of bipolar analysis, less interventionist justices were content to argue that the exclusion of illegitimate children or limitations on the circumstances under which they could inherit intestate were sufficiently related to significant state interests. The problems of bipolar analysis came more clearly to the fore in *Michael H. v. Gerald D.*[119]

3. *The rights of biological and contractual parents*

Michael H. v. Gerald D. arose from the complicated domestic situation of Carole D. Carole had married Gerald D. in 1976. Beginning in 1978, Carole and Michael H. became involved in extramarital sexual relations. In 1981, Carole gave birth to a child, Victoria. Gerald was listed on the birth certificate as Victoria's father and continuously held Victoria out to the world as his daughter. However, blood tests taken by Carole and Michael showed a 98.07% probability that Michael was Victoria's biologi-

117. UNIF. PROBATE CODE § 2-102 (1982).

118. *See* UNIF. PROBATE CODE § 2-109 (recognizing claims of some illegitimate children).

119. 109 S. Ct. 2333 (1989).

cal father. Moreover, for two different periods of three months and five months, respectively, after Victoria's birth, Michael, Carole, and Victoria lived together. During these periods, Michael held Victoria out to be his daughter. Ultimately, however, Carole chose to reestablish her permanent relationship with Gerald.[120]

After his attempts to visit Victoria had been rebuffed, Michael filed a paternity action in November, 1982, seeking to establish himself as Victoria's biological father and obtain legally enforceable visitation rights. At one point, Carole supported Michael's lawsuit; eventually, however, she withdrew her support. The California courts denied Michael's petition, relying on a statute which provides that "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" unless the presumption is rebutted by blood tests taken in response to a motion made within two years of the child's birth by 1) the husband of the mother or 2) the mother herself (if supported by an affidavit from the biological father acknowledging paternity).[121] Since neither Gerald nor Carole had filed the necessary motion, the California courts were unwilling to consider Michael's proffered evidence of blood tests. Michael appealed this decision, arguing that the California courts had violated his fourteenth amendment rights.[122]

Michael could not raise some of the points that had figured prominently in the constitutional analysis of other parental rights cases. For example, he obviously could not assert that the state was interfering with rights derived from a marital relationship. Further, the structure of the California statute and the fact that the adverse claimant was another man rather than the mother of the child muted any possible sex discrimination concerns.[123] Nonetheless, Michael could make plausible due process arguments based on cases such as *Stanley* and *Lehr*.[124]

The situation was, however, more complex than those in *Stanley* and *Lehr*. Michael had not only established a relation-

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120. *Id.* at 2337-38.

121. CAL. EVID. CODE § 621(a)-(d) (Deering 1986).

122. 109 S. Ct. at 2337-38.

123. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979) (parental rights of father of illegitimate child); Parham v. Hughes, 441 U.S. 347 (1979) (right of father of illegitimate child to maintain wrongful death action). The complex sex discrimination issues which can arise in the context of family law are beyond the scope of this article.

124. *See supra* notes 8-10, 12-24 and accompanying text.

ship with Victoria but had done everything within his power to continue to maintain that relationship in the face of Carole's and Gerald's resistance. Thus, the rationale for the denial of the biological fathers' claims in *Lehr*—that the state was not terminating a developed relationship[125]—was simply inapplicable. However, *Michael H.* was the first case in which the biological father was opposed by the mother's husband at the time of birth, rather than simply the mother herself, a potential adoptive parent, or the state acting as *parens patriae*. The presence of a marital father at the time of birth who opposed the biological father distinguishes the case sharply from all previous cases in which biological fathers had asserted fourteenth amendment rights.

Given these complexities and the Court's deep division on the issues in *Lehr*, it is not surprising that the decision in *Michael H.* was rendered by a fragmented Court. By a five-four vote, the Supreme Court affirmed the California judgment. Five separate opinions were issued, however, and the majority was unable to agree on a single rationale for its decision.[126]

Justice Scalia, speaking for himself, Chief Justice Rehnquist and (on most points) Justices O'Connor and Kennedy, outlined clearly the premises of noninterventionist constitutional jurisprudence. Viewing the case primarily from a substantive due process perspective, the plurality began by outlining a general methodology for determining whether a particular right should be deemed fundamental, contending that the appropriate test was whether "the asserted liberty interest [is] rooted in history and tradition."[127] Applying this test to the facts of *Michael H.*, Justice Scalia described the legal issue as "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."[128]

Turning to this issue, Justice Scalia first canvassed the long history of the presumption of legitimacy, concluding that "even in modern times . . . the ability of a person in Michael's posi-

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125. *See supra* note 20 and accompanying text.

126. *See* 109 S. Ct. at 2336-46 (Scalia, J., plurality opinion); *id.* at 2346-47 (O'Connor, J., concurring in part); *id.* at 2347-49 (Stevens, J., concurring in the judgment); *id.* at 2349-60 (Brennan, J., dissenting); *id.* at 2360-63 (White, J., dissenting).

127. *Id.* at 2342 (Scalia, J., plurality opinion).

128. *Id.*

tion to claim paternity has not been generally acknowledged."[129] In Justice Scalia's view, even if a right to establish paternity *per se* had been generally recognized, such a right would be insufficient to establish Michael's claim. Instead, Michael H. would have to show that a person in his position has traditionally been granted *parental rights*—rights to participate in and control in part the upbringing of the child. Noting that "not a single case, old or new" has granted parental rights to a person in Michael's position, the plurality concluded that "[t]his is not the stuff of which fundamental rights qualifying as liberty interests are made."[130]

Scalia also bolstered his argument by attacking the bipolar analysis that characterizes interventionist jurisprudence.

> It seems to us that [Justice Brennan's analysis] reflects the erroneous view that there is only one side to this controversy—that one disposition can expand a "liberty" of sorts without contracting an equivalent "liberty" on the other side. Such a happy choice is rarely available. Here, to *provide* protection to an adulterous natural father is to *deny* protection to a marital father, and vice versa. . . . One of them will pay a price . . . Michael by being unable to act as father of the child . . . or Gerald by being unable to preserve the integrity of [his] traditional family unit . . . .[131]

Justices Brennan, White, Marshall and Blackmun dissented.[132] Speaking for himself, Marshall and Blackmun, Brennan defended interventionist jurisprudence and delivered an impassioned attack on the plurality's approach to the definition of fundamental rights. He argued that Justice Scalia's analysis would render substantive due process redundant with the political process and accused the plurality of viewing the Constitution as "a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past" rather than a "living charter."[133] In defining fundamental rights, Justice Brennan argued that the Court should focus on general categories of liberty such as marriage, childbearing, and freedom from physical restraint and implied that Michael H.'s interest would be

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129. *Id.* at 2343.

130. *Id.* at 2344.

131. *Id.* at 2345 (emphasis in original).

132. *Id.* at 2349-59 (Brennan, J., dissenting, joined by Marshall, and Blackmun, JJ.); *id.* at 2360-63 (White, J., dissenting).

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

substantively protected under this analysis.[134] The essence of Brennan's conclusion is derived from his concept of pluralism. Characterizing Scalia's approach as resting on a "pinched conception of 'the family,' "[135] Brennan saw Michael's constitutional claim as a vindication of the view that

> [w]e 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 repellant practice because the same tolerant impulse protects our own idiosyncracies. Even if we can agree . . . 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 . . . In a community such as ours, "liberty" must include the freedom not to conform. The plurality today squashes this freedom . . . .[136]

Justice Brennan also took particular exception to Scalia's attack on the premises of bipolar analysis. Analyzing the case as a procedural due process problem,[137] Brennan argued:

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134. *Id.* at 2349-54.

135. *Id.* at 2353.

136. *Id.* at 2351.

137. Even if Brennan is technically correct on this point, analysis of the procedural claim requires a preliminary determination that can only be characterized as substantive in nature. As a precondition to maintenance of a procedural due process argument, a claimant must demonstrate that he has been deprived of a constitutionally recognized "liberty" or "property" interest. This interest may be established in one of two ways. First, state law may create the requisite interest. *See e.g.*, Wolff v. McDonald, 418 U.S. 539 (1974) (good time credits for inmates). Second, the state may be *required* to recognize the interest by the Constitution itself. *See e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982) (the right of a biological parent to raise their child).

While Justices Stevens and White apparently relied only on constitutional arguments to establish the existence of a liberty interest, Justice Brennan argues that the liberty interest was also created by California law itself. He contends that "the State has . . . made paternity the predominant concern in child-custody disputes and then told [Michael H.] that [he] may not prove . . . paternity." 109 S. Ct. at 2357 n.9 (Brennan, J., dissenting). This argument mischaracterizes California law. With respect to children born to married women, the state has not made paternity "the predominant concern." Instead, the husband of the mother is generally given custody, *whatever* the actual paternity of the child. The husband is also given the right to escape the obligations appurtenant to custody if he can prove that he is not in fact the natural father; similarly, the mother is given the right to demonstrate that someone other than her husband is the biological father if she wishes to obtain additional financial support. *See supra* note 119 and accompanying text. By contrast, unless supported by one of the marital partners, persons outside the marriage are given no substantive rights at all on these questions. Therefore California law cannot be said to provide Michael H. with the liberty interest requisite to maintaining a procedural due process claim.

The only other possibility is that the fourteenth amendment itself requires states to recognize the right to establish paternity as a liberty interest. But by its nature, the question of whether a particular interest rises to the level of constitutionally protected

> [The plurality] suggests that if Carole or Gerald alone wished to raise Victoria, or if both were dead and the State wished to raise her, Michael and Victoria might be found to have a liberty interest in their relationship with each other. But that would be to say that whether Michael and Victoria have a liberty interest varies with the State's interest in . . . protecting the marital family—and not Michael and Victoria's interest in their relationship with each other—that varies with the status of Carole and Gerald's relationship.[138]

Justice Brennan's refusal to consider the husband's interests separately from those of the state is required by the tenets of bipolar analysis. His reliance on this argument therefore simply exposes the more general weakness of the bipolar approach.

a. Comparing the different interests and rights. Once again, it is important to recognize precisely what is at stake in the case. The question is not whether Michael will in fact maintain some sort of relationship with Victoria. The issue is whether Michael will have a *legally enforceable right* to maintain the relationship or whether the right to decide whether he will have such a relationship will be vested in Carole and her husband, Gerald. As do all states, California begins with the presumption that the right to make the decision rests with the mother and her husband at the time of the birth.

One might take the position that the husband's rights and obligations toward Carole's children should be irrevocable. After all, the husband must have been aware of at least the theoretical possibility of adultery when he entered into the marriage contract, and there is a good deal to be said for the policy of protecting the children by clearly placing responsibility for their well-being on the mother's legal mate. But California law takes a different approach, allowing for dissolution of the husband's legal relationship with his wife's children in certain circumstances.

First, if the husband conclusively demonstrates through blood tests that he is not the biological father of the child, he is released from his responsibilities toward the child.[139] Granting the husband this opportunity is entirely consistent with his posi-

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liberty is one of substantive constitutional law; the issue is whether the interest in question is entitled to any protection at all, rather than whether procedures for determining the existence of the issue in a particular case are adequate. Thus, any discussion of procedural due process in *Michael H.* must first deal with a substantive issue of constitutional law.

138. 109 S. Ct. at 2354 (footnote omitted).

139. *See supra* note 121 and accompanying text.

tion in the relationship. He is, after all, the wronged party; the legal burden of providing for the child is a product of the wife's breach of her contractual obligations regarding exclusivity of sexual relations. If the husband is willing to relinquish his right to direct the upbringing of the child, he therefore has a plausible claim to be free from legal obligation toward that child as well.

Second, California law also allows the wife to use blood tests to prove that some person other than the husband is the biological father, provided that the biological father has filed an affidavit acknowledging paternity.[140] This provision is more problematic than the grant of similar rights to the husband. After all, the wife can hardly be viewed as the wronged party, and in some circumstances the exercise of her prerogative may deprive the husband of his presumptive right to direct the upbringing of children born during the marriage. Nonetheless, the provision can be defended as a device to protect the children themselves; if the husband is dead or poor, an action by the wife may be the only way to obtain financial support from the person who bears half of the responsibility for creating the child. Further, given the assumption that the wife is going to bear half the responsibility for raising the child in any event, there is something to be said for allowing her to choose between two plausible candidates to share the responsibility. Whatever one thinks of the wisdom of allowing the wife to file a motion for blood tests, however, this right of the mother should not create parental rights in favor of the biological father. Allowing the mother the option to choose the biological father as the legal father falls far short of allowing the biological father to assume this legal relationship by himself in violation of the wishes of the mother and marital father at the time of birth.

Michael stands in an entirely different position from either the husband or wife. His claim derives from actions that were both criminal and a direct interference with the contractual relationship between Gerald and Carole. In essence, Michael seeks to gain a benefit from his wrongdoing—the legal right to participate in and direct the upbringing of the child who was the product of his relationship with Carole—at the expense of the interests of the wronged party, Gerald. Moreover, Michael argues that his entitlement to this benefit rises to the level of a constitutional right which by its nature must be stronger than the

140. *See id.*

combined interests of both Gerald and Carole in maintaining (as far as still possible) the rights and responsibilities inherent in their contractual relationship.

b. The bipolar betrayal of pluralism. Against this background, the flaws in Brennan's pluralism-based attack[141] on Justice Scalia's reasoning emerge clearly. Essentially, *Michael H.* involves a clash between the contractually-derived interest of Gerald and the biologically-related interests of Michael. Scalia's analysis would not require states to give priority to the contractually-related interests; instead he would leave different states free to adhere to any combination of biological and contractual interests in deciding disputes over parental rights. In contrast, Brennan's approach would impose nationwide uniformity. Brennan would effectively *require* states to recognize a biologically-based view of parental rights rather than one relying on an approach rooted in the contractual obligations of marriage. Thus, it is the noninterventionist Scalia rather than the interventionist Brennan who best honors the pluralistic ideal.

Moreover, even if one focuses only on the specific individuals involved, Scalia's rejection of the constitutional challenge is more consistent with basic pluralist theory. By allowing states to give contractual interests priority over biological interests, he gives sexual partners such as Gerald and Carole a choice in organizing their relationship; they can either remain unmarried, leaving the rights and responsibilities for Carole's future children to be determined by biological factors, or marry, creating a strong presumption that Gerald will have the parental rights over all such children and financial responsibility for their support. Under Brennan's approach, they are denied the latter choice. While Gerald and Carole would remain free to marry, Gerald's contractual rights relating to Carole's children could be undermined by any future biologically-related father. Once again, the bipolar interventionist analysis leads to a conclusion that is clearly inimical to the basic ideal of pluralism.

In short, *Michael H.* stands as perhaps the most impressive example of the basic weakness of bipolar analysis. Justice Brennan's refusal to consider the inevitable impact of the decision on the rights of third parties almost inevitably skewed his evaluation of the constitutional calculus in favor of interventionism. By contrast, Justice Scalia's rejection of the bipolar approach al-

141. *See supra* notes 135-36 and accompanying text.

lowed a more realistic assessment of the various interests at stake.

IV. CONCLUSION

As demonstrated by its application in the family law context, bipolar analysis is inherently flawed because it ignores significant interests and rights of third parties. The unsoundness of the bipolar approach has important implications for the more general debate over the desirability of interventionism as a constitutional philosophy. One of the most important tenets of interventionist ideology is the contention that the judiciary should protect the interests of those whose position or views place them in opposition to those of the bulk of society. The bipolar approach bolsters this argument by characterizing issues as conflicts between the rights of individuals and the power of the government. Accepting this premise, it is easy to characterize interventionism as an instrument to ensure "toleration" of nontraditional views and lifestyles.[142] But cases such as *Moore*, *Michael H.*, and the intestate succession cases dramatically illustrate that intervention in favor of the minority viewpoint will often thwart the expectations of those who seek to obtain the advantages normally derived from more standard lifestyles. From this perspective, interventionism can be justified only if one accepts the view that the Constitution is not only protective of nonconforming individuals, but also *actively hostile* to more traditional forms. Obviously, this view is much more difficult to defend than the standard appeals to toleration. Thus, in a very real sense, the failure of bipolar analysis is also the failure of interventionist theory generally.

142. *E.g.*, D. RICHARDS, TOLERATION AND THE CONSTITUTION 255-82 (1986).