



J.R. v. Utah

United States District Court for the District of Utah, Central Division

April 15, 2003, Decided ; April 15, 2003, Filed

Civil No. 2:02-CV-0195J

Reporter

261 F. Supp. 2d 1268 *; 2003 U.S. Dist. LEXIS 7785 **

J.R., M.R. and W.K.J., Plaintiffs, vs. THE STATE OF UTAH, a governmental entity; MICHAEL LEAVITT, Governor of the State of Utah; MARK HURTLEFF, Attorney General of the State of Utah; and BARRY NANGLE, Director, Office of Vital Records and Statistics, Center for Health Data, Utah Department of Health, Defendants.

Disposition: The plaintiffs' motion for summary judgment was GRANTED IN PART and DENIED N PART. Certain of the plaintiffs' claims were DISMISSED WITHOUT PREJUDICE for want of an existing case or controversy; and the defendants' motion for summary judgment was DENIED.

Core Terms

genetic, surrogacy, procreate, gestational, parental rights, birth, fundamental rights, biological, child born, best interests of the child, biological parent, custody, parent-child, legal purpose, birth mother, surrogate mother, parentage, twin, conclusive effect, terminate, conceive, narrow construction, biological mother, liberty interest, own child, narrowly, privacy, woman, birth certificate, tailor

Case Summary

Procedural Posture

Plaintiff husband and wife (couple) and woman sued defendant State and State officials (collectively, State), seeking declaratory and injunctive relief, nominal monetary damages, and attorney's fees in connection with an alleged

violation of the couple's and woman's federal and state constitutional rights resulting from the State's compliance with [Utah Code Ann. § 76-7-204](#) (1999). The couple and woman moved for summary judgment.

Overview

The couple entered into a written agreement with the woman, in which the woman agreed to serve as a gestational carrier surrogate for a child to be conceived in vitro by the couple. The woman agreed to carry the implanted embryo through delivery, to have the couple's names entered on the birth certificate as the parents of the child, and to voluntarily surrender and waive all custody rights to the couple immediately upon the child's birth. The woman gave birth to twins. The court concluded that there was no genuine issue of material fact that the couple were the genetic/biological mother and father of the twins. The couple thus had a parent-child relationship with the twins to which their fundamental constitutionally protected liberty interests applied. [Utah Code Ann. § 76-7-204\(3\)\(a\)](#) unduly burdened the couple's fundamental liberty interests to the extent it conclusively deemed the woman to be the mother of the children for legal purposes, to the exclusion of the couple's rights to conceive and raise children without unwarranted governmental interference. By conclusively presuming the woman to be the mother, [§ 76-7-204\(3\)\(a\)](#) overstepped constitutional limits on legislative power.

Outcome

The motion for summary judgment was granted as to the constitutionality of one provision of the Utah statute at issue as applied to the couple. The motion was otherwise denied.

LexisNexis® Headnotes

Constitutional Law > Substantive Due Process > Scope

Healthcare Law > Medical Treatment > Failures & Refusals to Treat > General Overview

Constitutional Law > Bill of Rights > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview

Constitutional Law > Substantive Due Process > Privacy > General Overview

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Healthcare Law > Medical Treatment > End-of-Life Decisions > General Overview

Healthcare Law > Medical Treatment > Abortion > Right to Privacy

Healthcare Law > Medical Treatment > End-of-Life Decisions > Lifesaving Treatment

Healthcare Law > Medical Treatment > Patient Consent > Right to Refuse Treatment

HN1 Constitutional Law, Substantive Due Process

The United States Supreme Court has held that, in addition to the specific freedoms protected by the [Bill of Rights](#), the "liberty" specially protected by the Due Process Clause includes the rights to

marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion. The Supreme Court has also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. The Supreme Court has recognized on numerous occasions that the relationship between parent and child is constitutionally protected.

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN2 Substantive Due Process, Privacy

There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned.

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN3 Substantive Due Process, Privacy

The interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty protected by the [Fourteenth Amendment](#).

Constitutional Law > Substantive Due Process > Privacy > General Overview

Family Law > Parental Duties & Rights > Duties > Care & Control of Children

HN4 Substantive Due Process, Privacy

The Utah Supreme Court has defined the constitutional right of parents in expansive terms: the ideals of individual liberty which protect the

sanctity of one's home and family are essential in a free society. A parent has a fundamental right, protected by the Constitution, to sustain his relationship with his child. It is fundamental to the supreme court's jurisprudence that the custody, care and nurture of the child reside first in the parents, and that the parents' right to direct the upbringing and education of children under their control is protected by the Constitution. The United States Supreme Court included family relationships in the liberty of which a state cannot deprive any person without due process of law under the [Fourteenth Amendment to the United States Constitution](#).

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

Torts > Business Torts > Trade Libel > General
Overview

Constitutional Law > Bill of
Rights > Fundamental Rights > Unenumerated
Rights

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Constitutional Law > Substantive Due
Process > Scope

Constitutional Law > State Constitutional
Operation

[HN5](#) Privacy, Personal Decisions

The Constitution of Utah declares that frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government. [Utah Const. art. I, § 27](#). The cornerstone of democratic government is the conviction that governments exist at the sufferance of the people, in whom all political power is inherent. [Utah Const. art. I, § 2](#). A residuum of liberty reposes in the people. That liberty is not limited to the exercise of rights specifically enumerated in either the United States or the Utah

Constitutions. Thus, [Article I, § 25, of the Utah Constitution](#) states that this enumeration of rights shall not be construed to impair or deny others retained by the people. The [Ninth Amendment to the United States Constitution](#) states that the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. The rights inherent in family relationships-husband-wife, parent-child, and sibling-are the most obvious examples of rights retained by the people. They are natural, intrinsic, or prior in the sense that the United States and Utah Constitutions presuppose them, as they presuppose the right to own and dispose of property. The most universal relation in nature is that between parent and child.

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

Family Law > Parental Duties &
Rights > Duties > Care & Control of Children

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Family Law > Child Custody > General
Overview

[HN6](#) Privacy, Personal Decisions

The Utah Supreme Court views the right of a parent to maintain the relationship with a child as axiomatic: The integrity of the family and the parents' inherent right and authority to rear their own children have been recognized as fundamental axioms of Anglo-American culture, presupposed by all social, political, and legal institutions. This parental right transcends all property and economic rights. It is rooted not in state or federal statutory or constitutional law, to which it is logically and chronologically prior, but in nature and human instinct. Thus, the United States Supreme Court has declared that the liberty interest in family privacy has its source in intrinsic human rights. The parent's

right, as well as duty, to care for a child may be termed natural, as well as legal and moral. The Utah Supreme Court has spoken of the natural right and authority of the parent to the child's custody and of the prior and fundamental right of a parent to rear his child.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN7 Substantive Due Process, Privacy

The rights embodied in family relationships are inherent, natural, and retained rights, fundamental in nature, and the integrity of the family unit has found protection in the [Due Process Clause of the Fourteenth Amendment](#), the [Equal Protection Clause of the Fourteenth Amendment](#), and the [Ninth Amendment](#).

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

Constitutional Law > Supremacy Clause > General Overview

HN8 Federal & State Interrelationships, Abstention

Where an act of the legislature comes into conflict with the command of the United States Constitution or the constitution of the state of its enactment, there is no question as to the outcome: the statute fails and the constitution prevails. The more difficult question arises in trying to define the nature and extent of the conflict, if indeed a conflict between statute and constitution exists at all.

Constitutional Law > Substantive Due

Process > Privacy > General Overview

HN9 Substantive Due Process, Privacy

In the context of reproductive or procreative choice, a state law which imposes an undue burden on the woman's decision concerning procreative matters is unconstitutional. An undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking to make procreative choices. Where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Criminal Abortion > General Overview

Healthcare Law > Medical Treatment > Abortion > Right to Privacy

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN10 Equal Protection, Nature & Scope of Protection

To give effect to the [Fourteenth Amendment's](#) guarantee of the equal protection of the laws, the United States Constitution's protection of procreative choice must be at least as vigorous when a woman decides to give birth to a child as when she decides not to do so. U.S. Const. amend. XIV, § 1. A state-imposed burden on affirmative procreative choice must therefore withstand the same degree of scrutiny as a state-imposed burden on the choice to seek an abortion.

Family Law > Paternity &
Surrogacy > Surrogacy > General Overview

complained of-the injury has to be fairly traceable
to the challenged action of the defendant.

Family Law > Paternity & Surrogacy > General
Overview

Family Law > Paternity & Surrogacy > General
Overview

HN11 Paternity & Surrogacy, Surrogacy

The Utah surrogacy statute, [Utah Code Ann. § 76-7-204](#) (1999), does not prohibit use of gestational surrogacy as a procreative method, or deny persons access to that medical technology.

HN14 Family Law, Paternity & Surrogacy

See [Utah Code Ann. § 76-7-204\(3\)\(a\)](#).

Family Law > Paternity &
Surrogacy > Surrogacy > Agreements

Governments > Legislation > Interpretation

Family Law > Paternity & Surrogacy > General
Overview

HN15 Legislation, Interpretation

Family Law > Paternity &
Surrogacy > Surrogacy > General Overview

Federal courts have the power to adopt narrowing constructions of federal legislation. Indeed, the federal courts have the duty to avoid constitutional difficulties by doing so if such a construction is fairly possible. To some extent, this duty extends to state statutes as well.

HN12 Surrogacy, Agreements

[Utah Code Ann. § 76-7-204\(2\)](#) declares surrogacy agreements to be unenforceable even when not made for profit or gain as proscribed by [§ 76-7-204\(1\)](#).

Governments > Legislation > Interpretation

HN16 Legislation, Interpretation

Civil
Procedure > ... > Justiciability > Standing > Inj
ury in Fact

A federal court must uphold a statute if it is readily susceptible to a narrowing construction that would make it constitutional. The key to application of this principle is that the statute must be readily susceptible to the limitation; the court will not rewrite a state law to conform it to constitutional requirements. Even the United States Supreme Court is without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent.

Civil
Procedure > ... > Justiciability > Standing > Ge
neral Overview

HN13 Standing, Injury in Fact

To have standing, the plaintiff must have suffered an injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct

Governments > Legislation > Interpretation

Healthcare Law > ... > Reproductive
Services > Reproductive
Technology > Artificial Insemination

Healthcare Law > Medical Treatment > General

Overview

HN17 Legislation, Interpretation

A narrowing construction of a statute must be rejected if it conflicts with the statutory language.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Family Law > Paternity & Surrogacy > Surrogacy > General Overview

Family Law > Paternity & Surrogacy > General Overview

HN18 Substantive Due Process, Privacy

In the context of gestational surrogacy, [Utah Code Ann. § 76-7-204\(3\)](#) serves as an irrebuttable presumption often contrary to fact, lacking critical ingredients of due process.

Family Law > Child Custody > Custody Awards > General Overview

Family Law > Guardians > General Overview

HN19 Child Custody, Custody Awards

Some factors the court may consider in determining the child's best interests relate primarily to the child's feelings or special needs: the preference of the child; keeping siblings together; the relative strength of the child's bond with one or both of the prospective custodians; and, in appropriate cases, the general interest in continuing previously determined custody arrangements where the child is happy and well adjusted. Other factors relate primarily to the prospective custodians' character or status or to their capacity or willingness to function as parents: moral character and emotional stability; duration and depth of desire for custody; ability to provide personal rather than surrogate care; significant impairment of ability to function as a

parent through drug abuse, excessive drinking, or other cause; reasons for having relinquished custody in the past; religious compatibility with the child; kinship, including, in extraordinary circumstances, stepparent status; and financial condition. (These factors are not necessarily listed in order of importance.)

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Governments > Legislation > Interpretation

HN20 Presumptions, Rebuttal of Presumptions

A so-called presumption which cannot be rebutted by evidence is not a presumption but a rule of substantive law.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Family Law > Parental Duties & Rights > Nonmarital Children > General Overview

Family Law > Paternity & Surrogacy > General Overview

HN21 Substantive Due Process, Privacy

[Utah Code Ann. § 76-7-204\(3\)\(a\)](#) operates in every instance to abrogate the parental rights and interests of genetic/biological parents at the moment of their child's birth, without any prior opportunity for hearing on the merits of those rights and interests vis-a-vis the best interests of the child -- an obviously inappropriate result in any other context, even in dealing with children born out of wedlock.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

Family Law > Family Protection & Welfare > Children > General Overview

HN22 Substantive Due Process, Privacy

Under both the United States Constitution and the Utah Constitution, the legislature may not predetermine that the best interests of the child alone warrant the involuntary abrogation of parental rights where there has been no adjudication of a parent's unfitness, or a showing of abandonment or substantial neglect. That the child's welfare is the paramount consideration does not imply that the child's welfare is the sole consideration, to the exclusion of parental rights.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN23 Privacy, Personal Decisions

The parent-child relationship is a fact-one having legal significance and legal consequences, but a fact nonetheless. Parenthood is not brought into being by the operation of state or federal law. It arises from the conception and birth of children. Parenthood differs from, say, the privilege to form a corporation, or to distribute one's property by will, or to drive an automobile, because the parent-child relationship finds its source not in a legislative act, but in the facts of life itself. Childbirth makes parents of ordinary persons. The legislature does not. This parental right transcends all property and economic rights. It is rooted not in state or federal statutory or constitutional law, to which it is logically and chronologically prior, but in nature and human instinct. Thus, the United States Supreme Court has declared that the liberty interest in family privacy has its source in intrinsic

human rights.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Family Law > ... > Termination of Rights > Involuntary Termination > Best Interest of Child

Family Law > Parental Duties & Rights > Termination of Rights > General Overview

Family Law > ... > Termination of Rights > Involuntary Termination > General Overview

Family Law > ... > Termination of Rights > Involuntary Termination > Unfit Parents

HN24 Substantive Due Process, Privacy

The legislature cannot elect to end a parent's relationship with a child by substituting a finding of the child's best interest for a finding that a parent is unfit or incompetent as a basis for the involuntary termination of parental rights.

Family Law > ... > Custody Awards > Standards > Best Interests of Child

Family Law > Child Custody > Custody Awards > General Overview

HN25 Standards, Best Interests of Child

See [Utah Code Ann. § 76-7-204\(3\)\(b\)](#).

Constitutional Law > Substantive Due Process > Privacy > General Overview

Family Law > ... > Termination of Rights > Involuntary Termination > Procedure

Labor & Employment Law > Wrongful
Termination > Public Policy

HN26 Substantive Due Process, Privacy

States must provide the parents with fundamentally fair procedures protecting against improper termination of the parent-child relationship, including parent-child relationships between genetic/biological mothers and fathers and children born through gestational surrogacy. The state's concern for the best interests of the child, however compelling it may be, cannot sustain a legislative act that would summarily rewrite the facts of parenthood to suit legislative preferences as to matters of public policy.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Family Law > Paternity &
Surrogacy > Surrogacy > Agreements

Family Law > Paternity &
Surrogacy > Surrogacy > General Overview

HN27 Substantive Due Process, Privacy

Life is process, and this extraordinary process of human childbirth implicates the fundamental procreative rights of the birth mother as well as those of the mother and father whose best efforts at procreation have furnished the embryo.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Family Law > Paternity &
Surrogacy > Surrogacy > General Overview

Family Law > Paternity & Surrogacy > General
Overview

HN28 Substantive Due Process, Privacy

The blanket presumption of [Utah Code Ann. § 76-7-204\(3\)\(a\)](#) is not narrowly tailored to serve the state's compelling interests in safeguarding the best interests of the child and the health, safety and procreative interests of the surrogate mother.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Family Law > ... > Termination of
Rights > Involuntary Termination > Neglect

Family Law > Parental Duties &
Rights > Termination of Rights > General
Overview

HN29 Substantive Due Process, Privacy

The Utah Constitution recognizes and protects the inherent and retained right of a parent to maintain parental ties to his or her child under [Utah Const. art. I, §§ 7](#) and [25](#), and the United States Constitution recognizes and protects the same right under the [Ninth](#) and [Fourteenth Amendments](#). Under both Constitutions, a mother is entitled to a showing of unfitness, abandonment, or substantial neglect before her parental rights are terminated. [Utah Code Ann. § 76-7-204\(3\)\(a\)](#) requires no such showing on a fact-specific, case-by-case basis; it cannot be rebuffed by evidence of the genetic/biological fact of parenthood, and thus cannot satisfy the requirements of due process.

Family Law > Adoption > Adoption
Procedures > General Overview

Family Law > Paternity & Surrogacy > General
Overview

HN30 Adoption, Adoption Procedures

[Utah Code Ann. § 76-7-204\(4\)](#) provides that nothing in this section prohibits adoptions and adoption services that are in accordance with the laws of this state, at least implying that the parent-

child relationships presumed to exist under [§ 76-7-204\(3\)\(a\)](#) could be realigned in favor of the child's genetic/biological parents using the state's adoption procedure.

Family Law > Child
Custody > Jurisdiction > General Overview

[HN31](#) Child Custody, Jurisdiction

See Utah Code Ann. § 78-30-4.24 (2002).

Family Law > Paternity &
Surrogacy > Establishing Paternity > General
Overview

Family Law > Paternity & Surrogacy > General
Overview

[HN32](#) Paternity & Surrogacy, Establishing Paternity

See [Utah Code Ann. § 26-2-10\(1\)-\(4\)](#) (1998).

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

Constitutional Law > Substantive Due
Process > Privacy > General Overview

[HN33](#) Privacy, Personal Decisions

The fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as procreation, childrearing, marriage, and contraceptive choice, cases that embody the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government. Limitations on these fundamental rights are permissible only if they survive strict constitutional scrutiny -- that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary

and narrowly tailored to serve a compelling governmental interest.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Family Law > Paternity & Surrogacy > General
Overview

[HN34](#) Substantive Due Process, Privacy

The state may not close its eyes to the fact of a parental relationship simply because the parent happens to be a woman. This problem may be avoided, however, if [Utah Code Ann. § 76-7-204\(3\)\(a\)](#)'s parentage rule is not given any preclusive or conclusive effect.

Governments > Legislation > Interpretation

Governments > Legislation > Severability

[HN35](#) Legislation, Interpretation

The same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. If the language of a statute is not readily susceptible to a narrowing construction, but the unconstitutional language is severable from the remainder of the statute, that which is constitutional may stand while that which is unconstitutional will be rejected.

Governments > Legislation > Interpretation

Governments > Legislation > Severability

[HN36](#) Legislation, Interpretation

In order to determine whether partial invalidation of a state statute is appropriate, federal courts look to state law. Under Utah law, when reviewing the

construction of statutes, the general rule is that statutes, where possible, are to be construed so as to sustain their constitutionality. Accordingly, if a portion of the statute might be saved by severing the part that is unconstitutional, such should be done. In determining if an unconstitutional subsection is severable from its umbrella statute, the court looks to legislative intent. When the legislature's intent is not expressly stated, the court turns to the statute itself, and examines the remaining constitutional portion of the statute in relation to the stricken portion. Upon reviewing the statute as a whole and its operation absent the offending subsection, if the remainder of the statute is operable and still furthers the intended legislative purpose, the statute will be allowed to stand. The test fundamentally is whether the legislature would have passed the statute without the objectionable, i.e., the unconstitutional part. In Utah, then, the test is whether the legislature would have passed the statute without the objectionable part.

Governments > Legislation > Interpretation

HN37 Legislation, Interpretation

Frequently the courts are aided in the determination of legislative intent by the inclusion within a statute of a saving clause. But where there is no saving clause to aid the court's interpretation, the court must look to whether the statutory provisions are so dependent upon each other that the court should conclude the intention was that the statute be effective only in its entirety.

Constitutional Law > Equal
Protection > Parentage

Family Law > Paternity & Surrogacy > General
Overview

HN38 Equal Protection, Parentage

Utah Code Ann. § 76-7-204(1), (2), (3)(b) and (5)

provisions may stand alone.

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

Constitutional Law > Substantive Due
Process > Privacy > General Overview

HN39 Privacy, Personal Decisions

Even as it is called upon to consider new questions thrust upon it by the advent of new technology, the legislature, no less than the court, must keep the fundamental liberty interests of the people clearly in mind: The ideals of individual liberty which protect the sanctity of one's home and family are essential in a free society. To protect the individual in his constitutionally guaranteed right to form and preserve the family is one of the basic principles for which organized government is established.

Constitutional Law > Substantive Due
Process > Scope

HN40 Constitutional Law, Substantive Due Process

See Utah Const. art. I, § 27.

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Judges: BRUCE S. JENKINS, United States
Senior District Judge.

Opinion by: Bruce S. Jenkins

Opinion

[*1269] ORDER RE: MOTIONS FOR SUMMARY JUDGMENT

The plaintiffs, J.R., MR. and W.K.J., filed the instant action against the defendants under [42 U.S.C. § 1983 \(2000\)](#) on March 6, 2002, seeking declaratory and injunctive relief, nominal monetary damages and attorney's fees against the defendants arising from an alleged violation of plaintiffs' federal and state constitutional rights resulting from defendants' compliance with [Utah Code Ann. § 76-7-204](#) (1999), a Utah statute dealing with the validity and enforcement of contracts involving surrogate motherhood.

On May 7, 2002, plaintiffs filed a motion for summary judgment (dkt. no. 24); on September 5, 2002, after conducting limited discovery, the defendants filed a motion for summary judgment (dkt. no. 42), at the same time responding to plaintiffs' earlier motion. (Memorandum in Support **[**2]** of Defendants' Motion for Summary Judgment and m Opposition to Motion Filed by Plaintiffs, filed September 5, 2002 (dkt. no. 43) ("Defs' Mem.")) Plaintiffs filed a reply memorandum, together with exhibits (did. nos. 46-48).¹

[*1270] The motions were heard on September 17, 2002. Brian M. Barnard appeared on behalf of the plaintiffs; Philip C. **[**3]** Pugsley, Assistant Attorney General, appeared on behalf of the defendants. Having reviewed the memoranda, affidavits and exhibits submitted by the parties, and having heard the arguments of counsel, the court took the matter under advisement.

¹ Plaintiffs exhibits were separately filed under the case caption, but without the authenticating affidavits contemplated by [Fed. R. Civ. P. 56\(e\)](#). See, e.g., [T.J. Smith & Nephew, Ltd. v. Parke, Davis & Co., 623 F. Supp. 808, 813 \(D. Utah 1985\)](#); 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2722, at 382-84 & nn. 40-42 (3d ed. 1998). Absent objection by the defendants, and given the nature of the particular items submitted, this court has treated the plaintiffs' exhibits as authentic for the purposes of the pending summary judgment motions, but only for that purpose. See *id.* § 2722, at 384 & n. 43.

FACTUAL BACKGROUND

The facts in this case remain essentially undisputed.

M.R and J.R., husband and wife, are citizens of the State of Utah, as is W.K.J., an unmarried adult woman. Unable for medical reasons to have children on their own, J.R. and M.R., entered into a written agreement² with W.K.J. in February 1999 in which W.K.J. agreed to serve as a gestational carrier surrogate³ for a child to be conceived *in vitro* by J.R. and M.R. W.K.J. agreed to carry the implanted embryo through delivery, to have J.R. and M.R.'s names entered on the child's birth certificate as the parents of the child, and to "voluntarily surrender and waive all custody rights, if any, to the child's parents immediately upon birth of the child." (Agreement at 4 P 11.) To that end, W.K.J. agreed to "fully cooperate with any paternity/maternity proceedings or adoption proceedings necessary to establish parentage on behalf of the Intended Parents, **[**4]** " J.R. and M.R., and to "sign all affidavits and consents and attend any scheduled court hearing(s) either prior to or after the birth of the child to finalize the proceedings." (*Id.* at [2 Idaho 44, 3 P 10.](#))

In consideration for W.K.J.'s services as a gestational carrier surrogate,⁴ J.R. and M.R. agree to pay a list of various expenses, including legal fees, incurred by W.K.J. in connection with her

² See "TN VITRO/SURROGATE IMPLANTATION AGREEMENT," dated February 25, 1999 (the "Agreement"), annexed to Exhibit re: Surrogacy Agreement, filed September 16, 2002 (dkt. no. 47).

³ This nomenclature is suggested by Adam P. Plant, Commentary, *with a Little Help from My Friends: the Intersection of the Gestational Carrier Surrogacy Agreement, Legislative Inaction, and Medical Advancement*, [54 Ala. L. Rev. 639, 640-41](#) & n. 6 (2003)

⁴ W.K.J. made additional promises, from agreeing to "adhere to a healthy diet," to follow "all medical instructions given to her," to abstain from "dangerous sports or activities," smoking cigarettes, drinking alcohol, engaging in "any 'unsafe' sexual activity," or using illegal drugs, to submitting to medical and psychological evaluations and waiving confidentiality as to any reports or diagnoses. (Agreement at 2, 3.)

pregnancy and childbirth under the terms of the Agreement. (*Id.* at 2 P 5, [3 P 10](#), [4 P 11](#), 5 PP 14(A)-14(G).) ⁵ They **[**5]** also agree to "immediately accept custody and assume fixed legal responsibility for the child born to [W.K.J.] pursuant to this Agreement," (*Id.* at [65 Cal. 300](#), [4 P 11](#)), and promise to take the child as **[*1271]** is "recognizing that the child may have genetic or congenital abnormalities." (*Id.*)

[6]** Shortly after the making of the Agreement, viable embryos conceived *in vitro* using J.R.'s ova and M.R.'s sperm were implanted in W.K.J.'s uterus through a procedure performed in the State of California. ⁶ W.K.J. carried her pregnancy to term, giving birth to twin children in January, 2000, in Salt Lake County, State of Utah.

Notwithstanding the terms of the Agreement and the facts surrounding the plaintiffs' gestational surrogacy procedure, **[**7]** the Utah State Office of Vital Records and Statistics has declined plaintiffs' request that birth certificates be issued listing J.R. and M.R. as the parents of the two children. Instead, the existing birth certificates list

⁵ Curiously, both plaintiffs and defendants assert that "no contractual consideration was exchanged between W.K.J. and J.R. and M.R. as part of the Agreement." (Plaintiffs' Statement of Undisputed Facts re: Motion for Summary Judgment, filed May 7, 2002 (dkt. no. 26), at [5 Mont. 568](#), [6 P 20](#); accord, Complaint at 6 P 20; see Defs' Mem. at 8 ("Under the general rules of contract law, this agreement is not supported by consideration.")) The Court, on the other hand, finds itself at a loss to describe the parties' mutual exchange of promises in any other way--assuming that the parties intended their agreement to be binding. See, e.g., [Resource Management Co. v. Weston Ranch and Livestock Co., Inc.](#), [706 P.2d 1028](#), [1036](#) (Utah 1985) ("Consideration in an act or promise, bargained for and given in exchange for a promise."). Plaintiffs may simply be trying to plead within [Utah Code Ann. § 76-7-204\(2\)](#) (referring to "an agreement which is entered into, without consideration given").

⁶ By its express terms, the Agreement "will be governed and interpreted by California law" and all parties "specifically submit to the jurisdiction of the California courts in resolving any dispute." (Agreement at 7 P. 22.) It also incorporates an arbitration clause requiring that "any and all disputes relating to this Agreement or breach thereof shall be settled by arbitration in the State of Utah, in accordance with the then-current rules of the American Arbitration Association, . . ." (*Id.* at 7P 26.) These provisions appear to contradict each other.

W.K.J. as the mother and no one as the father. While defendant Nangle, acting as Director of that Office, has indicated that M.R. could be added to the certificates as father of the children based upon M.R. and W.K.J.'s acknowledgment, the Office would decline to remove W.K.J. and list J.R. as the mother of the children, at least "based solely on the written representations of W.K.J., M.R. and J.R. that J.R. is the biological mother of the children." (Plaintiffs' Statement of Facts at 8-9 PP 30-31.)

PLAINTIFFS' LEGAL THEORIES

Plaintiffs seek declaratory and injunctive relief (1) holding [Utah Code Ann. § 76-7-204](#) (1999) unconstitutional under the [Fourteenth Amendment to the United States Constitution](#) and [Article I](#), §§ 7 and [25](#) of the Utah Constitution; (2) forbidding compliance with or enforcement of [Utah Code Ann. § 76-7-204](#) by the defendant state officers; (3) validating the plaintiffs' "In Vitro/Surrogate Implantation Agreement"; and (4) requiring **[**8]** that the Utah Office of Vital Records and Statistics issue birth certificates for the plaintiffs' children "reciting that J.R. and M.R. are the parents of the children." (Complaint, filed March 6, 2002 (dkt. no. 1), at [7 Colo. 101](#), [2 P 1](#).)

[Utah Code Ann. § 76-7-204](#) (1999) reads:

76-7-204. Prohibition of surrogate parenthood agreements - Status of child - Basis of custody.

(1) (a) No person, agency, institution, or intermediary may be a party to a contract for profit or gain in which a woman agrees to undergo artificial insemination or other procedures and subsequently terminate her parental rights to a child born as a result.

(b) No person, agency, institution, or intermediary may facilitate a contract prohibited by Subsection (1). This section does not apply to medical care provided after conception.

(c) Contracts or agreements entered into in violation of this section are null and void, and unenforceable as contrary to public policy.

(d) A violation of this subsection is a class B misdemeanor.

(2) An agreement which is entered into, without consideration given, in which a woman agrees to undergo artificial insemination or other procedures and subsequently terminate **[**9]** her parental rights to a child born as a result, is unenforceable. **[*1272]**

(3) (a) In any case arising under Subsection (1) or (2), the surrogate mother is the mother of the child for all legal purposes, and her husband, if she is married, is the father of the child for all legal purposes.

(b) In any custody issue that may arise under Subsection (1) or (2), the court is not bound by any of the terms of the contract or agreement but shall make its custody decision based solely on the best interest of the child.

(4) Nothing in this section prohibits adoptions and adoption services that are in accordance with the laws of this state.

(5) This section applies to contracts or agreements that are entered into after April 24, 1989.

Plaintiffs J.R. and M.R. assert that the statute infringes upon their fundamental constitutional right to procreate by denying them the right to make an enforceable agreement to obtain the assistance of a third party in bearing children that J.R. is medically incapable of bearing on her own. If enforced according to its terms, plaintiffs argue, [Utah Code Ann. § 76-7-204](#) effectively leaves them childless, thereby denying their right to procreate altogether. **[**10]** Further, the statute "removes the possibility that a biological mother can become the legal parent of children produced through gestational surrogacy" because it conclusively presumes the surrogate mother to be the legal

parent of the child. (Memorandum in Support of Plaintiffs' Motion for Summary Judgment, filed May 7, 2002 (dkt. no. 25) ("Plts' Mem."), at 23.) This presumption also denies equal protection to J.R., plaintiffs assert, because under Utah law and administrative practice, the genetic/biological father of a child born to an unmarried gestational surrogate may be listed as the father on the child's birth certificate, while the genetic/biological mother may not. (25 *Id.* at 18-22.)

The Constitutional Right to Procreate

Counsel points to language in a series of United States Supreme Court cases indicating that "an individual's right to procreate and produce a family is well established in our nation's history and traditions," and that the right to procreate represents "a basic liberty," "one of the basic civil rights of man. . . fundamental to the very existence and survival of the race." (Plts' Mem. at 4, 5 (quoting [Skinner v. Oklahoma ex rel. Williamson](#), 316 U.S. 535 at 541, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942)).) **[**11]**

Moreover, the Supreme Court has explicitly recognized that the fundamental right of privacy protected under the [Due Process Clause](#) encompasses individual decisions regarding procreation, marriage and parentage. [Carey v. Population Svcs. Int'l](#), 431 U.S. 678, 684-85, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977). The *Carey* Court stated that "it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Id.* (internal quotations and citations omitted) (citing [Skinner](#), 316 U.S. at 541-42). Of all these personal choices, "decisions whether to accomplish or to prevent conception are among the most private and sensitive." [431 U.S. at 685](#). Thus, the decision to procreate "is at the very heart of this cluster of constitutionally protected choices" *Id.* see also

[*Eisenstadt v. Baird*, 405 U.S. 438, 453, 31 L. Ed. 2d 349, 92 S. Ct. 1029 \(1972\)](#) ("if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental **[**12]** intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); [*Glucksberg*, **\[*1273\]** 521 U.S. 702, 720](#) ("[T]he 'liberty' specially protected by the *Due Process Clause* includes the rights to marry, to have children, to direct the education and upbringing of one's children, [and] to marital privacy." (internal citations omitted)).

(*Id.* at 5.) The right to procreate, plaintiffs maintain, "is inextricably linked to the right to assume the role of parent to the procreated children." (*Id.* at 6.) They point to cases such as [*Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 \(1972\)](#), vindicating an unwed father's fundamental interest in the care and custody of his three children, and [*Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 53 L. Ed. 2d 14, 97 S. Ct. 2094 \(1977\)](#), acknowledging the historical importance of biological relationships to the concept of family.⁷ (*Id.*)

[13]** Plaintiffs also rely on the Utah Supreme Court's declaration that "the Utah Constitution recognizes and protects the inherent and retained right of a parent to maintain parental ties to his or her child under [Article I, § 7](#) and [§ 25](#)." [*In re J.P.*, 648 P.2d 1364, 1377 \(Utah 1982\)](#). Striking down a Utah law allowing the state to terminate a mother's parental rights involuntarily without a first establishing that she was unfit, the *In re J.P.* court reaffirmed the right to procreate as one of the "rights inherent in family relationships. . . which are the most obvious examples of rights retained by the people. They are 'natural,' 'intrinsic,' or 'prior' in

the sense that our Constitutions presuppose them." [*Id.* at 1373](#).

Gestational Surrogacy & the Right to Procreate

J.R. and M.R. assert that "[b]y engaging in the process of gestational surrogacy to produce their own child, J.R. and her husband, M.R. have exercised their fundamental right to procreate." (Reply & Response Memorandum in Support of Plaintiffs' Motion for Summary Judgment, filed September 16, 2002 (dkt. no. 46) ("Pltfs' Reply/Resp. Mem."), at 8.) They argue that [*Utah Code Ann. § **\[**14\]** 76-7-204*](#) unduly burdens the exercise of their right to procreate by declaring surrogacy contracts to be unenforceable. This attempt to limit access to this procreative means may be justified only by compelling state interests. In *Carey*, for example, a state law restricting access to contraceptives was held to limit the exercise of the right to decide *not* to procreate, and did not survive strict scrutiny. [*Carey v. Population Services International*, 431 U.S. 678, 686-91, 52 L. Ed. 2d 675, 97 S. Ct. 2010 \(1977\)](#). Likewise, plaintiffs insist, Utah's surrogacy statute limits these plaintiffs' access to medical technology that enables them to exercise their right to decide to procreate-to have children and a family-and it must therefore undergo strict scrutiny as well. (Pltfs' Mem. at 8-16.) "The State has no justifiable interest in preventing infertile couples from procreating through the gestational surrogacy process" absent some profit motive or actual monetary gain, and the State cannot justify the burden imposed upon the exercise of plaintiffs' rights by [*Utah Code Ann. § 76-7-204*](#) on public policy grounds; plaintiffs submit that the statute should be held **[**15]** unconstitutional under both the federal and Utah constitutions. ([*Id.* at 16-18](#).)

[*1274] J.R. and M.R. aver that gestational surrogacy represents their only opportunity to "bear or beget a child" that would truly be *theirs*, a true genetic and biological child of the marriage. Absent gestational surrogacy, their marriage would remain childless. Their singular opportunity to procreate

⁷"The usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element. [*Stanley v. Illinois*, 405 U.S. 645 at 651, 31 L. Ed. 2d 551, 92 S. Ct. 1208 \(1972\)](#), for example, spoke of 'the rights to conceive and to raise one's children' as essential rights,..." [*Smith*, 431 U.S. at 843](#).

through gestational surrogacy necessarily implicates their fundamental right to bear children, thereby invoking the protections of the United States Constitution and the Utah Constitution. See Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, [113 Harv.L.Rev. 835, 856 \(2000\)](#) ("[A] complete state ban on access to reproductive technology thus would also be constitutionally suspect, as it would deprive the infertile of their only chance at genetic parenthood." (footnote omitted)).

On the same basis, Plaintiffs also challenge [§ 76-7-204\(3\)\(a\)](#)'s presumption that "the surrogate mother is the mother of the child for all legal purposes, and her husband, if she is married, is the father of the child for all legal purposes. **[**16]** " If this presumption is given conclusive effect, the statute frustrates JR. and M.R.'s exercise of their right to procreate through gestational surrogacy by denying them legal parenthood of children who are unquestionably their own. Plaintiffs also contend that [§ 76-7-204\(3\)\(a\)](#) infringes on W.K.J.'s fundamental right to make procreative decisions by "forc[ing] legal parenthood on her against her will." (Pltfs' Mem. at 14-1 5.) By creating a statutory presumption that a surrogate is the mother of children born to her, "[un]effect, the State has declared, against W.K.J.'s own wishes, that W.K.J. has engaged in procreation although the children are not W.K.J.'s genetic or intended children." (*Id.* at 15.) See *Soos v. Superior Court*, [182 Ariz. 470, 897 P.2d 1356, 1361 \(Ct. App. 1994\)](#) (Gerber, J., concurring) (a surrogate's "contract is to carry the child, not to nurture or raise it.").

Beyond that, the plaintiffs challenge the State's existing administrative recordkeeping scheme, under which the genetic biological father's name may be placed upon the birth certificates of a child born to a gestational carrier surrogate (if the surrogate mother is unmarried), **[**17]** but the genetic/biological mother's name cannot. This disparity, they assert, operates to deny the genetic/biological mother the equal protection of

the laws guaranteed by the [Fourteenth Amendment](#). (*Id.* at 18-22.) The court in *Soos* reached essentially the same conclusion in striking down a similar disparity on equal protection grounds: "By affording the Father a procedure for proving paternity, but not affording the Mother any means by which to prove maternity, the State has denied her equal protection of the laws." [897 P.2d at 1361](#).

Defendants' Response

Counsel for the defendants acknowledges that "the ability to procreate and decisions between a man and wife relating thereto have been considered to be a fundamental right under the [Due Process Clause of the United States Constitution](#), and that "if privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (Defs' Mem. at 9 (quoting [Eisenstadt v. Baird](#), [405 U.S. 438, 453, 31 L. Ed. 2d 349, 92 S. Ct. 1029 \(1972\)](#))). Counsel **[**18]** argues that [§ 76-7-204](#) does not infringe upon J.R. and M.R.'s fundamental right to procreate because that right has not yet been extended to embrace gestational surrogacy: "the Supreme Court has not extended the fundamental right to procreate to encompass the type of reproductive technology involved in this case," (*id.* at 9), and cases **[*1275]** such as the *Baby M* case do not extend that right to cover surrogacy arrangements. (*Id.* at 4-7, 9-12.) See *In re Baby M*, [109 N.J. 396, 537 A.2d 1227, 1253, 77 A.L.R. 4th 1 \(1988\)](#) ("The right to procreate very simply is the right to have natural children, whether through sexual intercourse or artificial insemination," and does not include the custody, care, companionship and nurturing that follow birth).)

Defendants submit that state legislation such as this should not be struck down unless the finding of unconstitutionality proves to be "strictly unavoidable," (*id.* at 3), and that given appropriate deference, the Utah surrogacy statute should be

upheld as against plaintiffs' facial or "as applied" constitutional challenge. (*Id.* at 4.) The statute serves legitimate state interests in the protection of the health **[**19]** and well-being of surrogate mothers and the children born to them, and in avoiding the commercialization of childbirth: "'as overwhelmingly repugnant as the thought may be, unbridled surrogacy for profit could encourage the treatment of babies as commodities.'" (*Id.* at 13-20 (quoting *Doe v. Attorney General*, 194 Mich. App. 432, 487 N.W.2d 484, 486 (1992).)

Defense counsel contends that Utah's surrogacy statute addresses questions of public policy well suited to determination by the Legislature. (*Id.* at 4-7; see *Johnson v. Calvert*, 5 Cal. 4th 84, 97, 851 P.2d 776 (1993) ("we are all too aware that the proper forum for resolution of this issue is the legislature, where empirical data, largely lacking from this record, can be studied and rules of general applicability developed.")) The "time and research required to study and resolve a complicated social issue such as surrogacy are available to a legislative body," where "'fact finding can be less confined and the viewpoints of all interested institutions and disciplines can be presented and synthesized. In this manner only can the subject be dealt with comprehensively and the interests of all **[**20]** institutions and individuals be properly accommodated.'" (*Id.* at 5 (quoting *Calvert*, 5 Cal. 4th at 102, 851 P.2d at 788 (Arabian, J., concurring) (quoting *Satz v. Perlmutter*, 379 So. 2d 359, 360 (Fla. 1980)).) The Utah surrogacy statute "was passed after due deliberation and study by the Legislature," and "ra] legislative decision having been made in Utah, it should be respected. Thus, in this case, the court should defer to the will of the people because it is reasonable," and deciding otherwise would infringe on the prerogatives of the legislative branch. (*Id.* at 6, 7.) ⁸ **[**23]**

Defense counsel also asserts that the constitutional questions raised by plaintiffs need not even be decided in this case because the result sought by plaintiffs—full legal recognition of J.R. and M.R. as the parents and guardians of their children and the issuance of conforming birth certificates—may be achieved through Utah adoption proceedings without running afoul of the provisions of the surrogacy statute. (*Id.* at 7-8; see *Utah Code Ann. § 76-7-204(4)* ("Nothing in this section prohibits adoptions and adoption services that are in accordance with the laws **[**21]** of this state."); Utah Code Ann. §§ 78-30-i through 78-30-19 (2002).)

GESTATIONAL SURROGACY & PLAINTIFFS' CONSTITUTIONAL RIGHTS

While the United States Supreme Court has not yet addressed gestational surrogacy as a constitutional matter, the Court's more recent enumeration of "certain fundamental **[*1276]** rights and liberty interests" counsels a broader reading of those rights and interests than the defendants now suggest:

In a long line of cases, *HN1* we have held that, in addition to the specific freedoms protected by the *Bill of Rights*, the "liberty" specially protected by the *Due Process Clause* includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 69 L. Ed. 1070, 45 S. Ct. 571 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965); **[**22]** to use contraception, *ibid*; *Eisenstadt v. Baird*, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 (1952), and to abortion, *Casey*, *supra*.

⁸ However, as Chief Justice Stone observed in *Skinner*, *HN2* "There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned...." 316 U.S. at 544 (Stone, C.J., concurring).

We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. Cruzan, 497 U.S., at 278-279.

Washington v. Glucksberg, 521 U.S. 702, 720, 138 L. Ed. 2d 772, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997). The Court has "recognized on numerous occasions that the relationship between parent and child is constitutionally protected." Quilloin v. Walcott, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 98 S. Ct. 549 (1978); accord, Santosky v. Kramer, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982) (describing the "fundamental liberty interest of natural parents in the care, custody, and management of their child").⁹

Moreover, HN4 the Utah Supreme Court has defined the "constitutional right of parents" in expansive terms:

This Court has recently declared that "the ideals of individual liberty which... protect the sanctity of one's home and family" are "essential in a free society... ." In re Castillo, Utah, 632 P.2d 855, 856 (1981). A parent has a "fundamental right, protected by the Constitution, to sustain his relationship with his child." State in re Walter B., Utah, 577 P.2d 119, 124 (1978) (plurality opinion). It is fundamental to our jurisprudence that "the custody, care and nurture of the child reside first in the parents," Prince v. Massachusetts, 321 U.S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 645 [**24] (1944), and that the parents' right "to direct the upbringing and education of children under their control," Pierce v. Society of Sisters, 268 U.S. 510, 534-35, 45 S. Ct. 571, 573-74, 69 L. Ed. 1070 (1925), is protected by

the Constitution. In Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042 (1923), the Supreme Court included family relationships in the "liberty" of which a state cannot deprive any person without due process of law under the Fourteenth Amendment to the United States Constitution.

In re J.P., 648 P.2d at 1372. Justice Oaks, writing for the Utah Supreme Court, emphasized the deep roots of parents' right to maintain their relationship with their children:

We deal here with a fundamental principle. HN5 The Constitution of Utah [*1277] declares, "Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." Article I, § 27. The cornerstone of democratic government is the conviction that governments exist at the sufferance of the people, in whom "(a)ll political power is inherent... ." Utah Const. Art. I, § 2. A residuum [**25] of liberty reposes in the people. That liberty is not limited to the exercise of rights specifically enumerated in either the United States or the Utah Constitutions. Thus, Article I, § 25 of the Utah Constitution states, "This enumeration of rights shall not be construed to impair or deny others retained by the people." The Ninth Amendment to the United States Constitution states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." See generally Griswold v. Connecticut, 381 U.S. 479, 486-99, 85 S. Ct. 1678, 1682-90, 14 L. Ed. 2d 510 (1965) (Goldberg, J., concurring); L. Tribe, American Constitutional Law, § 11-3 (1978).

The rights inherent in family relationships—husband-wife, parent-child, and sibling—are the most obvious examples of rights retained by the people. They are "natural," "intrinsic," or "prior" in the sense that our Constitutions

⁹In Santosky, even the dissenting Justices did not dispute the principle that HN3 "the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty protected by the Fourteenth Amendment." 455 U.S. at 774 (Rehnquist, White, O'Connor, JJ. & Burger, C.J., dissenting).

presuppose them, as they presuppose the right to own and dispose of property.... Blackstone deemed "the most universal relation in nature ... (to be) that between parent and child." 1 W. Blackstone, *Commentaries* * 446.

[**26] [648 P.2d at 1372-73](#). [HN6](#) The Utah Supreme Court views the right of a parent to maintain the relationship with a child as axiomatic: "The integrity of the family and the parents' inherent right and authority to rear their own children have been recognized as fundamental axioms of Anglo-American culture, presupposed by all our social, political, and legal institutions."

This parental right transcends all property and economic rights. It is rooted not in state or federal statutory or constitutional law, to which it is logically and chronologically prior, but in nature and human instinct. Thus, the United States Supreme Court has declared that "the liberty interest in family privacy has its source.. . in intrinsic human rights... ." [Smith v. Organization of Foster Families, 431 U.S. 816, 845, 97 S. Ct. 2094, 2110, 53 L. Ed. 2d 14 \(1977\)](#).... Similarly, this Court has stated that the parent's right, as well as duty, to care for a child "may be termed natural, as well as legal and moral." [Mill v. Brown, 31 Utah 473, 483, 88 P. 609, 613 \(1907\)](#). More recently, this Court has spoken of "the natural right and authority of the parent to the child's custody," [**27] [State in re Jennings, 20 Utah 2d 50 at 52, 432 P.2d 879, 880 \(1967\)](#), and of "the prior and fundamental right of a parent to rear his child. . . ." [In re Castillo, 632 P.2d at 856](#).

[648 P.2d at 1373-74](#) (some quotations & citations omitted). *In re J.P.* emphatically reaffirms that [HN7](#) "the rights embodied in family relationships are inherent, natural, and retained rights," fundamental in nature, and that "'the integrity of the family unit has found protection in the Due Process Clause of the [Fourteenth Amendment](#), the [Equal Protection Clause of the Fourteenth Amendment](#), and the [Ninth Amendment](#).'" [648 P.2d at 1374](#)

(quoting [Stanley v. Illinois, 405 U.S. at 651](#) (citations omitted)).

The question, then, is *not* one of "extending constitutional protection to an asserted right or liberty interest," or being "asked to break new ground in this field," [Glucksburg, 521 U.S. at 720](#), because the fundamental right to [**1278] bear and raise children within the context of a marriage is already clearly established. See, e.g., [Roska v. Peterson, 304 F.3d 982, 993-94 \(10th Cir. 2002\)](#) (constitutionally protected [**28] liberty interest in family relationship between parents and child is clearly established; infringement of that interest by removing child from parents' custody without a hearing constitutes a denial of due process for which qualified immunity was not available); [Carey v. Population Services International, 431 U.S. at 687](#) ("[T]he Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."); [Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-40, 39 L. Ed. 2d 52, 94 S. Ct. 791 \(1974\)](#) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the [Fourteenth Amendment](#)"); [State ex rel. M W., 2000 UT 79, 12 P.3d 80, 83 \(Utah 2000\)](#) ("The court of appeals correctly stated in its decision that 'the Utah Constitution and the United States Constitution "recognize[] and protect[] the inherent and retained right of a parent to maintain parental ties to his or her child.'" (citations omitted)); *Matter of Adoption of B.O.*, [927 P.2d 202, 207 \(Utah Ct. App. 1996\)](#) ("We agree. [**29] .. that 'a parent has a fundamental right to maintain a relationship with his or her child.' This right is by now well established by both United States and Utah precedent." (citations omitted)); [State in Interest of E.D. v. E.J.D., 876 P.2d 397, 400 n.5 \(Utah Ct. App. 1994\)](#) ("It is well established that the Utah Constitution and the United States Constitution ""[recognize] and [protect] the inherent right of a parent to maintain parental ties to his or her child.'" [State ex rel. P.H. v. Harrison, 783 P.2d 565, 569 \(Utah App. 1989\)](#) (quoting [In re J.P.](#), [648](#)

[P.2d 1364, 1377 \(Utah 1982\)](#)); accord *State ex rel. D.W. Illy. WM*, 856 P.2d 363, 367 (Utah App.1993).").

Rather, the question is whether the statute unduly burdens the exercise of that right in a fashion that demands a judicial remedy.

CONFLICT BETWEEN STATUTE AND CONSTITUTION

HN8 Where an act of the legislature comes into conflict with the command of the United States Constitution or the constitution of the state of its enactment, there is no question as to the outcome: the statute fails and the constitution prevails. See, e.g., *Younger v. Harris*, 401 U.S. 37, 52, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971) [****30**] ("[A] statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the *Supremacy Clause*, when such an application of the statute would conflict with the Constitution. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)."); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 732-33, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982) ("neither Congress nor a State can validate a law that denies the rights guaranteed by the *Fourteenth Amendment*.")

The more difficult question arises in trying to define the nature and extent of the conflict, if indeed a conflict between statute and constitution exists at all. See, e.g., *Connecticut v. Menillo*, 423 U.S. 9, 46 L. Ed. 2d 152, 96 S. Ct. 170 (1975)(no conflict between statute prohibiting abortions and *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973), as applied to attempted abortion by untrained and unlicensed practitioner).

HN9 In the context of reproductive or procreative choice, a state law "which imposes an undue burden on the woman's decision" concerning procreative matters "is unconstitutional. [****31**] ... An 'undue burden is... shorthand for the conclusion that a [***1279**] state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman" seeking to make procreative choices.

Stenberg v. Carhart, 530 U.S. 914, 921, 147 L. Ed. 2d 743, 120 S. Ct. 2597 (2000) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 877, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992) (plurality opinion)). ¹⁰ "Where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Carey*, 431 U.S. at 686. See *Edwards v. Valdez*, 789 F.2d 1477, 1483 (10th Cir. 1986) ("If a statute... infringes upon a fundamental right, it is subject to strict scrutiny and will be sustained only if it is precisely tailored to further a compelling state interest.").

[**32] Challenge to [Utah Code Ann. § 76-7-204](#) (1999)

HN11 The Utah surrogacy statute, [Utah Code Ann. § 76-7-204](#) (1999), does not prohibit use of gestational surrogacy as a procreative method, or deny persons access to that medical technology, in contrast to cases such as *Carey*, in which distribution of nonprescription contraceptives was limited to licensed pharmacists. *431 U.S. at 681-82*. It is uncontroverted that plaintiffs utilized this method to accomplish the birth of twin children, and to that extent, have effectively exercised their rights to procreate.

The question now facing this court is whether the Utah surrogacy statute unduly burdens J.R. and M.R. in the exercise of their procreative and parental rights by denying them the recognition and rights of legal parents to the care and custody of their children because the children were born

¹⁰ Both *Stenberg* and *Casey* examine procreative choice in the context of abortion procedures, but offer helpful guidance in this context as well. **HN10** To give effect to the *Fourteenth Amendment's* guarantee of "the equal protection of the laws," the constitution's protection of procreative choice must be at least as vigorous when a woman decides to give birth to a child as when she decides not to do so. U.S. CONST., Amend. XIV, § 1. A state-imposed burden on affirmative procreative choice must therefore withstand the same degree of scrutiny as a state-imposed burden on the choice to seek an abortion.

through gestational surrogacy.¹¹ Plaintiffs challenge the constitutionality of [Utah Code Ann. § 76-7-204\(2\) and \(3\)](#)¹² alleging that these provisions "prevent J.R. and M.R. from legally being acknowledged as parents of their own children," even though DNA testing indicates to a presumptive certainty that "J.R. **[**33]** and M.R. are, respectively, the biological mother and father of the twins who are in part the subject matter of this action." (Pltfs' Reply/Response Mem. at 3 PP 6, 7.)

Plaintiffs **[**34]** & [Utah Code Ann. § 76-7-204\(2\)](#)

[HN12](#) [Section 76-7-204\(2\)](#) declares surrogacy agreements to be unenforceable even when not made for profit or gain as proscribed by [§ 76-7-204\(1\)](#). Yet this provision says nothing about whether or not J.R. and **[*1280]** M.R. may be "legally.., acknowledged as parents of their own children." That question falls outside of the terms of the parties' Agreement, be it enforceable or not.

The court has reviewed the Complaint with some care, and it appears that none of the relief sought by plaintiffs in this action involves the actual enforcement of any of the terms of the plaintiffs' Agreement against any party. The Agreement reflects a mutual exchange of promises between J.R. and M.R. on the one hand, and W.K.J. on the other. All three parties to the Agreement are aligned as *plaintiffs* in this action, and none of them have alleged any controversy arising out of the

terms of their Agreement.¹³

[35]** Absent some genuine issue concerning the enforcement of the plaintiffs' Agreement, the plaintiffs lack standing to challenge [§ 76-7-204\(2\)](#) because they have alleged no injury in fact resulting from the application or enforcement of this statutory provision. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 at 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130, (1992) [HN13](#) ("plaintiff must have suffered an 'injury in fact'-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be fairly trace[able] to the challenged action of the defendant,.. ." (citations omitted)); *Z.J. Gifts D-4, L.L. C. v. City of Littleton*, 311 F.3d 1220, 1226 (10th Cir. 2002).

[Utah Code Ann. § 76-7-204\(3\)\(a\)](#) & Determination of Parental Rights

As noted above, [Utah Code Ann. § 76-7-204\(3\)\(a\)](#) provides [HN14](#) that "the surrogate mother is the mother of the child for all legal purposes, and her husband, if she is married, is the father of the child for all legal purposes." In contrast **[**36]** to [§ 76-7-204\(2\)](#), this provision may bear directly upon the question whether J.R. and M.R. may be "legally... acknowledged as parents of their own children." (Pltfs' Reply/Resp. Mem. at 3 P. 7.) Plaintiffs have alleged the requisite "injury in fact" that affords them standing to pursue their constitutional challenge to this statutory presumption.

Defendants' counsel submits that [§ 76-7-204\(3\)\(a\)](#)

¹¹ In this case, conception occurred and gestation began in California, a state that recognizes gestational surrogacy as a lawful procreative procedure. The State of Utah's concern under [§ 76-7-204](#) in this case is with the end result of that procedure, the live birth, care and custody of two children who are the genetic and biological offspring of J.R. and M.R.

¹² In their reply memorandum, plaintiffs concede that they lack standing to challenge the "contract for profit or gain" provisions of [Utah Code Ann. § 76-7-204\(1\)](#) (1999) because "plaintiffs did not enter in to a surrogacy 'contract for profit or gain.'" (Pltfs' Reply/Resp. Mem. at 2 P. 2.) They also acknowledge that their Agreement "recites sufficient mutual promises to form a binding contract." (*Id.* at 5.) See note 5, *supra*.

¹³ This case stands in striking contrast to the prior reported cases dealing with surrogacy issues, many of which involved a custody dispute between surrogate mother and a genetic parent. See Annotation, [Determination of Status as Legal or Natural Parents in Contested Surrogacy Births](#), 77 A.L.R. 5th 567 (2000), and cases discussed therein; *Johnson v. Calvert*, 5 Cal. 4th 84, 851 P.2d 776, 19 Cal. Rptr. 2d 494 (1993); *In re Baby M*, 109 N.J. 396, 537 A.2d 1227, 537 A.2d 1227, 1253, 77 A.L.R. 4th 1 (1988).

was enacted to ensure that whatever else may happen, a child born of a surrogacy arrangement comes into the world with at least one easily identifiable legal parent and guardian-the birth mother-and thus cannot be orphaned at birth at the whim of the genetic parents. (Defs' Mem. at 14-16 (citing John J. Mandler, *Developing a Concept of the Modern Family: A Proposed Uniform Surrogate Parenthood Act*, 73 Geo. L.J. 1283, 1285-86(1985)).) ¹⁴ However, where the genetic/biological parents actively assert their rights and interests in the child and seek full custody of the child, the State's concern about orphanage largely dissipates.

[37] [*1281]** If, even in that setting, Utah Code Ann. § 76-7-204(3)(a) applies to preclude either the assertion by J.R. and/or M.R. of their parental relationship with the children they have conceived or the recognition of J.R. and M.R. as legal parents of the children, then at that point, the law takes flight from the facts and plaintiffs' fundamental right to procreate and to maintain family relations may be unduly burdened. ¹⁵

[38] Construction of Utah Code Ann. § 76-7-204(3)(a)**

The Utah surrogacy statute was first enacted in 1989, following on the heels of the controversial

"Baby M" litigation in the courts of the State of New Jersey. See In re Baby M, 109 N.J. 396, 537 A.2d 1227, 77 A.L.R.4th 1 (1988). The Legislature likely was concerned about the protection of the procreative rights of birth mothers who conceived children through artificial insemination pursuant to contracts under which they agreed in advance to forfeit their parental rights to their own genetic/biological/birth children in favor of the genetic/biological father with whom they had agreed, much like the circumstances of *Baby M*. Legislatures in nearly half of the states enacted similar measures at about the same time. See, e.g., Lori Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 Va. L. Rev. 2343, 2346-49 (1995).

As plaintiffs point out, however, medical technology has moved beyond artificial insemination and traditional surrogacy ¹⁶ to the viable implantation of embryos fertilized *in vitro* using ova and sperm cells from the "intended parents, **[**39]** " not the surrogate birth mother. To the extent that the meaning of a statute is defined by the problem that it was designed to remedy,' ¹⁷ **[**40]** it may be that the Utah surrogacy statute simply did not contemplate the unique interplay of interests involved in the implantation of live embryos in the womb of a genetic stranger, in contrast to the more conventional dispute between the genetic/biological birth mother and genetic/biological father in the *Baby M* case. ¹⁸

¹⁴Ironically, as plaintiffs point out, if § 76-7-204 is enforced according to its terms, "neither the surrogate nor the state can force the biological or intended parents to take responsibility for the child they formerly wanted and helped create." (Pltfs' Reply/Resp. Mem. at 15.) Recognition of the genetic/biological parents' relationship to the child born to the surrogate, on the other hand, brings with it parental *responsibilities* as well as parental rights.

¹⁵This circumstance is not the one presented in Michael H. v. Gerald D., 491 U.S. 110, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989), in which a plurality of the Court upheld a California statute that established an irrebuttable presumption that a child born to a married woman living with her husband, who is neither impotent nor sterile, is a child of the marriage, observing that the presumption furthered "our traditions" that "have protected the marital family against the sort of claim" asserted by Michael H., a stranger to the marriage who asserted paternity of the couple's child, Victoria. 491 U.S. at 124 (Scalia, O'Connor, Kennedy, JJ. & Rehnquist, C.J.).

¹⁶Traditional surrogacy," in which the surrogate mother contributes her own ova to the effort along with carrying the pregnancy to term and giving birth, is not new; as a procreative method, it has been known for centuries. See, e.g., *Genesis* 16:1-4, 15; 30:1-10.

¹⁷Elliot Coal Mm. Co., Inc. v. Director, Office of Workers' Compensation Programs, 17 F.3d 616, 631(3rd Cir. 1994) ("additional support for our parsing of the text of the Act. . . can be found in the 'mischief rule, discussed in the venerable *Heydon 's Case*, 76 Eng. Rep. 637 (Ex.1584). That canon of construction directs a court to look to the 'mischief and defect' that the statute was intended to cure. *Id.* at 638.")

¹⁸Indeed, "Most surrogacy laws assume that the 'surrogate' birth

A narrowing construction ¹⁹ of [§ 76-7-204\(3\)\(a\)](#) that would limit its application to **[*1282]** surrogate birth mothers who have contributed their own genetics to the conception of the child would obviate the application of the statutory presumption to cases of true gestational surrogacy-such as this one-and avoid any conflict with the fundamental rights of genetic/biological parents such as J.R. and M.R.

[41]** "It is well-settled that [HN16](#) a federal court must uphold a statute if it is "readily susceptible" to a narrowing construction that would make it constitutional...." [Citizens for Responsible Government State Political Action Committee v. Davidson](#), 236 F.3d 1174, 1194 (10th Cir. 2000)(quoting [Virginia v. American Booksellers Ass'n](#), 484 U.S. 383, 397, 98 L. Ed. 2d 782, 108 S. Ct. 636 (1988)).

The key to application of this principle is that the statute must be 'readily susceptible' to the limitation; we will not rewrite a state law to

mother is genetically related to the child; they thus fail to address the increasingly common phenomenon of gestational surrogacy." Garrison, [Law Making for Baby Making](#), *supra*, 113 Harv. L. Rev. at 852.

¹⁹ It is well settled that [HN15](#) federal courts have the power to adopt narrowing constructions of federal legislation. See, e.g., [New York v. Ferber](#), 458 U.S. 747, 769, n. 24, 102 S. Ct. 3348, 3361, n. 24, 73 L. Ed. 2d 1113(1982); [United States v. Thirty-seven Photographs](#), 402 U.S. 363, 368-370, 91 S. Ct. 1400, 1404-1405, 28 L. Ed. 2d 822 (1971). Indeed, the federal courts have the duty to avoid constitutional difficulties by doing so if such a construction is fairly possible. See, e.g., [Ferber](#), *supra*, 458 U.S. at 769, n. 24, 102 S. Ct. at 3361, n. 24; [Thirty-seven Photographs](#), *supra*, 402 U.S., at 369, 91 S. Ct. , at 1404; [Schneider v. Smith](#), 390 U.S. 17, 26-27, 88 S. Ct. 682, 687-688, 19 L. Ed. 2d 799 (1968).

[Boos v. Barry](#), 485 U.S. 312, 330-331, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988). See also [NLRB v. Jones & Laughlin Steel Corp.](#), 301 U.S. 1, 30, 81 L. Ed. 893, 57 S. Ct. 615 (1937) ("The cardinal principle of statutory construction is to save and not to destroy."). To some extent, this duty extends to state statutes as well. See, e.g., [Erznoznik v. Jacksonville](#), 422 U.S. 205 at 216, 45 L. Ed. 2d 125, 95 S. Ct. 2268(1975)("A state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts"); [Frisby v. Schultz](#), 487 U.S. 474, 482, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988).

conform it to constitutional requirements." [American Booksellers](#), 484 U.S. at 397, 108 S. Ct. 636(citations omitted, emphasis added). Even the Supreme Court is "without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." [Stenberg v. Carhart](#), 530 U.S. 914, 120 S. Ct. 2597, 2616, 147 L. Ed. 2d 743(2000)(quotations and citations omitted); see also [Almendarez-Torres v. United States](#), 523 U.S. 224 at 238, 140 L. Ed. 2d 350, 118 S. Ct. 1219 at 1240(1998)(statute must be "genuinely susceptible" to narrowing **[**42]** construction); [City of Houston v. Hill](#), 482 U.S. 451, 468, 107 S. Ct. 2502, 96 L. Ed. 2d 398(1987) ("fairly" or "obviously susceptible"); [Erznoznik v. City of Jacksonville](#), 422 U.S. 205, 216, 95 S. Ct. 2268, 45 L. Ed. 2d 125(1975)("easily susceptible").

Id.

Weighing *against* a narrowing construction of [§ 76-7-204\(3\)\(a\)](#) is its reference to "any case arising under Subsection (1) or (2)"; both [subsections \(1\) & \(2\)](#) refer to "a woman [who] agrees to undergo artificial insemination or other procedures" resulting in the birth of a child. [Utah Code Ann. § 76-7-204\(1\), \(2\)](#)(1999) (emphasis added). The "artificial insemination or other procedures" language of [§ 76-7-204\(1\)& \(2\)](#) thus defines the class of persons who are affected by [§ 76-7-204\(3\)\(a\)](#). Nothing in [§ 76-7-204](#) further defines the scope or expanse of the phrase "or other procedures," or indicates whether it was intended to cover gestational surrogacy or not.

Plaintiffs submit that there is no legislative history available for [Utah Code Ann. § 76-7-204](#), and they point out that the legislative materials cited by defense counsel refer to the substance of other **[**43]** legislative proposals that were not enacted. (Pltfs' Reply/Resp. Mem. at 11-12; see **[*1283]** Exhibits re: Legislative History, filed September 17, 2002 (dkt. no. 48).)

Neither plaintiffs nor the Attorney General have suggested a narrowing construction of the statute as a means of avoiding the alleged clash of constitution and statute in this case.²⁰ **[**44]** This court is reluctant to impose a narrowing construction *sua sponte*, at least in the absence of interpretive aids such as legislative history that support such a reading of the statute's plain language.²¹ Given its ordinary meaning, the phrase "artificial insemination or other procedures" appears to contemplate medical procedures beyond or in addition to the artificial insemination utilized in *Baby M*, including *in vitro* fertilization—a procedure that was available by 1989 when the statute was passed.²² **HN17** A narrowing construction must be rejected if it "conflicts with the statutory language," *Stenberg*, 530 U.S. at 942, as it appears that it would in this instance.

[45] Fundamental Rights vs. Compelling Interests**

To the extent that [Utah Code Ann. § 76-7-204\(3\)](#)'s

²⁰ Counsel for the defendants recites that "it is a basic rule of construction... to construe the statute in such a way as to avoid the conclusion that it is unconstitutional," (Defs' Mem. at 3), but does not suggest a narrowing construction of [§ 76-7-204\(3\)\(a\)](#) that would avoid the constitutional problem.

²¹ Commentators viewing the Utah surrogacy statute in the context of other state statutes involving surrogacy have read [§ 76-7-204](#) as embracing gestational surrogacy as well as surrogate parentage of the kind addressed in *Baby M See, e.g., Adam P. Plant, Commentary, with a Little Help from My Friends: the Intersection of the Gestational Carrier Surrogacy Agreement, Legislative Inaction, and Medical Advancement*, 54 *Ala. L. Rev.* 639, 650 & n. 77 (2003). At the same time, one author suggests that "if a state uses an alternate statutory construction that avoids the problems presented in" cases such as *Soos v. Superior Court*, 182 *Ariz.* 470, 897 *P.2d* 1356 (*Ct. App.* 1994), then the prohibition of surrogacy contracts "could potentially be upheld." *Id.* at 651. Construing [§ 76-7-204\(3\)\(a\)](#) as applying only to genetic/biological surrogate mothers would avoid the equal protection problem raised in *Soos* under a statute that prevented the genetic/biological mother from establishing her own maternity apart from the gestational surrogate

²² The first *in vitro* fertilization birth occurred in 1978 in the United Kingdom. Garrison, *sup ra*, at 848 & n.56.

declaration that "the surrogate mother is the mother of the child for all legal purposes, and her husband, if she is married, is the father of the child for all legal purposes" may be read to limit or even preclude the assertion of parental rights or interests by the genetic/biological father or mother of the child, the genetic/biological parents' constitutionally protected rights have been burdened by the statute. Absent a compelling state interest justifying that burden,²³ a finding that [§ 76-7-204\(3\)](#) is unconstitutional as applied becomes "strictly unavoidable" if the genetic/biological parents' fundamental rights—and the constitutions that guarantee them—are to be vindicated.

[46] The State's "Compelling Interests"**

That gestational surrogacy implicates J.R. and M.R.'s fundamental rights does not mean that all other interests instantly give way, or that the State has nothing to say about the process. The gestational carrier surrogate is still the birth mother of the child, with at least some legally protected interests. The State asserts ongoing interests in protecting the health, safety and welfare of both the birth mother **[*1284]** and the child born of that pregnancy, whatever the child's genetic origins may be. Indeed, defense counsel asserts that the State's legitimate—even compelling—interests include (1) protecting the best interests of the child born through gestational surrogacy;²⁴ (2) avoiding

²³ While the Court has not described the exact parameters of the right to maintain family relationships, it clearly has indicated that regulation of these relationships must be justified by an overriding state interest." 3 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 18.28, at 584-85 (3d ed. 1999) (footnote omitted).

²⁴ The defendants assert that

[i]f enforceable, surrogacy contracts would permit the intending parents, whose motivations for entering into the contract are driven by their desire to have and raise a child, to unilaterally and irrevocably determine the parentage and custody of the child or children born through such an arrangement.... Contrary to Utah law and public policy, however, this determination is made without considering whether the intending parents are "financially able and

complicated and unsettling custody disputes; (3) protecting the surrogate birth mother's physical health and emotional well being, and her interest in a relationship with the child she had borne; (4) preventing the exploitation of women, particularly through surrogacy-for-profit arrangements; and (5) preventing children from becoming "commodities" to be purchased and sold. (Defs' Mem. at 12-23.)

[47] "The Best Interests of the Child"**

Defendants argue that "the best interest of the child [is] a sufficiently compelling interest to justify government intrusion into a person's fundamental, but qualified right to procreate," particularly when "surrogacy contracts avoid any objective determination of the best interest of the child." (*Id.* at 14 (citing *Doe v. Attorney General*, 194 Mich. App. 432, 487 N.W.2d 484, 486-87 (Mich. Ct. App.1992)).) Plaintiffs respond that § 76-7-204(3)'s conclusive presumption that the gestational surrogate (and her spouse, if any) is the legal parent of the child also "avoids any objective determination of the best interest of the child," contrary to the defendants' assertion that "those interests must be paramount." (Pltfs' Reply/Resp. Mem. at 14.)

The question of "the best interests of the child" proves inescapably fact-driven.²⁵ **[**49]** Yet § 76-

morally fit to have the care, supervision and training of the child."

(Defs' Mem. at 16 (quoting Utah Code Ann. § 78-30-9 (2002)).) Of course, for the many married couples that choose to conceive and bear a child *without* relying on a gestational surrogate, these considerations are routinely entrusted to their own judgment, without any state intervention.

²⁵ Utah courts speak of "those numerous factors which must be weighed in determining the 'best interests of the child.'" *Smith v. Smith*, 726 P.2d 423 at 425 (Utah 1986); see, e.g., *Hutchison v. Hutchison*, 649 P.2d 38 (Utah 1982):

HN19 Some factors the court may consider in determining the child's best interests relate primarily to the child's feelings or special needs: the preference of the child; keeping siblings together; the relative strength of the child's bond with one or both of the prospective custodians; and, in appropriate cases, the general interest in continuing previously determined

[7-204\(3\)](#) requires *no* fact-finding to decide that it is in "the best interest of the child" in *all* instances for the gestational surrogate birth mother to be deemed the legal parent of the child- regardless of the circumstances of the genetic/biological parents who actually **[**48]** conceived the child-and to do so without a **[*1285]** hearing. In every instance, it finds the fact of parenthood from the fact of childbirth. **HN18** In the context of gestational surrogacy, [§ 76-7-204\(3\)](#) serves as "an irrebuttable presumption often contrary to fact," lacking "critical ingredients of due process.. . ." *United States Dept. of Agriculture v. Murry*, 413 U.S. 508, 514, 37 L. Ed. 2d 767, 93 S. Ct. 2832 (1973).²⁶

HN21 *Utah Code Ann. § 76-7-204(3)(a)* operates in every instance to abrogate the parental rights and interests of genetic/biological parents at the moment of their child's birth, without any prior opportunity for hearing on the merits of those rights and interests *vis-a-vis* the "best interests of the child"-an obviously inappropriate result in any other context, even in dealing with children born out of wedlock. See *Stanley v. Illinois*, 405 U.S. at 654-59 (striking down state's irrebuttable statutory presumption that all unmarried fathers are not

custody arrangements where the child is happy and well adjusted. Other factors relate primarily to the prospective custodians' character or status or to their capacity or willingness to function as parents: moral character and emotional stability; duration and depth of desire for custody; ability to provide personal rather than surrogate care; significant impairment of ability to function as a parent through drug abuse, excessive drinking, or other cause; reasons for having relinquished custody in the past; religious compatibility with the child; kinship, including, in extraordinary circumstances, stepparent status; and financial condition. (These factors are not necessarily listed in order of importance.)

Id. at 42 (footnotes omitted).

²⁶ As one commentator cogently observes, **HN20** "A so-called presumption which cannot be rebutted by evidence is not a presumption but a rule of substantive law." Michael H. Graham, *Handbook of Federal Evidence* § 301.9, at 106 (3d ed. 1991). Indeed, "the use of the terms irrebuttable and conclusive presumption, referring solely to rules of law and not presumptions, should be discontinued as useless and confusing." *Id.* (footnote omitted).

qualified to raise their children; hearing on the merits required); [*Caban v. Mohammed*, 441 U.S. 380, 388-94, 60 L. Ed. 2d 297, 99 S. Ct. 1760 \(1979\)](#) **[**50]** (invalidating statute which requires consent of the mother of a child born out of wedlock to adoption, but denied the same right to the father of the child); [*Santosky v. Kramer*, 455 U.S. 745, 71 L. Ed. 2d 599, 102 S. Ct. 1388 \(1982\)](#) (requiring proof by no less than clear and convincing evidence to justify termination of parental rights).²⁷

The Utah Supreme **[**51]** Court has already determined that [HN22](#) under both the United States Constitution and the Utah Constitution, the Legislature may not predetermine that "the best interests of the child" alone warrant the involuntary abrogation of parental rights where there has been no adjudication of a parent's unfitness, or a showing of abandonment or substantial neglect. "That the child's welfare is the 'paramount consideration'" does not "imply that the child's welfare is the sole consideration, to the exclusion of parental rights." [In re J.P., 648 P.2d at 1377](#).

In re J.P. amplified [Quilloin v. Walcott](#), 434 U.S. 246 at 255, 54 L. Ed. 2d 511, 98 S. Ct. 549(1978), in which a unanimous Court underscored the constitutional inadequacy of a finding of a "child's best interest" as the sole means of overriding the constitutional right of parents who have not been shown to be unfit, echoing the observation in *Santosky* that the State's "interest favors preservation, not severance, of natural familial bonds," at least "while there is still reason to believe that positive, nurturing parent-child

relationships exist." [455 U.S. at 766-67](#).²⁸

[52]** [HN23](#) **[*1286]** The parent-child relationship is a *fact-one* having legal significance and legal consequences, but a fact nonetheless. Parenthood is *not* brought into being by the operation of state or federal law. It arises from the conception and birth of children. Parenthood differs from, say, the privilege to form a corporation, or to distribute one's property by will, or to drive an automobile, because the parent-child relationship finds its source not in a legislative act, but in the facts of life itself.

Childbirth makes parents of ordinary persons. The Legislature does not.

This parental right transcends all property and economic rights. It is rooted not in state or federal statutory or constitutional law, to which it is logically and chronologically prior, but in nature and human instinct. Thus, the United States Supreme Court has declared that "the liberty interest in family privacy has its source ... in intrinsic human rights...." [Smith V. Organization of Foster Families](#), 431 U.S. 816, 845, 53 L. Ed. 2d 14, 97 S. Ct. 2094, ...

[In re J.R., 648 P.2d at 1373](#).²⁹ See also [Belsito v. Clark](#), 67 Ohio Misc. 2d 54, 644 N.E.2d 760 (C.P. 1994) **[**53]** (the natural parents of a child conceived through *in vitro* fertilization and born to a gestational surrogate are the persons who have provided the "genetic imprint" for that child, unless they have affirmatively relinquished their rights).

²⁷ Reasoning that "a natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right," [455 U.S. at 758-59](#) (internal quotation marks omitted) the *Santosky* Court required a standard of proof that "reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." [Id. at 755](#).

Under the conclusory rule of [§ 76-7-204\(3\)\(a\)](#), the risk of error falls entirely upon the genetic/biological parents.

²⁸ The defendants' assertion that [§ 76-7-204\(3\)\(a\)](#)'s parentage rule protects the child against abandonment by his genetic/biological parents presupposes that "positive, nurturing parent-child relationships" will *not* exist between the genetic/biological parents and the child they have gone to such great lengths to produce. This seems counter-intuitive, at minimum, and clearly does not correspond to the facts in this case.

²⁹ What a far different experience life would be if the State undertook to issue children to people in the same fashion that it now issues driver's licenses. What questions, one wonders, would appear on the written test?

The parent-child relationship between J.R. and M.R. and the children born to W.K.J. likewise remains an uncontroverted genetic and biological fact. The Legislature cannot overcome that fact (or the fundamental interests that arise from that fact) using the simplistic device of a conclusive presumption that the fact does not exist. And "the State registers no gain towards its declared goals when it separates children from the custody of fit parents." [*Stanley v. Illinois*, 405 U.S. at 652](#).

In re J.P. left no doubt that [HN24](#) the Legislature cannot elect to end a parent's relationship with a child by "substitut[ing] a finding of 'the child's best interest' for a finding that a parent is 'unfit or incompetent' as a basis for the involuntary termination of parental rights." [648 P.2d at 1377-78](#). See [State in Interest of G.D. v. L.D.](#), [894 P.2d 1278 \(Utah Ct. App. 1995\)](#) ("In fact, it is unconstitutional **[**54]** to terminate a parent's rights based upon a finding of the best interests of the child without first finding that the parent is below some minimum threshold of fitness. *In re J.P.*, [648 P.2d 1364, 1374-77 \(Utah 1982\)](#).)³⁰

[55]** [HN26](#) States must "provide the parents with fundamentally fair procedures" protecting against improper termination of the parent-child relationship, [Santosky](#), [455 U.S. at 754](#), including parent-child relationships between genetic/biological mothers and fathers and children born through gestational surrogacy. The State's concern for the "best interests of the child," however compelling it may be, **[*1287]** cannot

sustain a legislative act that would summarily rewrite the facts of parenthood to suit legislative preferences as to matters of public policy.

Protection of the Surrogate Mother

Defendants also assert that [Utah Code Ann. § 76-7-204](#) protects the surrogate birth mother's physical health and emotional well being, and that [§ 76-7-204\(3\)\(a\)](#) protects her interest in a relationship with the child to whom she has given birth by deeming her in every instance to be "the mother of the child for all legal purposes," whether she desires to be or not. Plaintiffs object that this is "forcing parenthood" upon someone who does not want it, someone who has given birth to another couple's child solely to assist them in building their family.

³¹

[56]** The California Supreme Court in [Johnson v. Calvert](#), [5 Cal. 4th 84, 851 P.2d 776, 19 Cal. Rptr. 2d 494](#), cert. denied, [510 U.S. 874, 126 L. Ed. 2d 163, 114 S. Ct. 206](#), and cert. dismissed, [510 U.S. 938 \(1993\)](#), acknowledged that both the genetic/biological mother and the gestational surrogate birth mother had submitted credible evidence of a mother and child relationship under California's version of the [Uniform Parentage Act](#).³² Given those relationships, the court turned to the intent of the parties to the surrogacy agreement to determine that the natural and legal parents of the

³⁰ Yet that appears to be exactly what [§ 76-7-204\(3\)\(b\)](#) tries to do:

[HN25](#) (b) In any custody issue that may arise under Subsection (1) or (2), the court is not bound by any of the terms of the contract or agreement but shall make its custody decision based solely on the best interest of the child.

[Utah Code Ann. § 76-7-204\(3\)\(b\)](#) (emphasis added). It would seem exceedingly difficult to sustain this provisions in light of *In re J.P.* and its progeny. However, because there is no "custody issue" arising under the Agreement between the parties to this action, the court need not decide the validity of [§ 76-7-204\(3\)\(b\)](#) at this time.

³¹ *Cf. Planned Parenthood of Southeastern Pennsylvania v. Casey*, [505 U.S. 833, 928, 120 L. Ed. 2d 674, 112 S. Ct. 2791 \(1992\)](#) (Blackmun, J., concurring in part) ("This assumption--that women can simply be forced to accept the 'natural' status and incidents of motherhood--appears to rest upon a conception of women's role that has triggered the protection of the [Equal Protection Clause](#). See, e.g., *Miss. Univ. for Women v. Hogan*, [458 U.S. 718, 724-726, 102 S. Ct. 3331, 3336-3337, 73 L. Ed. 2d 1090 \(1982\); *Craig v. Boren*, \[429 U.S. 190, 198-199, 97 S. Ct. 451, 457-458, 50 L. Ed. 2d 397\\(1976\\)\]\(#\)." \(footnote omitted\)\).](#)

³² The gestational surrogate birth mother contended that she was the mother by reason of having given birth to the child, see [Cal. Civil Code § 7003](#); the genetic parents contended that their paternity/maternity was established by blood tests, see [Cal. Civil Code § 7015](#).

child were those who intended to bring about the birth and raise the child as their own—the genetic/biological mother and father. However, the court rejected the claim that the gestational surrogate was exercising "her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service without (by definition) any expectation that she will raise the resulting child as her own." 851 P.2d at 787. To the *Calvert* court, the choice to gestate and deliver a baby for the genetic parents pursuant to a surrogacy agreement is not **[**57]** the constitutional equivalent of the decision whether to bear a child of one's own; "any constitutional interests [the gestational surrogate] possesses in this situation are something less than those of a mother." *Id.* at 786.

However, this court is not prepared to say that a surrogate birth mother—even a surrogate birth mother who is a genetic stranger to the child born to her—is not exercising her fundamental rights, viz., her right to procreate and to make her own decisions about reproduction (*e.g.*, whether to terminate or continue a pregnancy), or that she has no legally protected interest in her relationship to the child she has carried to term and to whom she in fact gave birth.

Pregnancy and childbirth have **[**58]** physiological and psychological impacts upon the person experiencing the pregnancy and giving birth to the child, whatever the genetic particulars may be. *HN27* Life is process, and this extraordinary process of human **[*1288]** childbirth implicates the fundamental procreative rights of the birth mother as well as those of the mother and father whose best efforts at procreation have furnished the embryo. See, *e.g.*, *A.H. W v. G.H.B.*, 339 N.J. Super. 495, 772 A.2d 948, 952-54 (N.J. Super. Ct. Ch. Div. 2000); Alayna Ohs, Note, *The Power of Pregnancy: Examining Constitutional Rights in a Gestational Surrogacy Contract*, 29 *Hastings Const. L.Q.* 339, 355-61 (2002) (gestational surrogacy implicates fundamental procreative rights of surrogate mother).

The question becomes whether [§ 76-7-204\(3\)\(a\)](#)'s parentage rule is "narrowly tailored" to serve the State's compelling interest in protecting the interests of the gestational surrogate in her own pregnancy and her relationship with the child, taking into consideration the burden imposed upon the fundamental procreative and parental rights of the genetic/biological parents. See, *e.g.*, *Glucksberg*, 521 U.S. at 721 **[**59]** ("the [Fourteenth Amendment](#) 'forbids the government to infringe... 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" (quoting *Reno v. Flores*, 507 U.S. 292, 302, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993)) (emphasis in original)); see also *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 at 358, 137 L. Ed. 2d 589, 117 S. Ct. 1364 (1997). ("Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest.")

If accorded conclusive effect, [§ 76-7-204\(3\)\(a\)](#) "could hardly be described as narrowly tailored." *Citizens for Responsible Government State Political Action Committee v. Davidson*, 236 F.3d at 1199. The statute establishes the surrogate's parental rights to the exclusion of the genetic/biological mother, and if the surrogate is married, to the exclusion of the genetic/biological father as well.³³ No fact-specific determination of the relative fitness of the surrogate or the genetic/biological parents is required. Instead, [§ 76-7-204\(3\)\(a\)](#)'s self-operative **[**60]** parentage rule supplants the parental rights of the genetic/biological parents by putting the surrogate (and her spouse, if any) in their place, regardless of the particular facts and circumstances surrounding each surrogacy arrangement.³⁴

³³ In doing so, the [§ 76-7-204\(3\)\(a\)](#) presumption may collide with the existing rule of Utah law that as "between a natural parent and a nonparent, we begin with the presumption that placing a child with his or her natural parent is in the child's best interests." *State of Utah in the Interest of J.M.*, 940 P.2d 527, 530 (Utah Ct. App. 1997).

³⁴ Plaintiffs suggest that "[n]arrowly tailored alternatives are readily

The State's Other Interests

The remaining interests asserted by the State either are not "compelling" (*e.g.*, "avoiding complicated and unsettling **[**61]** custody disputes"), or involve facts not presented in this case (*viz.*, exploitation of women through surrogacy-for-profit contracts, or children becoming commodities). (Defs' Mem. at 12-23.)

Even assuming that the State has compelling interests in avoiding surrogacy for profit, [Utah Code Ann. § 76-7-204\(3\)\(a\)](#) cannot be said to be narrowly tailored to serve these interests because it affects *all* surrogate births, not just those entered into for profit or financial gain. No one has alleged that W.K.J.'s surrogacy was entered into for profit or gain; there is no allegation that W.K.J. has been "exploited" in some fashion, or that her interest in the children has been unfairly overborne in favor of the genetic/biological parents; and **[*1289]** none of the uncontroverted facts of this case even hints that the two children conceived by J.R. and M.R. and borne by W.K.J. have been treated as a *commodity* (*i.e.*, "anything bought or sold; any article of commerce" ³⁵), by anyone. Yet defendants assert that [§ 76-7-204\(3\)\(a\)](#) applies to define the parental rights of W.K.J., J.R. and M.R. no less than it would in the case of a blatant surrogacy-for-profit scheme.

[62]** [Utah Code Ann. § 76-7-204\(3\)\(a\)](#) burdens the fundamental parental rights of J.R. and M.R. by attempting to abrogate them through substitution of another legal parent, and that burden cannot be justified as serving these asserted "compelling interests," particularly where they have very little bearing upon the uncontroverted facts of this case.

Conclusive Effect & "Undue Burden"

available," such as judicial oversight of surrogacy arrangements or a post-natal proceeding for "a judicial acknowledgment of parentage." (Pltfs' Reply/Resp. Mem. at 17.)

³⁵ "Webster's New World Dictionary 281 (3d. coil. ed. 1991).

In the context of gestational surrogacy, [Utah Code Ann. § 76-7-204\(3\)\(a\)](#) establishes a rule of substantive law that genetic/biological parents—particularly genetic/biological *mothers* who are not the birth mother—are not qualified to raise their children and declares that they will have *no* parental rights or legal relationship as a parent with the children they have conceived. It mandates that the surrogate mother "is the mother of the child for all legal purposes, and her husband, if she is married, is the father of the child for all legal purposes," to the exclusion of the child's natural parents.

In doing so, [§ 76-7-204\(3\)\(a\)](#) places a substantial obstacle in the path of a woman" in J.R.'s position who is seeking to make procreative choices, [Stenberg, 530 U.S. at 921 **\[**63\]**](#) (quoting [Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 877, 120 L. Ed. 2d 674, 112 S. Ct. 2791 \(1992\)](#) (plurality opinion)), and to bear and raise her own children, unduly burdening the exercise of her fundamental rights. Indeed, when the State undertakes to extinguish parental rights, "it seeks not merely to infringe that fundamental liberty interest, but to end it. 'If the State prevails, it will have worked a unique kind of deprivation.... A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.'" [Santosky, 455 U.S. at 759](#) (quoting [Lassiter v. Department of Social Services, 452 U.S. 18, 27, 68 L. Ed. 2d 640, 101 S. Ct. 2153 \(1981\)](#)).

HN28 This blanket presumption is not narrowly tailored to serve the State's compelling interests in safeguarding the best interests of the child and the health, safety and procreative interests of the surrogate mother. It may be that some genetic/biological parents are unsuited to have custody of children, and in those instances, the exercise of parental rights may not be in the best interests of the child. But certainly many natural parents **[**64]** "are not in this category; some are wholly suited to have custody of their children," [Stanley v. Illinois, 405 U.S. at 654](#) (footnote

omitted), and at minimum, the [Due Process Clause](#) requires the State to provide them with a fundamentally fair hearing on that question before depriving them of legal parenthood of their own children. [Id. at 654-58](#). As the Utah Supreme Court has explained,

We conclude that [HN29](#) the Utah Constitution recognizes and protects the inherent and retained right of a parent to maintain parental ties to his or her child under [Article I, § 7](#) and [§ 25](#), and that the United States Constitution recognizes and protects the same right under the [Ninth](#) and [Fourteenth Amendments](#). We further conclude that, under both Constitutions, a mother is entitled to a showing of unfitness, abandonment, or **[*1290]** substantial neglect before her parental rights are terminated.

[In re J. P., 648 P.2d at 1377. Utah Code Ann. § 76-7-204\(3\)\(a\)](#) requires no such showing on a fact-specific, case-by-case basis; it cannot be rebuffed by evidence of the genetic/biological fact of parenthood, and thus cannot satisfy the requirements **[**65]** of Due Process.

Can Adoption Relieve the Statutory Burden on Plaintiffs' Rights?

Counsel for the defendants argues that the plaintiffs may gain the legal rights and status of parents of the children they conceived by pursuing the matter through a Utah State adoption proceeding, and any burden on their procreative and parental rights is thereby relieved:

More than twenty-four hours have passed since the birth of the twins (Utah Code Ann. § 78-30-4.19) and WKJ has the absolute legal right to irrevocably (Utah Code Ann. § 78-30-4.20) consent to their adoption by J.R. and M.R. pursuant to Utah Code Ann. § 78-30-4.14. Once she has done so, JR and MR can petition either the district or juvenile court for a decree of adoption. Utah Code Ann. § 78-30-7. Approval of such a petition would be subject only to a home study of their ability to

financially and morally care for the children. Utah Code Ann. § 78-30-14.

(Defs' Mem. at 7-8.) The availability of the adoption process, counsel continues, would obviate any need for this court to decide the constitutional questions raised by plaintiffs' challenge to the statute. (*Id.*)

The contemplated adoption proceeding **[**66]** does not require a court to enforce the Agreement itself. As defense counsel suggests, W.K.J. need only agree to the termination of any parental rights she may have in favor of the adoption of the children by J.R. and M.R., and J.R. and M.R. need only present the required petitions and make the required showings that would enable a Utah state court to bring law into harmony with genetics, and grant their adoption of the children that in fact they have conceived. As counsel suggests, completing the anticipated adoption proceedings would produce the result now desired by all of the plaintiffs without running afoul of the restrictions of [Utah Code Ann. § 76-7-204](#).

Plaintiffs concede that the adoption process is available,³⁶ but argue that resort to adoption should not be required where it is uncontroverted that J.R. and M.R. are the genetic/biological parents of the children born to W.K.J. (Pltfs' Reply/Resp. Mem. at 17 n.4 ("That they must adopt their own children rankles biological parents of a gestational surrogacy. The possibility that in an adoption the court could deny them parenthood of their own children is troublesome.")) J.R. and M.R. 's fundamental interests in parenting **[**67]** the children they have conceived would be burdened by the requirements of the adoption process, and by

³⁶That an adoption proceeding may be required to conclusively establish J.R. and M.R.'s parental relationship to the children was expressly contemplated by these parties, as plainly reflected in the second paragraph of the Agreement: "the parties have been advised that under Utah law, it is illegal for any party to profit or gain from a surrogacy arrangement and that *an adoption may be required to establish the intended parents as the legal parents* of the surrogate child." (Agreement at 1 (emphasis added).)

the risk, however remote, that a finding of the best interests of their children could be adverse to J.R. and M.R., resulting in a denial of parental rights.

Other courts considering the question of surrogacy in the context of adoption proceedings have found that "[g]estational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes." *Johnson v. Calvert*, 5 Cal. 4th at 96, [*1291] 851 P.2d at 784. [**68] In *Culliton v. Beth Isr. Deaconess Med. Ctr.*, 435 Mass. 285, 291, 756 N.E.2d 1133, 1138 (2001), the Massachusetts Supreme Court distinguished gestational surrogacy from traditional surrogacy, in which the birth mother also contributed her own genetics, and concluded that "as is evident from its provisions, the adoption statute was not intended to resolve parentage issues arising from gestational surrogacy agreements." The Utah appellate courts have yet to address this question.

HN30 *Utah Code Ann. § 76-7-204(4)* provides that "nothing in this section prohibits adoptions and adoption services that are in accordance with the laws of this state," at least implying that the parent-child relationships presumed to exist under § 76-7-204(3)(a) could be realigned in favor of the child's genetic/biological parents using the State's adoption procedure.

Resort to the adoption process to gain legal recognition of J.R. and M.R.'s parental rights, effective though it might be, still fails to account for the parent-child relationship that already exists in fact between J.R. and M.R. and the twin children they conceived, and thus continues to burden J. [**69] R. and M.R.'s fundamental parental rights in the same fashion as § 76-7-204(3)(a).

Parents who bear and raise children in the traditional way need not seek the imprimatur of the State before exercising their rights as parents, or being recognized as such by the law. The State's interest in the child's well-being "favors preservation, not severance, of natural familial bonds," *Santosky*, 455 U.S. at 766-67, and the same

would seem to be true of natural familial bonds that happened to be aided in their formation through use of medical technology.

Requirement of a Hearing

To say that plaintiffs need not resort to traditional adoption procedures to vindicate J.R. and M.R.'s fundamental parental rights does not mean that some form of adjudicative hearing is not required. Given the legally protected interests of both the genetic/biological parents and the gestational surrogate mother, due process would seem to require a hearing in which those interests are examined and reconciled in light of the facts. A finding of genetic consanguinity between intended parents and child, based upon the results of DNA testing or other probative evidentiary facts, would provide a [**70] factual footing for formally acknowledging the relationships that exist and serve as the basis for the registration of a supplemental birth certificate reflecting the child's true genetic/biological parentage. At the same time, the surrogate birth mother would be afforded an opportunity to assert whatever interest she may have in her relationship with the children she has borne.³⁷

One provision of the State's adoption statute may provide for such a hearing: 78-30-4.24. Determination of rights prior to adoption petition.

HN31 Any interested party may petition the court for a determination of the rights and interests of any person who may claim an interest in a child under this chapter, at any time prior to the filing of a petition for adoption, including any time prior to the child's birth.

³⁷ If and when the day comes that *in vitro* fertilization is followed by *in vitro* gestation, and ultimately by *in vitro* birth of a live human child, then the interests of the birth mother will no longer be at issue because no surrogate will be required. Until then, the law will likely continue to protect the procreative rights of everyone involved.

Utah Code Ann. § 78-30-4.24(2002).

[71]** *Culliton v. Beth Israel Deaconess Medical Center* involved a similar procedure in the Massachusetts courts in which the genetic/biological **[*1292]** parents, joined by the gestational surrogate, sought a prenatal declaration of maternity and paternity as to their unborn twin children, apart from the traditional adoption or paternity procedures. The Massachusetts Supreme Court held that the Probate and Family Court Department had the power to grant the relief they sought:

Here, where (a) the plaintiffs are the sole genetic sources of the twins; (b) the gestational carrier agrees with the orders sought; (c) no one, including the hospital, has contested the complaint or petition; and (d) by filing the complaint and stipulation for judgment the plaintiffs agree that they have waived any contradictory provisions in the contract (assuming those provisions could be enforced in the first place), we conclude that pursuant to the Probate and Family Court's general equity jurisdiction under G.L. c. 215, § 6, the judge had authority to consider the merits of the relief sought here.

[435 Mass. at 291-92, 756 N.E.2d at 1138](#) (footnote omitted). *Culliton* concluded that **[**72]** the traditional adoption procedure "was not intended to resolve parentage issues arising from gestational surrogacy agreements"; that the statutory paternity procedure "is simply an inadequate and inappropriate device to resolve parentage determinations of children born from this type of gestational surrogacy"; and that the state artificial insemination statute simply "does not apply." [Id., 435 Mass. at 290-91, 756 N.E.2d at 1137-38](#). Instead, *Culliton* looked to the general equity jurisdiction of the court and sought to find a balance between concerns for the best interests of the child and the rights of the genetic/biological parents, who everyone acknowledged to be the parents of the twin children born to the surrogate.

The *Culliton* court granted the relief sought by the genetic/biological parents, seeing no need to remand the matter where all parties had entered into a stipulation for the entry of judgment, and no interested party had raised any objection: "Since the complaint was filed, the twins have been born. It is consequently now appropriate to order the entry of a judgment declaring the plaintiffs the lawful parents of the twins." [Id., 435 Mass. at 295, 756 N.E.2d at 1141](#). **[**73]** A judgment was to be entered "declaring the plaintiffs as the legal parents of the children" and ordering that plaintiffs' names be placed on the applicable records of birth, "listing the plaintiffs as the mother and father, respectively, of the children." [Id., 435 Mass. at 296, 756 N.E.2d at 1141](#).

Culliton offers helpful guidance for the satisfactory resolution of the controversy in this case. Entry of an order establishing J.R. and M.R.'s relationship to their twin children through a proceeding under Utah Code Ann. § 78-30-2.24 would afford the legal recognition they seek for their parental relationship with their children, and would furnish a basis for issuance of supplementary birth certificates under [Utah Code Ann. § 26-2-10](#) (1998) ³⁸ listing **[*1293]** J.R. and M.R. as the mother and

³⁸ [Section 26-2-10](#) provides, in pertinent part:

26-2-10. Supplementary certificate of birth.

[HN32](#) (1) Any person born in this state.. . whose parentage has been determined by any U.S. state court. . . having jurisdiction,... may request the state registrar to register a supplementary certificate of birth on the basis of that status.

(2) The application for registration of a supplementary certificate may be made by the person requesting registration, if he is of legal age, by a legal representative, or by any agency authorized to receive children for placement or adoption under the laws of this or any other state.

(3) (a) The state registrar shall require that an applicant submit identification and proof according to department rules....

(4) (a) After the supplementary certificate is registered, any information disclosed from the record shall be from the supplementary certificate.

(b) Access to the original certificate and to the evidence submitted in support

father of the children.

[**74] The only significant obstacle is [§ 76-7-204\(3\)\(a\)](#)'s presumption that W.K.J. is the "mother of the children for all legal purposes," if that presumption is to be given conclusive effect.

RELIEF TO WHICH PLAINTIFFS ARE ENTITLED

This court concludes that [Utah Code Ann. § 76-7-204\(3\)\(a\)](#)'s presumption that W.K.J. as a surrogate mother is the "mother of the child for all legal purposes" cannot lawfully be given preclusive or conclusive effect in the light of evidence that J.R. and M.R. are in fact the genetic/biological parents of the twin children that W.K.J. gave birth to in January of 2000. Giving [§ 76-7-204\(3\)\(a\)](#) any preclusive or conclusive effect with reference to J.R. and M.R. would unduly burden J.R. and M.R.'s fundamental rights of to bear and raise children as guaranteed by both the United States Constitution and the Utah Constitution. That burden is neither necessary to, nor narrowly tailored to serve any compelling State interest; and the statute is not readily susceptible to a narrowing construction that would avoid the collision between this legislative act and the plaintiffs' fundamental rights.

Plaintiffs are entitled to a declaratory judgment that [Utah \[**75\] Code Ann. § 76-7-204\(3\)\(a\)](#) is unconstitutional as applied to J.R. and M.R. to the extent that [§ 76-7-204 \(3\)\(a\)](#)'s rule of parentage would be given preclusive or conclusive effect in any state court proceeding or other setting in which J.R. and M.R. seek legal recognition of their parental relationship with the twin children born to W.K.J. in January, 2000, based upon evidence that J.R. and M.R. are the genetic/biological parents of the children.

[Section 76-7-204\(3\)\(a\)](#) may legitimately presume in the first instance that W.K.J., as the birth mother

of the twin children born in January of 2000, is their mother, as indeed the law would routinely presume as to *all* birth mothers at the moment of childbirth. Upon presentation of evidence of genetic consanguinity between those children and J.R. and M.R., however, that presumption must dissolve and be given no further force or effect. Otherwise, the effect of the statute would be that of a rule of substantive law denying legal recognition to the uncontroverted fact of J.R. and M.R.'s parentage of the two children, unduly burdening and frustrating J.R. and M.R.'s exercise of their constitutionally guaranteed fundamental rights to [**76] maintain that relationship and to raise their own children.

In so ruling, this court simply follows in the footsteps of the Utah Supreme Court in cases such as [In re J.P.](#), which eloquently reaffirmed these fundamental rights to bear and raise children in the most emphatic of terms, and held them to be protected by both the United States Constitution and the Utah Constitution. In so ruling, this court also follows decisions of the United States Supreme Court that have consistently "held that [HN33](#) the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as procreation, childrearing, marriage, and contraceptive choice," cases that "embody the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government." [Planned Parenthood of Southeastern Pennsylvania v. Casey](#), 505 U.S. 833, 926-27, 120 L. Ed. 2d [*1294] 674, 112 S. Ct. 2791 (1992) (Blackmun, J., concurring in part) (citing [Eisenstadt](#), 405 U.S. at 453).

The Court has long held that limitations on these fundamental rights are permissible only if they survive "strict" constitutional [**77] scrutiny—that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest. [Griswold v. Connecticut](#), 381 U.S. 479, 485, 14 L. Ed. 2d 510,

of the supplementary certificate are not open to inspection except upon the order of a Utah district court or as provided under Section 78-30-18.

[85 S. Ct. 1678 \(1965\)](#). The defendants have made no such showing in favor of [§ 76-7-204\(3\)\(a\)](#)'s parentage rule that would justify it being given any conclusive effect.

Application of [§ 76-7-204\(3\)\(a\)](#)'s parentage rule in this case may also run afoul of the [Fourteenth Amendment's](#) guarantee of equal protection of the laws, at least to the extent that under Utah law and administrative practice, M.R. can be listed as the father on the birth certificates of the children born to W.K.J., an unmarried woman, but J.R. cannot be listed as their mother. The equal protection problems that arise in that scenario have been examined with some care in [Soos v. Superior Court](#), 182 Ariz. 470, 897 P.2d 1356 (Ct. App. 1994), which held that a state statute violated the [Fourteenth Amendment's Equal Protection Clause](#) when it permitted a genetic/biological father to prove paternity, but did not allow for a genetic/biological **[**78]** mother to prove maternity. Instead, it automatically granted a gestational carrier surrogate the status of legal mother. The Soos court concluded that the State's statute affected fundamental liberty interests of parental rights and thus was subject to a strict scrutiny analysis. Soos held that the State had not shown any compelling interest to justify the dissimilar treatment of men and women similarly situated (the biological father and the biological mother of the same child), and therefore, that the statute was unconstitutional. [Id.](#), 182 Ariz. at 474-75, 897 P.2d at 1360-61.

This court is satisfied that Soos is well reasoned and that its conclusion is sound. [HN34](#) The State may not close its eyes to the fact of a parental relationship simply because the parent happens to be a woman. This problem may be avoided, however, if [§ 76-7-204\(3\)\(a\)](#)'s parentage rule is not given any preclusive or conclusive effect.³⁹

³⁹ Plaintiffs assert that the law should do its best to recognize the legal existence of essential human relationships where those relationships exist in actual fact, and that public records, particularly vital records such as birth certificates, should be unfailingly accurate

[79]** Severability of [§ 76-7-204\(3\)\(a\)](#)

Counsel for the defendants suggests that if a portion of [§ 76-7-204](#) is invalidated, the remainder of the statute should stand unaffected. (Defs' Mem. at 31.) Plaintiffs respond that [§ 76-7-204](#) contains no "savings clause," that "there is no basis for severability" of [§ 76-7-204](#)'s provisions, and that the entire statute may be "declared to be unconstitutional and invalid." (Pltfs' Reply/Resp. Mem. at 6-7.)

In [Brockett v. Spokane Arcades, Inc.](#), 472 U.S. 491, 86 L. Ed. 2d 394, 105 S. Ct. 2794 (1985), the Court reversed the facial invalidation of a state statute according to the "normal rule that partial, rather than facial, invalidation is the required course." 472 U.S. at 504. Noting that [HN35](#) "the same statute may be in part constitutional and in part unconstitutional," the Brockett Court held that "if the parts are wholly independent of each other, that which is constitutional may stand while **[*1295]** that which is unconstitutional will be rejected." [Id.](#) at 502.

More recently, the Tenth Circuit echoed *Brockett* in explaining that "[i]f the language of a statute is not readily susceptible to a **[**80]** narrowing construction, but the unconstitutional language is severable from the remainder of the statute, 'that which is constitutional may stand while that which is unconstitutional will be rejected.'" [Citizens for Responsible Government State Political Action Committee v. Davidson](#), 236 F.3d at 1194 (quoting *Brockett*, 472 U.S. at 502 (internal quotations omitted)).

[HN36](#) "In order to determine whether partial invalidation of a state statute is appropriate, federal courts look to state law." 236 F.3d at 1195 (citing *Brockett*, 472 U.S. at 506-07); [Leavitt v. Jane L.](#), 518 U.S. 137, 139, 135 L. Ed. 2d 443, 116 S. Ct.

in the information they report. Both parent and child have an interest in having the child's birth certificate reflect their relationship.

The State also has a significant interest in the accuracy of the records it keeps, particularly vital records like birth certificates.

[2068 \(1996\)](#)(per curiam)(severability is an issue of state law). Under Utah law, "When reviewing the construction of statutes, 'I[t]he general rule is "that statutes, where possible, are to be construed so as to sustain their constitutionality. Accordingly, if a portion of the statute might be saved by severing the part that is unconstitutional, such should be done.'" [State v. Lopes, 1999 UT 24, PP 18, 980 P.2d 191](#) (quoting [Celebrity Club, Inc. v. Utah Liquor Control Comm 'n, 657 P.2d 1293, 1299 \(Utah 1982\)](#)). **[**81]** " [Gallivan v. Walker, 2002 UT 89, 54 P.3d 1069, 1098 \(Utah 2002\)](#).

In determining if an unconstitutional subsection is severable from its umbrella statute, "we look to legislative intent." [Id. at PP 19](#). When the legislature's intent is not expressly stated, we "turn to the statute itself, and examine the remaining constitutional portion of the statute in relation to the stricken portion." [Id.](#) Upon reviewing the statute as a whole and its operation absent the offending subsection, "[i]f the remainder of the statute is operable and still furthers the intended legislative purpose, the statute will be allowed to stand." [Id.](#); see also [Berry v. Beech Aircraft Corp., 717 P.2d 670, 686 \(Utah 1985\)](#) ("Severability, where part of an act is unconstitutional, is primarily a matter of legislative intent[,], which generally is determined by whether the remaining portions of the act can stand alone and serve a legitimate legislative purpose." (citations omitted, alteration in original)); [Stewart v. Pub. Serv. Comm'n, 885 P.2d 759, 779-80 \(Utah 1994\)](#); [Union Trust Co. v. Simmons, 116 Utah 422, 429, 211 P.2d 190, 193 \(1949\)](#). **[**82]** In [Union Trust Co.](#), we further noted that "[t]he test fundamentally is whether the Legislature would have passed the statute without the objectionable[, i.e., the unconstitutional] part" [116 Utah at 429, 211 P.2d at 193](#); see also [Berry, 717 P.2d at 686](#).

[id.](#) In Utah, then, the test is "whether the legislature would have passed the statute without the objectionable part. .. ." [American Target](#)

[Advertising, Inc. v. Giani, 199 F.3d 1241, 1250 \(10th Cir.\)](#), cert. denied, 531 U.S. 811, 148 L. Ed. 2d 14, 121 S. Ct. 34(2000).

HN37 "Frequently the courts are aided in the determination of legislative intent by the inclusion within a statute of a 'saving clause.'" [Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 779 \(Utah 1994\)](#) (quoting [Union Trust Co. v. Simmons, 116 Utah 422, 211 P.2d 190, 193 \(1949\)](#)). " [Id.](#) But as plaintiffs point out, there is no saving clause in [§ 76-7-204](#) to aid our interpretation. "Therefore, we must look to whether the statutory provisions 'are so dependent upon each other that the court should conclude the intention was that the statute be effective only in its entirety.'" [Id.](#) **[**83]** (quoting [Stewart, 885 P.2d at 779](#)).

If [§ 76-7-204\(3\)\(a\)](#)'s parentage rule is struck down to the extent it would otherwise have conclusive effect, this court must **[*1296]** decide "whether the remaining sections [of the statute], standing alone, will further the legislative purpose." [Stewart, 885 P.2d at 779](#).

[Subsections \(1\), \(2\), \(3\)\(b\) and \(5\) of § 76-7-204](#) deal with the enforceability and legal consequences of surrogacy contracts. As explained above, the validity of these provisions is an issue that this court is not called upon to address at this point in this case. [Subsection \(4\)](#), stating that "nothing in this section prohibits adoptions and adoption services that are in accordance with the laws of this state" seems unlikely to engender any constitutional controversy at all.

This court has reviewed the statute as a whole, and it appears that the "contract" subsections and the "adoptions" subsection of [§ 76-7-204](#), "standing alone, will further the legislative purpose" of precluding the enforcement of surrogacy contracts in cases in which such arrangements fall into dispute, and may continue to do so without the aid of the conclusive effect of [§ **\[**84\]** 76-7-204\(3\)\(a\)](#)'s parentage rule.

In reaching this conclusion, the court is expressing no view as to the validity or unconstitutionality of these subsections. The court is only concluding that [HN38](#) these provisions may stand alone, for whatever value they may have, and that the Legislature probably would have enacted them even without giving the [§ 76-7-204\(3\)\(a\)](#) parentage rule conclusive effect.

To the extent, then, that [§ 76-7-204\(3\)\(a\)](#) may be denied conclusive effect under the United States Constitution and the Utah Constitution, the balance of [§ 76-7-204\(1\), \(2\), \(3\)\(b\), \(4\)](#) and [\(5\)](#) appear to be severable from the affected subsection and do not depend upon [§ 76-7-204\(3\)\(a\)](#) to achieve their purposes.

CONCLUSION

In this case, there is no genuine issue of material fact that plaintiffs J.R. and M.R. are the genetic/biological mother and father of twin 'children to whom plaintiff W.K.J. gave birth in January of 2002. As genetic/biological parents of children carried by a gestational carrier surrogate birth mother, J.R. and M.R. have a parent-child relationship with those children to which their fundamental constitutionally protected liberty interests apply. [Utah Code \[**85\] Ann. § 76-7-204\(3\)\(a\)](#) unduly burdens J.R. and M.R.'s fundamental liberty interests to the extent that it conclusively deems W.K.J. to be "the mother of the children for all legal purposes," to the exclusion of J.R. and M.R.'s "rights to conceive and raise one's children," [Stanley v. Illinois, 405 U.S. at 651](#), without unwarranted governmental interference.

J.R. and M.R. are entitled to declaratory relief pursuant to [42 U.S.C. § 1983 \(2000\)](#) and [28 U.S.C. § 2201 \(2000\)](#) in the form of a judgment that [Utah Code Ann. § 76-7-204\(3\)\(a\)](#) is unconstitutional as applied to J.R. and M.R. to the extent that it limits or precludes in any way the legal recognition or exercise of J.R. and M.R.'s fundamental rights as parents to raise the children they have conceived.

By conclusively presuming W.K.J. to be "the mother of the child[ren] for all legal purposes," and thereby excluding J.R. from recognized legal motherhood of the children from and after the moment of their birth, [§ 76-7-204\(3\)\(a\)](#) oversteps the limits on legislative power imposed by both the United States Constitution and the Utah Constitution in favor of the protection [\[**86\]](#) of fundamental liberty interests. [U.S. CONST., Amends. IX, XIV; UTAH CoNsT. Art. I, §§ 7, 25](#). Upon the presentation of evidence in an appropriate forum establishing J.R. and M.R.'s genetic/biological relationship to the children born to W.K.J., [§ 76-7-204\(3\)\(a\)](#) can have no binding force or effect on the legal [\[*1297\]](#) recognition or enforcement of J.R. and M.R.'s parental rights.

J.R. and M.R.'s fundamental liberty interests in their parental relationship with their children arises from the *fact* of the biological parent-child relationship, independent of any grant of right, privilege or designation of status by the State. As cases such as *In re JP*. instruct, J.R. and M.R.'s parental rights may be extinguished only upon clear and convincing evidence supporting an individualized finding of unfitness, abandonment or other sufficient grounds at a hearing meeting the requirements of the Due Process Clause of the [Fourteenth Amendment](#), and [Article I, § 7 of the Utah Constitution](#); they may not be supplanted or pre-empted by legislative act deeming a gestational surrogate mother to be the "mother of the children for all legal purposes."

[HN39](#) Even as it is called upon to 'consider new questions [\[**87\]](#) thrust upon it by the advent of 'new technology, the Legislature, no less than the court, must keep the fundamental liberty interests of the people clearly in mind: "[The ideals of individual liberty which... protect the sanctity of one's home and family" are "essential in a free society... ." [In re Castillo, 632 P.2d 855, 856 \(Utah 1981\)](#). "'To protect the (individual) in his constitutionally guaranteed right to form and preserve the family is one of the basic principles for which organized government is established... ." [In](#)

re J.P., 648 P.2d at 1372, 1373 (quoting *Lacherv. Venus*, 177 Wis. 558 at 569, 188 N.W. 613 at 617, 24 A.L.R. 403, 409 (1922)). As the Utah Constitution so wisely reminds us all, *HN40* "Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." *UTAH CONST. Art. I, § 27*.

This court need not examine the constitutionality of the remaining subsections of [§ 76-7-204](#) because they're not in controversy in this action; any evaluation of their respective validity would at this point be purely advisory. Plaintiffs concede they **[**88]** lack standing to challenge [§ 76-7-204\(1\)](#), and this court can find no existing dispute among these parties arising under their Agreement that would call into question [§ 76-7-204\(2\)](#), [\(3\)\(b\)](#) or [\(5\)](#). Beyond that, [§ 76-7-204\(4\)](#) is purely declarative that existing adoption laws remain undisturbed. Having determined that these provisions are severable from [§ 76-7-204\(3\)\(a\)](#), this court's ruling leaves these remaining provisions essentially undisturbed, and plaintiffs' Complaint is dismissed as to [§ 76-7-204\(1\)](#), [\(2\)](#), [\(3\)\(b\)](#), [\(4\)](#) and [\(5\)](#) without prejudice for lack of an existing case or controversy within the meaning of Article III of the United States Constitution.⁴⁰ **[**89]** This court likewise sees no need to decide the validity of plaintiffs' "In Vitro/Surrogate Implantation Agreement," and declines plaintiffs' invitation to do so for substantially the same reason, the lack of an existing case or controversy.⁴¹

⁴⁰ This disposition may be variously phrased as a lack of standing on the part of the plaintiffs, or a lack of subject matter jurisdiction on the part of this court, but the end result is the same. Those provisions await adjudication on another day.

Though these claims are dismissed, the defendants have not made the requisite showing that they are entitled to judgment as a matter of law on the merits of these claims and their motion for summary judgment must be denied. As is true of plaintiffs' claims, this court lacks jurisdiction to decide the merits of defendant's [Rule 56](#) motion beyond the question presented by [§ 76-7-204\(3\)\(a\)](#).

⁴¹ W.K.J. appears as a plaintiff in this action, but pleads no discrete

[*1298] This court defers on plaintiffs' request for injunctive relief forbidding the defendant state officers to comply with or enforce [Utah Code Ann. § 76-7-204\(3\)\(a\)](#), and requiring that the Utah Office of Vital Records and Statistics issue birth certificates for the plaintiffs' children "reciting that J.R. and M.R. are the parents of the children," pending further hearing on whether "further **[**90]** necessary or proper relief based on a declaratory judgment" need be granted against "any adverse party whose rights have been determined by such judgment," pursuant to [28 U.S.C. § 2202 \(2000\)](#). These are questions of remedy rather than substantive right, and a further showing of a threat of irreparable harm may need to be made before such relief is granted.⁴²

The declaratory relief set forth herein may well prove to be sufficient to vindicate the plaintiffs' fundamental liberty interests in their relationship with their own children, particularly where it appears that an appropriate state proceeding may be initiated to obtain recognition of that relationship-recognition by a state court that may well be sufficient to bring about the issuance of **[**91]** supplemental birth certificates with the form and content that plaintiffs seek.

Plaintiffs thus may be able to achieve their purposes without further direct intervention by this court into the workings of the government of the State of Utah.

Plaintiffs having demonstrated that there exists no

"injury in fact" resulting from the fact that [§ 76-7-204\(3\)\(a\)](#) deems her to be the legal mother of the children born to her in January of 2000. It should come as no surprise to her that the State of Utah presumes in the first instance that the birth mother is the mother of children to whom she has given birth. Nothing now before this court suggests that W.K.J. is not free to relinquish her parental rights in favor of J.R. and M.R., as apparently she has planned to do. Absent some more particularized showing of injury-in-fact flowing from the challenged statute, this court likely must also dismiss her claim for lack of standing.

⁴² This court likewise defers the question of an award of nominal damages and statutory attorney's fees and costs ([42 U.S.C. § 1988](#)) for further consideration at an appropriate time and upon an appropriate record.

genuine issue of material fact and that they are entitled-at least in part-to judgment as a matter of law, and the court having determined that there is no existing case or controversy as to the remainder of plaintiffs' claims,

IT IS ORDERED that the plaintiffs' motion for summary judgment is GRANTED IN PART as to the constitutionality of [Utah Code Ann. § 76-7-204\(3\)\(a\)](#), as applied to plaintiffs J.R. and M.R. and to the extent explained above, and DENIED N PART as to the remainder of plaintiffs' substantive claims; plaintiffs' claims concerning the constitutionality of the balance of [§ 76-7-204\(1\)](#), [\(2\)](#), [\(3\)\(b\)](#), [\(4\)](#) and [\(5\)](#) are DISMISSED WITHOUT PREJUDICE for want of an existing **[**92]** case or controversy; and that defendants' motion for summary judgment is DENIED.

DATED this 15 day of April, 2003.

BY THE COURT:

BRUCE S. JENKINS

United States Senior District Judge

Jackson v. Lee

United States District Court for the Central District of California

July 22, 2026, Decided; July 22, 2026, Filed

5:25-cv-01177-SSS-ACCVx

Reporter

2026 U.S. Dist. LEXIS 164005 *; 2026 LX 343996

Alexandra Jackson v. Scott Lee, et al.

Core Terms

transport, privacy, motion to dismiss, delivery, staff, reproductive, inmate, summon, negligence claim, leave to amend, postpartum, prison, medical care, state-law, battery, qualified immunity, active labor, birth, leg, emotional distress, cervical, intimate, intervene, prenatal, notice, constitutional right, labor and delivery, custodial, retaliate, stall

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For Lieutenant J. Brown, an individual, Officer A Corria-Barriga, an individual, Officer L Hernandez, an individual, Officer L Valencia, a individual, Defendants: Dennis Matthew Wong, Raye Ann Hutslar, CAAG - California Attorney General Office, San Francisco, CA; Jacqueline A. Kallberg,

CAAG - Office of Attorney General, San Diego, CA; R Lawrence Bragg, Office of the Attorney General, Sacramento, CA.

For Scott Lee, an individual, Defendant: Lauren Supance Dossey, Burke Williams and Sorensen [*2] LLP, Irvine, CA; Susan E. Coleman, Burke Williams and Sorensen LLP, Los Angeles, CA.

Judges: SUNSHINE S. SYKES, UNITED STATES DISTRICT JUDGE.

Opinion by: SUNSHINE S. SYKES

Opinion

CIVIL MINUTES—GENERAL

Proceedings: (IN CHAMBERS) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS [DKTS. NO. 28, 38]

Before the Court are Defendant Dr. Scott Lee's Motion to Dismiss Plaintiff's First Amended Complaint, [Dkt. No. 38, "Lee Motion"], and the Motion to Dismiss Plaintiff's First Amended Complaint filed by Defendants Valencia, Inegbeje, Brown, Hernandez, and Coria-Barriga ("Correctional Defendants"), [Dkt. No. 28, "Collective Motion"]. Having considered the parties' arguments, relevant legal authority, and record in this case, the Court **GRANTS IN PART** and **DENIES IN PART** each Motion as set forth below. [Dkts No. 28, 38].

I. BACKGROUND

The following allegations are drawn from the FAC and are accepted as true for purposes of these Motions. Plaintiff Alexandra Jackson was incarcerated at the California Institution for Women ("CIW") in Chino, California, from February 2023 through May 2023, while pregnant with her fourth child. [Dkt. No. 24, First Amended Complaint or "FAC" ¶¶ 1, 64]. Defendant Scott Lee, M.D., [*3] the facility's only obstetrician-gynecologist, provided Plaintiff's prenatal care. [Id. ¶¶ 1, 65, 70]. Plaintiff alleges that during prenatal appointments, Defendant Lee coerced her into medically unnecessary pelvic and breast examinations and pressured her to schedule an induction, which she refused. [Id. ¶¶ 73-83].

On May 17, 2023, at approximately 2:00 p.m., Plaintiff reported contractions to Defendant Valencia, the housing-unit correctional officer. [Id. ¶ 84]. Officer Valencia summoned CIW medical staff, who transported Plaintiff by institutional ambulance to the on-site Triage and Treatment Area ("TTA") rather than to an outside hospital. [Id. ¶ 85]. Plaintiff alleges she was left in a hallway during active labor and then placed in a room with windows open to public view, without a gown or curtain, where passing inmates and staff could see her unclothed. [Id. ¶¶ 87-89]. Defendant Inegbeje, a nurse, allegedly explained that Defendant Lee had instructed staff not to call an outside ambulance until he examined Plaintiff, and Defendant Lee did not examine Plaintiff or authorize transport until approximately 3:45 p.m. [Id. ¶¶ 90-94]. After Defendant Lee performed a cervical examination, [*4] an ambulance was summoned at approximately 3:48 p.m. [Id. ¶ 100]. Plaintiff alleges that Defendant Inegbeje twice attempted to force her legs closed to stall the delivery as Plaintiff sought to push. [Id. ¶¶ 103-104]. Plaintiff delivered her son at the TTA at approximately 4:07 p.m. [Id. ¶ 106].

Following delivery, Plaintiff and her newborn were

transported to an outside hospital for recovery. [Id. ¶ 109]. Before transport, Defendant Brown signed an Inmate Transport and Guarding Assessment authorizing full mechanical restraints. [Id. ¶ 124]. Defendant Hernandez accompanied Plaintiff to the hospital, and Defendant Coria-Barriga later applied leg restraints at approximately 8:00 p.m., which were removed the following morning. [Id. ¶¶ 110-122]. Plaintiff alleges Defendant Coria-Barriga denied her privacy, including by keeping her shackled while she used the restroom, as well as following her into the restroom. [Id. ¶¶ 117-118]. After returning to CIW, Plaintiff filed grievances regarding the May 17 conduct and alleges she was thereafter denied adequate postpartum care. [Id. ¶¶ 138-146].

The First Amended Complaint alleges fifteen causes of action:

1. Violation of the [Eighth Amendment to the United States Constitution](#) for improper medical [*5] care pursuant to [42 U.S.C. § 1983](#) against Defendants Lee, Inegbeje, Valencia, and Does 1-11;
2. Violation of the [Eighth Amendment to the United States Constitution](#) for excessive force pursuant to [42 U.S.C. § 1983](#) against Defendants Inegbeje, Coria-Barriga, Hernandez, Brown, and Doe 12;
3. Violation of the [Eighth Amendment to the United States Constitution](#) for sexual assault pursuant to [42 U.S.C. § 1983](#) against Defendant Lee;
4. Violation of [First](#) and [Fourteenth Amendments to the United States Constitution](#) for retaliation pursuant to [42 U.S.C. § 1983](#) against Defendants Lee, Inegbeje, and Does 6-11;
5. Violation of [Article I, Section 1.1 of the California Constitution](#) against Defendants Lee, Inegbeje, and Does 1-6;

6. Sexual battery ([Cal. Civ. Code § 1708.5](#)) against Defendant Lee;
7. Gender violence ([Cal. Civ. Code § 52.4\(c\)\(2\)](#)) against Defendant Lee;
8. Violation of the [Tom Bane Civil Rights Act \(Cal. Civ. Code § 52.1\)](#) against Defendant Lee;
9. Violation of the [Ralph Civil Rights Act \(Cal. Civ. Code § 51.7\)](#) against Defendant Lee;
10. Battery against Defendants Lee, Inegbeje, and Does 1-6;
11. Battery against Defendant Coria-Barriga;
12. Intentional infliction of emotional distress against all Defendants;
13. Negligence against Defendants Lee, Inegbeje, Valencia and Does 1-6;
14. Negligence against Defendants Coria-Barriga, Hernandez, Brown, and Doe 12;
15. Negligence against Defendants Lee, Inegbeje, Valencia, Does 1-6, Coria-Barriga, and Hernandez.

[See generally FAC].

Two motions to dismiss the FAC are before the Court. First, Correctional Defendants Valencia, Inegbeje, Brown, Hernandez, and Coria-Barriga moved [*6] to dismiss the FAC on October 31, 2025. [Dkt. No. 28, Collective Motion]. Plaintiff opposed on December 5, 2025, [Dkt. No. 30, "Collective Opp."], and the Correctional Defendants replied on December 19, 2025, [Dkt. No. 33, "Collective Reply"].

Second, Defendant Scott Lee, M.D., moved separately to dismiss the FAC. Defendant Lee's original motion was denied without prejudice for failure to adequately detail the parties' Local Rule 7-3 meet-and-confer efforts. [Dkt. No. 37]. Defendant Lee thereafter filed an Amended Motion to Dismiss on January 15, 2026, supported by an

amended declaration further detailing those efforts, including additional meet-and-confer discussions on October 1 and October 3, 2025, following the filing of the FAC. [Dkt. No. 38, Lee Motion]. Defendant Lee's Amended Motion is also accompanied by a Request for Judicial Notice and the Declaration of Lauren Dossey. [Id.]. Plaintiff opposed the Amended Motion on January 20, 2026, [Dkt. No. 39, "Lee Opp."], and Defendant Lee replied, [Dkt. No. 40, "Lee Reply"].

II. LEGAL STANDARD

A motion to dismiss under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) tests the legal sufficiency of the claims in a complaint. [Navarro v. Block, 250 F.3d 729, 732 \(9th Cir. 2001\)](#). Dismissal of a claim is proper under [Rule 12\(b\)\(6\)](#) when a plaintiff "fails to state [*7] a cognizable legal theory or fails to allege sufficient factual support for its legal theories." [Caltex Plastics, Inc. v. Lockheed Martin Corp., 824 F.3d 1156, 1159 \(9th Cir. 2016\)](#). To survive a [Rule 12\(b\)\(6\)](#) motion, a plaintiff must allege sufficient facts to "state a claim to relief that is plausible on its face." [Ashcroft v. Iqbal, 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#) (quoting [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#)).

In analyzing a motion to dismiss, a court must accept as true all material factual allegations and draw all reasonable inferences in the non-moving party's favor. [Doe v. United States, 419 F.3d 1058, 1062 \(9th Cir. 2005\)](#). A court need not accept, however, "a legal conclusion couched as a factual allegation." [Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 \(1986\)](#). When reviewing a [Rule 12\(b\)\(6\)](#) motion, a court must consider the complaint in its entirety and any attached documents, documents incorporated by reference, or matters of which a court may take judicial notice. [Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 \(2007\)](#). If a complaint fails to state a plausible claim, a court should freely grant

leave to amend under [Federal Rule of Civil Procedure 15\(a\)\(2\)](#) even if such a request was not made, unless amendment would be futile. [Watison v. Carter, 668 F.3d 1108, 1117 \(9th Cir. 2012\)](#).

III. REQUESTS FOR JUDICIAL NOTICE

In support of his Motion, Defendant Lee requests judicial notice of Plaintiff's Government Claim Form submitted to the State on November 15, 2023. [Dkt. No. 38-3, "RJN"]. A court ruling on a [Rule 12\(b\)\(6\)](#) motion may consider documents incorporated by reference into the complaint and matters subject to judicial notice. [United States v. Ritchie, 342 F.3d 903, 908 \(9th Cir. 2003\)](#) [*8]. The FAC expressly relies on the Government Claim Form and alleges compliance with the [Government Claims Act](#). [FAC ¶ 25]. The form's existence and contents are therefore incorporated by reference. The Court **GRANTS** the request and considers the Government Claim Form for the fact of its filing and contents, but not for the truth of any disputed matter asserted therein.

IV. DISCUSSION

The Court addresses the two Motions separately. Because Defendant Lee and the Correctional Defendants are represented by different counsel, challenge different claims, and raise largely distinct arguments, the Court considers Defendant Lee's Motion first, [Dkt. No. 38], and then turns to the Correctional Defendants' Motion, [Dkt. No. 28]. Two issues, however, are present across both Motions: the scope of [Article I, Section 1.1 of the California Constitution](#) and the duty of care underlying Plaintiff's negligence claims under [California Penal Code section 4023.8](#) and its state-prison analogue, [section 3408](#). The Court's resolution of each issue applies equally to both Motions, and the Court cross-references its analysis where those issues arise.

A. Lee's Motion to Dismiss

Defendant Lee moves to dismiss only the state-law claims asserted against him. He does not challenge Plaintiff's [§ 1983](#) claims (Claims 1, 3, and 4). [*9] The Court addresses Defendant Lee's three arguments in the order he presents them.

First, the Court considers whether the Government Claims Act bars Plaintiff's state-law claims against Defendant Lee to the extent they rely on conduct occurring before or after May 17, 2023. Second, the Court considers whether Plaintiff states a claim for violation of [Article I, Section 1.1 of the California Constitution](#) (Claim 5). Third, the Court considers whether Plaintiff states a claim for negligence (Claims 13 and 15), addressing both whether those counts impermissibly split a single negligence cause of action and whether they rest on a viable duty of care.

1. Claims 5-10, 12, 13, 15: Whether Plaintiff's state law claims are barred under the Government Claims Act to the extent they rely on conduct outside of May 17, 2023

Defendant Lee moves to limit Plaintiff's state-law claims against him to conduct occurring on May 17, 2023, arguing that all other conduct falls outside the scope of her Government Claim and is therefore barred. [Lee Motion at 6]. Plaintiff responds that her timely claim encompassed the abuse, neglect, unwanted touching, and interference with her reproductive decision-making during her labor and delivery and thus covers each state-law [*10] claim asserted against Defendant Lee. [Lee Opp. at 6-7].

The Government Claims Act requires a plaintiff to present a timely claim to the public entity before suing a public employee for conduct within the scope of employment, and to plead facts demonstrating or excusing compliance. [Cal. Gov't Code §§ 905, 945.4, 950.2](#); [California v. Superior Court, 32 Cal. 4th 1234, 1243, 13 Cal. Rptr. 3d 534, 90 P.3d 116 \(2004\)](#). A complaint is barred to the extent it alleges "a factual basis for recovery

which is not fairly reflected in the written claim." [*Stockett v. Ass'n of Cal. Water Agencies Joint Powers Ins. Auth.*, 34 Cal. 4th 441, 447, 20 Cal. Rptr. 3d 176, 99 P.3d 500 \(2004\)](#). The claim need not specify each cause of action, but the complaint's factual premises must correspond to those described in the claim; a plaintiff may not premise liability on "acts or omissions committed at different times" than those identified. [*Blair v. Superior Court*, 218 Cal. App. 3d 221, 225, 267 Cal. Rptr. 13 \(1990\)](#).

Here, the Government Claim Form establishes the temporal scope of Plaintiff's state-law claims against Defendant Lee on May 17, 2023. [See Dkt. No. 38-3, Ex. A]. The form identifies a single "Date of Incident," 5/17/2023, instead of a date range or a continuing course of conduct, and the narrative attached to the form describes only the events of that day: the onset of labor at CIW, the delay in transport, the denial of privacy, and the immediate hospital recovery extending into the following morning, when Plaintiff's restraints [*11] were removed. [*Id.*]. The narrative says nothing of Plaintiff's prenatal care, her six-week postpartum checkup, or any denial of care in the weeks that followed. A public entity reviewing the claim would therefore have understood it to concern the May 17 labor, delivery, and immediate post-delivery period, and would have had no notice to investigate conduct occurring before or well after that date. See [*Stockett*, 34 Cal. 4th at 447](#).

The claim's reference to the "post-delivery process" does not broaden that scope to reach Plaintiff's later postpartum care. Read together with a single May 17 incident date and a narrative that ends with Plaintiff's overnight hospital recovery, the phrase describes the immediate aftermath of the delivery, not the six-week checkup or the subsequent weeks of allegedly deficient care.

Both parties read the claim the same way. Defendant Lee describes it as reaching Plaintiff's labor, delivery, and "the immediate postpartum period." [Lee Motion at 1]. Plaintiff, in turn,

characterizes each of her state-law claims against Defendant Lee as "arising from Lee's conduct on May 17, 2023." [Lee Opp. at 7]. Plaintiff nowhere contends that her claim reached her later postpartum care, and the Court [*12] will not construe the claim more broadly than Plaintiff herself does.

Applying that scope, Plaintiff may not premise state-law liability against Defendant Lee on conduct falling outside May 17, 2023. Two categories of allegations are barred.

First, the pre-labor conduct—the coerced prenatal pelvic and breast examinations, the abortion-related comment at Plaintiff's first prenatal appointment, and the induction discussions—occurred before May 17 and thus lies outside the claim. [FAC ¶¶ 67, 73-83]. Because Claims 6 and 7 rest substantially on that prenatal conduct, they are barred except to the extent they are predicated on the cervical examination Defendant Lee performed during labor on May 17.

Second, the post-delivery conduct—Defendant Lee's alleged refusals to see Plaintiff, his comments at the six-week postpartum checkup, and the denial of postpartum care over the following weeks—likewise falls outside the Government Claim. [FAC ¶¶ 136, 138-140, 145-146]. By contrast, conduct occurring on May 17, 2023, through Plaintiff's immediate hospital recovery, including the delayed transport, the cervical examination, and the privacy conditions during labor and delivery, is fairly reflected [*13] in the claim and is not barred.

As such, the Court **GRANTS IN PART** Defendant Lee's Motion on this ground. Plaintiff's state-law claims against Defendant Lee (Claims 5, 6, 7, 8, 9, 10, 12, 13, and 15) are limited to conduct occurring on May 17, 2023, and are **DISMISSED** to the extent they rely on conduct occurring before or after that date. Because the six-month period for presenting a claim as to the barred conduct has long passed, the claim-presentation defect cannot be cured by amendment, and dismissal of the out-of-scope allegations is **WITHOUT LEAVE TO**

AMEND.¹ See [Cal. Gov't Code § 911.2](#).

2. Claim 5: Whether Plaintiff states a claim for violation of [Article I, Section 1.1 of the California Constitution](#)

Defendant Lee moves to dismiss Claim 5, arguing that [Article I, Section 1.1 of the California Constitution](#) is confined to the rights to obtain an abortion and to choose or refuse contraception, and that his conduct on May 17, 2023, concerned his medical judgment as the attending physician rather than any protected reproductive decision. [Lee Motion at 6-8]. Plaintiff responds that [Section 1.1](#) protects "intimate decisions" concerning reproductive freedom more broadly, including decisions about where and how to give birth, and that Defendant Lee interfered with those decisions by refusing to authorize her transport [*14] to a hospital until she submitted to an unwanted cervical examination. [Lee Opp. at 7-13].

To state a claim under the state constitutional right to privacy, a plaintiff must plead (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a sufficiently serious invasion of that interest. [Hill v. Nat'l Collegiate Athletic Ass'n](#), 7 Cal. 4th 1, 39-40, 26 Cal. Rptr. 2d 834, 865 P.2d 633 (1994); [Am. Acad. of Pediatrics v. Lungren](#), 16 Cal. 4th 307, 330, 66 Cal. Rptr. 2d 210, 940 P.2d 797 (1997). The Court addresses the threshold question of [Section 1.1](#)'s scope before applying that framework to the conduct remaining after the temporal limitation set forth in Section IV.A.1 above.

a. Section 1.1 is not limited to abortion and contraception

Defendant Lee's construction cannot be reconciled with the provision's text. [Section 1.1](#) provides that the State "shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives." [Cal. Const. art. I, § 1.1](#). The operative phrase "which includes" is one of enlargement, not limitation. [Flanagan v. Flanagan](#), 27 Cal. 4th 766, 774, 117 Cal. Rptr. 2d 574, 41 P.3d 575 (2002); [People v. Aguirre](#), 64 Cal. App. 5th 652, 661, 279 Cal. Rptr. 3d 126 (2021). Where a statute defines a term by reference to specified items, those items illustrate rather than exhaust the term's meaning, and the same principle governs interpretation [*15] of California legislation in this Circuit. [FTC v. MTK Mktg., Inc.](#), 149 F.3d 1036, 1040 (9th Cir. 1998). Read this way, [Section 1.1](#) protects "reproductive freedom in [an individual's] most intimate decisions" generally, of which the expressly stated abortion and contraception rights are mere examples.

The sole appellate authority construing [Section 1.1](#) confirms this reading. In [Carpenter v. Superior Court](#), the court held that the provision protects a Californian "from interference with [their] reproductive freedom, including [their] right to have a home birth and make other decisions about [their] childbirth." 93 Cal. App. 5th 1279, 1313, 311 Cal. Rptr. 3d 669 (2023). The California Legislature's companion declaration is to the same effect, recognizing that the fundamental privacy right regarding personal reproductive decisions includes "the right to make and effectuate decisions about *all* matters relating to pregnancy, *including* prenatal care, childbirth, [and] postpartum care" [Cal. Health & Safety Code § 123462](#) (emphases added). The Court thus finds that [Section 1.1](#) reaches a person's decisions concerning where and how to give birth. However, the Court need not,

¹This ruling addresses only the state-law claims against Defendant Lee that are the subject of his Motion. It does not reach Plaintiff's state-law claims against the Correctional Defendants, who did not raise the Government Claims Act, and it does not affect any of Plaintiff's federal claims under [42 U.S.C. § 1983](#), to which the claim-presentation requirement does not apply. See [California v. Superior Court](#), 32 Cal. 4th 1234, 1240, 13 Cal. Rptr. 3d 534, 90 P.3d 116 (2004).

and does not, define the outer bounds of the provision to resolve this Motion. The Court limits its ruling on this issue to the alleged facts of this case.

b. The [*16] FAC plausibly alleges interference with a protected decision

Defendant Lee's argument that the operative allegations describe only his exercise of medical discretion misappropriates both the pleaded facts and the governing law. Taking the allegations as true and drawing all reasonable inferences in Plaintiff's favor, the FAC alleges each element of a Section 1.1 claim as to Defendant Lee's conduct on May 17, 2023.

As to the first element, Plaintiff has alleged a legally protected privacy interest under [Section 1.1](#). As mentioned above, the state constitutional right to privacy protects not only against the unauthorized dissemination of private information but also the interest in "making intimate personal decisions or conducting personal activities without observation, intrusion, or interference," what the California Supreme Court has termed "autonomy privacy." [Hill, 7 Cal. 4th at 35](#). [Section 1.1](#) secures an individual's "reproductive freedom in their most intimate decisions," which the Court has found encompasses the decision where and how to give birth. Plaintiff's decision to be transported to a hospital to deliver her child is a decision of that character, and it thus falls within the autonomy-privacy interest [*17] [Section 1.1](#) protects. Plaintiff alleges that, upon reporting labor, she sought to be taken to a hospital and repeatedly requested that an ambulance be called to transport her there. [FAC ¶¶ 84-85, 90].

That her asserted interest is one the California Legislature has independently recognized reinforces its constitutional weight. California law provides that an incarcerated person "in labor or presumed to be in labor *shall* be treated as an emergency and *shall* be transported to the outside

facility" for childbirth, conditioning mandatory transport on labor, or even *presumed* labor, and not on any preliminary examination. [Cal. Penal Code § 3408\(l\)](#) (emphases added). The statute does not necessarily create the privacy interest Plaintiff asserts under the California Constitution, but it does lend additional support to her claim that her interest in being transported to a hospital to give birth is concrete and not abstract, and that the State itself treats interference with that interest as a serious matter.

As to the second element, Plaintiff has alleged a reasonable expectation that her decision would not be overridden by custodial or medical staff. She pleads that, while under the care and supervision of CDCR, she [*18] reasonably expected her right to be free from interference with her reproductive freedom to be respected. [FAC ¶ 190]. That expectation is objectively reasonable in light of [Section 3408\(l\)](#) and of the settled rule that even an incarcerated competent adult has a right of self-determination and control over bodily integrity. [Thor v. Superior Court, 5 Cal. 4th 725, 744, 21 Cal. Rptr. 2d 357, 855 P.2d 375 \(1993\)](#). Prison medical personnel may not force treatment, such as a cervical examination, over the objection of a mentally competent patient absent an emergency or the procedures specified by regulation, none of which is alleged here. [Thor, 5 Cal. 4th at 731-32](#); [Cal. Code Regs. tit. 15, § 3999.210\(e\)](#).

As to the third element, Plaintiff has alleged a serious invasion of that interest. She pleads that Defendant Lee instructed staff not to call an ambulance until he examined her and then declined to examine her or otherwise attend to her for nearly two hours while she was in active labor and repeatedly requesting transport. [FAC ¶¶ 90-92]. She further pleads that Defendant Lee told her he would not call an ambulance unless she permitted a cervical examination, that she was uncomfortable with the examination and believed it unnecessary and potentially harmful, and that she submitted "against her will" and "under duress" because she believed no ambulance [*19] would be called

otherwise. [*Id.* ¶¶ 94-96]. Finally, she pleads that Defendant Lee's stated justification for the examination was false, that he admitted after performing it that the hospital selection was not his to make, and that she never received the hospital transport she sought, ultimately delivering her child at the prison without pain relief. [*Id.* ¶¶ 98-100, 106]. Those allegations describe not a delay in care but the denial of the very decision Section 1.1 protects, accomplished through coercion and a confessed pretext.

Defendant Lee's contention that his conduct reflected protected medical judgment does not warrant dismissal. The "difference of medical opinion" principle on which he relies may govern claims challenging the adequacy of treatment but not on a claim involving a coerced, unconsented intrusion upon an intimate decision.

In any event, Plaintiff alleges that the stated medical justification was pretextual and was admitted to be false, which forecloses resolving the characterization of Defendant Lee's conduct in his favor at the pleading stage. [*Id.* ¶¶ 98-99]. Whether an assessment of cervical dilation before transport in fact aligns with sound obstetric practice, and [*20] whether any legitimate penological or medical interest justified the challenged conduct, are questions to be resolved on a developed record under *Hill's* balancing of interests. See *Hill*, 7 Cal. 4th at 40 (holding that whether an invasion of privacy is justified requires balancing the privacy interest against countervailing interests, an inquiry that turns on the specific circumstances of the case); *Hernandez v. Hillside, Inc.*, 47 Cal. 4th 272, 287, 97 Cal. Rptr. 3d 274, 211 P.3d 1063 (2009) (holding that the privacy analysis depends on the particular factual context, including the seriousness of the intrusion and the strength of the countervailing interests). They are not properly decided on a motion to dismiss.

To the extent Defendant Lee argues that Plaintiff's theories concerning hospital delivery and refusal of the examination were raised for the first time in her

Opposition, the argument is unavailing. The FAC sufficiently pleads the underlying facts, and a plaintiff need not plead legal theories. See *Fed. R. Civ. P. 8(a)(2)*; *Alvarez v. Hill*, 518 F.3d 1152, 1157-58 (9th Cir. 2008). Claim 5 incorporates the general allegations by reference, including the specific allegations concerning Defendant Lee's conduct on May 17, 2023, as the Court detailed above. [See FAC ¶ 188].

As such, the Court **DENIES** Defendant Lee's Motion as to Claim 5, insofar as the claim rests on his conduct [*21] on May 17, 2023.

3. Claims 13 and 15: Whether Plaintiff states a claim for negligence

The Court turns to Defendant Lee's challenges to Plaintiff's negligence claims. Defendant Lee first argues that Counts 13 and 15 impermissibly split a single negligence cause of action and that one must be dismissed.

Negligence is a single cause of action under California law, and invoking different sources of duty does not, by itself, create distinct claims. *Landeros v. Flood*, 17 Cal. 3d 399, 405, 131 Cal. Rptr. 69, 551 P.2d 389 (1976). But the assertion of overlapping or alternative negligence theories in separate counts is not a proper basis for dismissal under *Rule 12(b)(6)*. *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762-63 (9th Cir. 2015). In any event, Counts 13 and 15 rest on distinct primary rights, adequate medical care and bodily privacy, and allege different breaches and injuries. See *Crowley v. Katleman*, 8 Cal. 4th 666, 681, 34 Cal. Rptr. 2d 386, 881 P.2d 1083 (1994). The Court thus rejects Defendant Lee's argument to the extent it seeks dismissal of either negligence count on a claim-splitting theory.

Defendant Lee next argues that Counts 13 and 15 fail because they rely on *California Penal Code section 4023.8*, which by its terms governs county jails rather than state prisons such as CIW, and that *section 4023.8(o)* addresses only the placement of

correctional guards during labor and delivery, a matter over which Defendant Lee argues he exercised no control. The argument misapprehends [*22] the source of the duty Plaintiff alleges. A negligence claim need not be predicated on any statute. The special relationship between custodial staff and an inmate independently gives rise to a duty of reasonable care, [*Giraldo v. Cal. Dep't of Corr. & Rehab.*, 168 Cal. App. 4th 231, 250-52, 85 Cal. Rptr. 3d 371 \(2008\)](#), and a physician owes the patient an independent professional duty to exercise the knowledge, skill, and care ordinarily possessed by reasonable practitioners, [*Flowers v. Torrance Mem'l Hosp. Med. Ctr.*, 8 Cal. 4th 992, 997-98, 35 Cal. Rptr. 2d 685, 884 P.2d 142 \(1994\)](#). The FAC pleads those common-law duties directly. [FAC ¶¶ 241, 256].

The Court finds that Plaintiff sufficiently pleads a negligence claim against Defendant Lee under the common law, and that her citation to the jail provision ([section 4023.8](#)) instead of its materially identical prison counterpart ([section 3408](#)) does not warrant dismissal. A plaintiff need not identify the correct legal theory or statute to survive a motion to dismiss, so long as she pleads facts giving rise to a plausible claim. [*Johnson v. City of Shelby*, 574 U.S. 10, 11, 135 S. Ct. 346, 190 L. Ed. 2d 309 \(2014\)](#) (holding that federal pleadings rules do not require dismissal of a complaint for "imperfect statement of the legal theory supporting the claim asserted"). The statutory provisions on which Plaintiff relies inform the applicable standard of care but they are not the source of Defendant Lee's duty.

Those principles resolve both claims. As to Claim [*23] 13, the FAC alleges that Defendant Lee, as Plaintiff's treating physician, breached his duty of reasonable care by conditioning her transport to an outside hospital on his own examination and delaying that transport while she was in active labor. [FAC ¶¶ 90-100, 242-244]. As to Claim 15, even assuming [section 4023.8\(o\)](#) speaks only to guard placement and does not itself impose a duty on Defendant Lee, the FAC

independently alleges that Plaintiff's medical providers, including Defendant Lee, owed her a common-law duty of reasonable care during her labor and delivery, and that Defendant Lee breached that duty by, among other things, delivering her in a room exposed to public view, without a gown or curtain. [FAC ¶¶ 87-89, 256-258]. Whether the conditions of Plaintiff's delivery were within Defendant Lee's control, and whether he exercised reasonable care, are factual questions not suited to resolution on the pleadings. As such, the Court **DENIES** Defendant Lee's Motion as to Claims 13 and 15.

B. Valencia, Inegbeje, Brown, Hernandez, and Coria-Barriga's Motion to Dismiss

Correctional Defendants challenge eight of Plaintiff's claims, which the Court now addresses in turn. The Court begins with the two [Eighth Amendment](#) claims: [*24] the deliberate-indifference claim for inadequate medical care against Officer Valencia and Nurse Inegbeje, together with their assertion of qualified immunity (Claim 1); and the excessive-force claim against Lieutenant Brown and Officer Hernandez (Claim 2).

The Court then turns to the three claims asserted against Nurse Inegbeje individually—[First Amendment](#) retaliation (Claim 4), violation of [Article I, Section 1.1 of the California Constitution](#) (Claim 5), and battery (Claim 10)—before addressing the claim for intentional infliction of emotional distress against Officers Valencia, Brown, and Hernandez (Claim 12).

Finally, the Court addresses Plaintiff's two negligence claims: transport-based negligence against Officers Valencia and Inegbeje (Claim 13), and privacy-based negligence against Officers Valencia, Inegbeje, Hernandez, and Coria-Barriga (Claim 15). The Correctional Defendants do not challenge the battery claim against Defendant Coria-Barriga (Claim 11) or the negligence claim against Defendants Coria-Barriga, Hernandez,

Brown, and Doe 12 (Claim 14), so those claims will proceed.

1. Claim 1: Whether Plaintiff states an [Eighth Amendment](#) medical care claim against Defendants Valencia and Inegbeje

a. Officer Valencia

Plaintiff alleges that Officer Valencia, the housing-unit [*25] officer, violated the [Eighth Amendment](#) by failing to summon an outside ambulance. A prison official is deliberately indifferent only if she "knows of and disregards an excessive risk to inmate health." [Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 128 L. Ed. 2d 811 \(1994\)](#). As alleged, Officer Valencia responded to Plaintiff's report of contractions by promptly summoning CIW medical staff, who transported Plaintiff to the TTA. [FAC ¶¶ 84-85]. A non-medical officer who summons medical personnel does not disregard a known risk; she addresses it. See [Lemire v. Cal. Dep't of Corr. & Rehab., 726 F.3d 1062, 1084 \(9th Cir. 2013\)](#).

Here, the FAC pleads no facts showing Officer Valencia knew that summoning on-site staff, rather than calling 911 for an outside ambulance, posed an excessive risk that she chose to ignore. The Court thus **GRANTS** the Motion as to Claim 1 against Officer Valencia and **DISMISSES** the claim with leave to amend.

b. Nurse Inegbeje

The allegations against Nurse Inegbeje are materially different. Plaintiff alleges that Nurse Inegbeje, a medical provider, observed Plaintiff in active labor for an extended period and declined to summon an outside ambulance, deferring to Defendant Lee's instruction to wait for his examination. [FAC ¶¶ 90-100]. Deliberate indifference may be shown where an official intentionally delays or interferes with [*26] needed

medical care, [Jett v. Penner, 439 F.3d 1091, 1096 \(9th Cir. 2006\)](#), and a nurse's deference to a physician does not categorically defeat the claim where she ignores an obvious medical emergency, [Ortiz v. City of Imperial, 884 F.2d 1312, 1314 \(9th Cir. 1989\)](#).

Here, drawing all inferences in Plaintiff's favor, the FAC alleges more than a mere difference of medical opinion. It alleges that immediate transport was the medically required response to an inmate in active labor. See [Edmo v. Corizon, Inc., 935 F.3d 757, 786 \(9th Cir. 2019\)](#) (holding that to show deliberate indifference, plaintiff must show that the course of treatment was medically unacceptable under the circumstances and that the official chose the course in conscious disregard of an excessive risk to the plaintiff's health). The Court thus **DENIES** the Motion as to Claim 1 against Nurse Inegbeje.

c. Qualified Immunity as to Valencia and Inegbeje

Defendants assert qualified immunity for both officers. "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." [Pearson v. Callahan, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 \(2009\)](#) (citation modified). "It protects all but the plainly incompetent or those who knowingly violate the law." [Ashcroft v. al-Kidd, 563 U.S. 731, 743, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 \(2011\)](#) (citation modified).

The qualified immunity [*27] analysis involves two distinct steps, determining: (1) whether the facts alleged by plaintiff establish a violation of a constitutional right; and (2) if so, whether the right was "clearly established" at the time of defendant's alleged misconduct. [Pearson, 555 U.S. at 232; Sandoval v. Las Vegas Metro. Police Dep't, 756 F.3d 1154, 1160 \(9th Cir. 2014\)](#), cert. denied, 574

U.S. 1153, 135 S. Ct. 1401, 191 L. Ed. 2d 360 (2015). Both prongs entail questions of law that the court may address in either order. See [Pearson, 555 U.S. at 236](#).

"A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." [Mullenix v. Luna, 577 U.S. 7, 11-12, 136 S. Ct. 305, 193 L. Ed. 2d 255 \(2015\)](#) (per curiam) (citation modified). In determining whether a right is clearly established, there does not need to be a "case directly on point, but existing precedent must have placed the . . . constitutional question beyond debate." [al-Kidd, 563 U.S. at 741](#); see [Thompson v. Rahr, 885 F.3d 582, 587 \(9th Cir. 2018\)](#) ("For a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate, such that every reasonable official, not just a reasonable official, would have understood that he was violating a clearly established right." (citation modified)); [District of Columbia v. Wesby, 583 U.S. 48, 138 S. Ct. 577, 199 L. Ed. 2d 453 \(2018\)](#) ("The rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted." [*28] (citation modified)). "[T]he dispositive question is whether the violative nature of particular conduct is clearly established." [Thompson, 885 F.3d at 587](#).

Here, the Court has already found that Plaintiff has not stated an [Eighth Amendment](#) claim as to Officer Valencia, so the Court does not reach the qualified immunity issue as to Officer Valencia.

As to Nurse Inegbeje, it has been clearly established that officials may not deny, delay, or intentionally interfere with needed medical care. *Sandoval v. County of San Diego*, 985 F.3d 657, 680-81 (9th Cir. 2021) (citing [Jett, 439 F.3d at 1096](#)) ("Our cases make clear that prison officials violate the Constitution when they 'deny, delay or intentionally interfere' with needed medical treatment."). Prison policies requiring that labor be treated as an emergency further inform the

reasonableness of Nurse Inegbeje's conduct. [Furnace v. Sullivan, 705 F.3d 1021, 1027-28 \(9th Cir. 2013\)](#) ("Prison regulations governing the conduct of correctional officers are also relevant in determining whether an inmate's right was clearly established."). The Court thus **DENIES** qualified immunity as to Nurse Inegbeje.

2. Claim 2: Whether Plaintiff states an [Eighth Amendment](#) claim for excessive force against Defendants Brown and Hernandez

a. Lieutenant Brown

Plaintiff alleges that Lieutenant Brown used excessive force by signing an Inmate Transport and Guarding Assessment [*29] authorizing full restraints. [FAC ¶ 124]. An [Eighth Amendment](#) excessive-force claim requires that force be applied "maliciously and sadistically to cause harm." [Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct. 995, 117 L. Ed. 2d 156 \(1992\)](#).

Here, Lieutenant Brown is not alleged to have applied any restraints or directed their application; Plaintiff instead alleges that it was Defendant Coria-Barriga who independently decided to apply leg restraints after Plaintiff refused to let her hold the baby. [FAC ¶¶ 112-115]. Signing a general authorization that permits restraints when necessary, without applying or directing the challenged force, does not state a claim for excessive force, and Plaintiff does not cite any authority holding the contrary. The FAC's conclusory assertion that Lieutenant Brown "observed" Plaintiff in restraints, [*id.* ¶ 168], is contradicted by its own chronology. The Court **GRANTS** the Motion as to Claim 2 against Lieutenant Brown and **DISMISSES** the claim with leave to amend.

b. Officer Hernandez

Plaintiff alleges that Officer Hernandez was present

when Defendant Coria-Barriga applied leg restraints and did nothing to prevent it. [FAC ¶¶ 116, 121]. An officer who is present and has a realistic opportunity to intervene in the use of unconstitutional force, yet fails [*30] to do so, may be liable. *Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995).

Here, because Defendants do not challenge the underlying shackling claim against Defendant Coria-Barriga, the Court finds that Plaintiff sufficiently alleges a claim for excessive force against Officer Hernandez for observing the shackling and failing to intervene. The Court thus **DENIES** the Motion as to Claim 2 against Officer Hernandez.

3. Claim 4: Whether Plaintiff states a First Amendment retaliation claim against Defendant Inegbeje

Plaintiff alleges that Nurse Inegbeje retaliated against her for filing a grievance. A prison retaliation claim requires (1) protected conduct; (2) adverse action by a state actor; (3) a causal connection; (4) chilling of First Amendment activity; and (5) the absence of a legitimate penological purpose. *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005). Defendants do not dispute that Plaintiff's grievance was protected conduct but argue that she alleges no adverse action by Nurse Inegbeje. The FAC attributes the specific retaliatory acts to others—an unnamed head nurse (Doe 6) who asked Plaintiff to rescind her grievance, and unnamed staff (Does 7-11) who allegedly withheld postpartum care. [FAC ¶¶ 143-145]. The allegation that Nurse Inegbeje herself "took adverse actions," [*id.* ¶ 184], is conclusory and [*31] unsupported by specific facts. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). The Court **GRANTS** the Motion as to Claim 4 and **DISMISSES** the claim against Nurse Inegbeje with leave to amend.

4. Claim 5: Whether Plaintiff states a

reproductive freedom claim against Defendant Inegbeje

The Correctional Defendants move to dismiss Plaintiff's claim under Article I, Section 1.1 of the California Constitution against Nurse Inegbeje, arguing that the provision does not reach conduct occurring during labor and delivery and that Nurse Inegbeje's actions concerned only the manner of Plaintiff's medical care. Plaintiff responds that Section 1.1 protects her intimate decisions concerning childbirth, and that Nurse Inegbeje interfered with those decisions when she physically attempted to force Plaintiff's legs closed to stall the delivery as Plaintiff sought to push.

The scope of Section 1.1 is governed by the Court's construction in resolving Defendant Lee's Motion. See discussion *supra* Section IV.A.2. As the Court found there, Section 1.1 protects an individual's "reproductive freedom in their most intimate decisions," and that protection reaches a person's decisions concerning where and how to give birth. The same construction applies to the claim against Nurse Inegbeje. Applying the three elements [*32] that govern a claim under the state constitutional privacy guarantee, the Court finds that the FAC sufficiently states a claim against Nurse Inegbeje. See *Hill*, 7 Cal. 4th at 35-40.

As to the first element, Plaintiff has alleged a legally protected privacy interest. Plaintiff's decision how to proceed through the final stage of her labor, including her decision to push and deliver her child without physical interference, is a decision "concerning . . . how to give birth" of the character the Court has found Section 1.1 protects. Plaintiff alleges that she was actively in labor and attempting to deliver when Nurse Inegbeje intervened. [FAC ¶¶ 103-104].

As to the second element, Plaintiff has alleged a reasonable expectation that her decisions during delivery would not be physically overridden by custodial or medical staff. She pleads that, while under the care and supervision of CDCR, she

reasonably expected her right to be free from interference with her reproductive freedom to be respected. [FAC ¶ 190]. That expectation is objectively reasonable. Even an incarcerated, competent adult retains a right of self-determination and control over her own bodily integrity, and prison medical personnel may not impose [*33] physical intervention over the objection of a competent patient absent an emergency or the procedures specified by regulation. See [Thor, 5 Cal. 4th at 731-32, 744 \(1993\)](#); [Cal. Code Regs. tit. 15, § 3999.210\(e\)](#).

As to the third element, Plaintiff has alleged a serious invasion of that interest. She pleads that Nurse Inegbeje twice attempted to force her legs closed to stall the delivery as she sought to push, against her will and over her objection. [FAC ¶¶ 103-04]. A physical attempt to arrest a woman's delivery of her child, as she actively labors to bring it about, is not a mere delay in or disagreement about care but is instead a direct physical override of the very decision that Section 1.1 protects. That Plaintiff ultimately delivered her son a short time later does not defeat the claim. [*Id.* ¶ 106]. As with Defendant Lee, the question is whether a protected decision was interfered with, not whether the interference ultimately succeeded in preventing the birth.

For substantially the same reasons stated in addressing the identical contention by Defendant Lee, Nurse Inegbeje's assertion that her conduct reflected no more than the exercise of medical judgment does not warrant dismissal. See discussion *supra* Section IV.A.2. If anything, the argument has less [*34] force here. The conduct alleged against Defendant Lee concerned the timing of transport and his insistence on a cervical examination, decisions at least facially framed as clinical judgments. But here, the conduct alleged against Nurse Inegbeje is a hands-on physical act of pressing Plaintiff's legs closed to stall the delivery as she sought to push. [FAC ¶¶ 103-104]. Whether that intervention was a warranted response to the circumstances of Plaintiff's labor, or an effort to

arrest the delivery over her objection, is a factual question that cannot be resolved in Defendants' favor on the pleadings. For the same reasons the Court declined to resolve Defendant Lee's justification defense at this stage, it declines to resolve Nurse Inegbeje's here.

As such, the Court **DENIES** the Motion as to Claim 5 against Nurse Inegbeje.

5. Claim 10: Whether Plaintiff states a claim for battery against Defendant Inegbeje

Plaintiff alleges that Nurse Inegbeje committed battery by forcibly closing her legs to stall the delivery. [FAC ¶¶ 103-104, 220-221]. In the medical context, a battery occurs where the treatment was "substantially different" from that to which the patient consented, and the scope of consent [*35] is ordinarily a question of fact. [So v. Shin, 212 Cal. App. 4th 652, 669-70, 151 Cal. Rptr. 3d 257 \(2013\)](#). Although consent may be implied in a medical emergency, Plaintiff alleges that Nurse Inegbeje acted to stall labor over Plaintiff's express objection as she sought to push, conduct a factfinder could find substantially different from the childbirth assistance to which Plaintiff consented. See, e.g., [Doe v. Kachru, 115 Cal. App. 5th 175, 189-91, 338 Cal. Rptr. 3d 1 \(2025\)](#). Resolution of the scope of consent is inappropriate on a motion to dismiss. The Court thus **DENIES** the Motion as to Claim 10.

6. Claim 12: Whether Plaintiff states a claim for IIED against Defendants Valencia, Brown, and Hernandez

Plaintiff asserts intentional infliction of emotional distress against Officers Valencia, Brown, and Hernandez. The tort requires (1) extreme and outrageous conduct undertaken with the intent to cause, or reckless disregard of the probability of causing, emotional distress; (2) severe emotional distress; and (3) actual and proximate causation. [C.B. v. Moreno Valley Unified Sch. Dist., 544 F.](#)

[Supp. 3d 973, 994 \(C.D. Cal. 2021\)](#). Conduct is outrageous when it is so extreme as to exceed all bounds of that usually tolerated in a civilized community. *Id.*

Two features of the pleaded conduct bear on that assessment. First, the alleged conduct was undertaken by correctional officers exercising custodial authority over [*36] Plaintiff, who could neither leave nor secure care on her own. The abuse of a position of real or apparent power over a plaintiff, and conduct directed at a person the defendant knows to be peculiarly susceptible to emotional distress, are both recognized markers of outrageousness. *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal. 3d 493, 497-98, 86 Cal. Rptr. 88, 468 P.2d 216 (1970). Second, Plaintiff alleges that the officers disregarded governing statutory protections—those mandating outside transport, restricting the restraint of women in labor and postpartum recovery, and requiring privacy during delivery—during her labor, delivery, and immediate recovery, a period during which she was uniquely vulnerable. [FAC ¶¶ 84-85, 116, 124]. A reasonable factfinder crediting those allegations could conclude that the officers' conduct exceeded the bounds of decency. Whether it did is ordinarily a question of fact, and the Court's role at the pleading stage is only to determine whether reasonable minds could differ. Here, the Court finds that they could. See [C.B., 544 F. Supp. 3d at 994-95](#). The Court therefore declines to rule, as a matter of law and on the pleadings, that the conduct alleged against Officers Valencia, Brown, and Hernandez was not outrageous.

The Correctional Defendants' remaining arguments do not compel [*37] a different result. Officer Valencia's summoning of on-site staff, Lieutenant Brown's authorization of restraints, and Officer Hernandez's failure to intervene are each conduct personally attributable to the officer in question, and the sufficiency of Plaintiff's allegations of intent and causation as to each is a matter for a developed record rather than dismissal.

Finally, Defendants' reliance on [California](#)

[Government Code section 820.8](#) is misplaced. [Section 820.8](#) provides that a public employee "is not liable for an injury caused by the act or omission of another person," but it expressly preserves liability "for injury proximately caused by his own negligent or wrongful act or omission." [Cal. Gov't Code § 820.8](#). The immunity thus bars a defendant's liability only insofar as the claim rests on conduct committed by someone else. It does not reach a defendant's own acts or omissions. Here, the intentional-infliction claim against Lieutenant Brown rests on his own act of authorizing Plaintiff's restraint, and the claim against Officer Hernandez rests on his own failure to intervene in the application of those restraints. To the extent Plaintiff's claim against Lieutenant Brown or Officer Hernandez is instead premised on Defendant Coria-Barriga's independent [*38] decision to apply the leg restraints, [section 820.8](#) bars that portion of the claim. But because each remains potentially liable for his own alleged conduct, the statute does not require dismissal.

As such, the Court **DENIES** the Motion as to Claim 12 against Officers Valencia, Brown, and Hernandez.

7. Claim 13: Whether Plaintiff states a transport-based negligence claim against Valencia and Inegbeje

Plaintiff alleges that Officer Valencia and Nurse Inegbeje were negligent in failing to arrange her immediate transport to an outside hospital during active labor. Negligence requires a duty of care, breach, causation, and damages. [Ileto v. Glock Inc.](#), 349 F.3d 1191, 1203 (9th Cir. 2003). As the Court has explained, custodial staff owe inmates a common-law duty of reasonable care arising from the special relationship between jailer and prisoner, and that duty does not depend on any statute. [Giraldo](#), 168 Cal. App. 4th at 250-52.

As for Correctional Defendants' argument that Claim 13 fails because it is predicated on

[California Penal Code section 4023.8\(l\)](#), which governs county jails rather than state prisons, for the reasons stated in addressing the identical argument raised by Defendant Lee, that miscitation does not warrant dismissal. See discussion *supra* Section IV.A.3. The FAC adequately alleges that both defendants breached that [*39] duty by failing to arrange the outside transport required for an inmate in active labor. That Officer Valencia's response was sufficient to defeat the deliberate-indifference claim in Claim 1 does not defeat the negligence claim, because negligence is a less demanding standard than deliberate indifference. See [Farmer, 511 U.S. at 835](#) ("[D]eliberate indifference describes a state of mind more blameworthy than negligence.").

The Correctional Defendants' reliance on [California Government Code section 845.6](#) is misplaced. That provision immunizes a public employee from liability for injuries caused by a failure to furnish or provide adequate medical care to a prisoner, but it contains an express exception: the employee "is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care." [Cal. Gov't Code § 845.6](#). Plaintiff's claim falls within that exception. She alleges that Officer Valencia and Nurse Inegbeje knew she was in active labor and failed to summon the emergency outside transport required in that circumstance—in other words, a failure to summon needed care, not a challenge to the adequacy of care actually furnished. [FAC ¶¶ 84-85, 90-100]. [Section 845.6](#) imposes liability [*40] for precisely that failure. See [Jett, 439 F.3d at 1099](#). Correctional Defendant's cited authority does not compel a different result, as it did not consider the mandatory-transport duty imposed by [section 3408\(l\)](#) or the governing CDCR protocols in assessing the reasonableness of staff's response. See *Steel v. Alameda Cnty. Sheriff's Office*, 428 F. Supp. 3d 235, 244-45 (N.D. Cal. 2019).

Nor does [California Government Code section](#)

[820.2](#) immunize the alleged conduct. [Section 820.2](#) confers immunity only for the "basic policy decisions" entrusted to a coordinate branch of government, [Johnson v. State](#), 69 Cal.2d 782, 793-94, 73 Cal. Rptr. 240, 447 P.2d 352 (1968), not for the operational decisions that carry those policies out. [Barner v. Leeds](#), 24 Cal.4th 676, 685-92, 102 Cal. Rptr. 2d 97, 13 P.3d 704 (2000). The decision whether to summon emergency transport for a particular inmate in active labor is an operational one, and the alleged failure to comply with governing statutes and CDCR manuals as to a specific prisoner is not the kind of discretion the immunity protects. See, e.g., [Luttrell v. Hart](#), No. 19-cv-07300, 2020 U.S. Dist. LEXIS 173856, 2020 WL 5642613, at *8 (N.D. Cal. Sept. 22, 2020). Whether the officers breached their duty of care, and whether any exercise of judgment was reasonable, are questions for a developed record.

As such, the Court **DENIES** the Motion as to Claim 13.

8. Claim 15: Whether Plaintiff states a privacy-based negligence claim against Defendants Valencia, Inegbeje, Hernandez, and Coria-Barriga

Plaintiff asserts privacy-based negligence against Officers Valencia, Inegbeje, Hernandez, and Coria-Barriga, arising [*41] from her exposure during labor and delivery and the denial of privacy during her postpartum recovery. As with Claim 13, the duty of reasonable care is supplied by the common-law special relationship between custodial staff and an inmate, and Defendants' contention that the claim fails because it cites [California Penal Code section 4023.8\(o\)](#) rather than its identical state-prison analogue, [section 3408\(o\)](#), does not warrant dismissal. See discussion *supra* Sections IV.A.3., IV.B.7. Whether prison officials unreasonably invaded an inmate's bodily privacy is a fact-intensive inquiry that is generally unsuited to resolution on the pleadings. See *Vazquez v. County of Kern*, No. 16-cv-01057, 2017 WL 6447887, at

*7 (E.D. Cal. Dec. 18, 2017), *reversed and remanded on other grounds by 949 F.3d 1153 (9th Cir. 2020)*.

Taking the allegations as true, Plaintiff has adequately pleaded breach as to Officer Valencia, Nurse Inegbeje, and Officer Coria-Barriga. As to Nurse Inegbeje, Plaintiff alleges that she was left to labor half-clothed in a public hallway and placed in a room with windows open to public view, where staff and other inmates could see her unclothed as she gave birth. [FAC ¶¶ 87-89]. Defendants' contention that these are only "speculative" invasions misreads the FAC, which alleges actual exposure that Plaintiff experienced. As to Officer Valencia, Plaintiff alleges [*42] that her failure to arrange transport to an appropriate medical facility, despite knowing Plaintiff was in labor, foreseeably resulted in that exposure at the TTA; a defendant whose negligence sets in motion the conduct that causes the injury is not insulated from liability merely because she was not present. [FAC ¶¶ 84-85]. See *Bilyeu v. Standard Freight Lines*, 182 Cal. App. 2d 536, 544, 6 Cal. Rptr. 65 (1960). And as to Officer Coria-Barriga, Plaintiff alleges that she kept Plaintiff shackled while she removed her underwear to change her dressing and followed her into the restroom while she remained restrained. [FAC ¶¶ 117-118]. Whether those intrusions were reasonable under the circumstances is not a question the Court can resolve on the pleadings.

Officer Hernandez's separate argument fails for the reasons already stated in connection with Plaintiff's IIED claim. Defendants contend that, to the extent the privacy-based negligence claim against Officer Hernandez rests on Officer Coria-Barriga's conduct, *California Government Code section 820.8* bars it. But Plaintiff asserts the claim on the basis of Officer Hernandez's own inaction—his failure to intervene in the unlawful shackling that deprived Plaintiff of privacy when she used the restroom—not on Officer Coria-Barriga's conduct. [Collective Opp. at [*43] 20 n.11]. *Section 820.8* immunizes a public employee only for injuries caused by the acts of another and expressly

preserves liability for injury "proximately caused by his own negligent or wrongful act or omission." *Cal. Gov't Code § 820.8*. See discussion *supra* Section IV.B.6. Because the claim rests on Officer Hernandez's own alleged failure to intervene in the shackling—the same conduct underlying Plaintiff's excessive-force claim against him in Claim 2—*section 820.8* does not bar it, for the same reason the statute does not bar Plaintiff's intentional-infliction claim against him in Claim 12.

As such, the Court **DENIES** the Motion as to Claim 15 against Officers Valencia, Inegbeje, Hernandez, and Coria-Barriga.

V. CONCLUSION

For the foregoing reasons, the Court rules as follows.

On Defendant Lee's Motion to Dismiss [Dkt. No. 38]:

- The Motion is **GRANTED IN PART** as to the Government Claims Act; Plaintiff's state-law claims against Defendant Lee (Claims 5, 6, 7, 8, 9, 10, 12, 13, and 15) are **limited to conduct occurring on May 17, 2023**, and all allegations resting on conduct occurring before or after that date are **DISMISSED WITHOUT LEAVE TO AMEND**.
- The Motion is **DENIED** as to Claim 5 (California Constitution), insofar as that claim rests [*44] on Defendant Lee's conduct on May 17, 2023.
- The Motion is **DENIED** as to Claims 13 and 15 (negligence).

On the Correctional Defendants' Motion to Dismiss [Dkt. No. 28]:

- Claim 1 (*Eighth Amendment* — medical care) is **GRANTED** as to Officer Valencia and **DISMISSED with leave to amend**, and the Court does not reach qualified immunity as to

Officer Valencia; the Motion is **DENIED** as to Nurse Inegbeje, and qualified immunity is **DENIED** as to Nurse Inegbeje.

- Claim 2 ([Eighth Amendment](#) — excessive force) is **GRANTED** as to Lieutenant Brown and **DISMISSED with leave to amend**; the Motion is **DENIED** as to Officer Hernandez.

- Claim 4 ([First Amendment](#) retaliation) is **GRANTED** as to Nurse Inegbeje and **DISMISSED with leave to amend**.

- Claim 5 (California Constitution — reproductive freedom) is **DENIED** as to Nurse Inegbeje.

- Claim 10 (battery) is **DENIED** as to Nurse Inegbeje.

- Claim 12 (intentional infliction of emotional distress) is **DENIED** as to Officers Valencia, Brown, and Hernandez.

- Claim 13 (transport-based negligence) is **DENIED** as to Officers Valencia and Inegbeje.

- Claim 15 (privacy-based negligence) is **DENIED** as to Officers Valencia, Inegbeje, Hernandez, and Coria-Barriga.

Except as otherwise specified, the claims dismissed herein are **DISMISSED WITH [*45] LEAVE TO AMEND**. The portions of Plaintiff's state-law claims dismissed as outside the scope of her Government Claim are **DISMISSED WITHOUT LEAVE TO AMEND**, because the time to present a claim as to that conduct has passed and the defect cannot be cured by amendment.

Should Plaintiff elect to amend, she must file a Second Amended Complaint within **twenty-one (21) days** of the date of this Order. In addition, Plaintiffs must email the redlined version to Chambers by email at SSS_Chambers@cacd.uscourts.gov on the same day it is filed electronically. Failure to timely amend, or the filing of an amended complaint that

does not cure the deficiencies identified herein, may result in dismissal of the dismissed claims with prejudice.

The claims not challenged by either Motion are unaffected by this Order and will proceed. These include Claim 3 ([Eighth Amendment](#) sexual assault claim against Defendant Lee), Claim 11 (battery claim against Defendant Coria-Barriga), Claim 14 (negligence claim against Defendants Coria-Barriga, Hernandez, Brown, and Doe 12), and Plaintiff's [Section 1983](#) claims against Defendant Lee (Claims 1 and 4), which Defendant Lee did not challenge.

IT IS SO ORDERED.

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Warning

As of: October 18, 2026 7:03 AM Z

Johnson v. Calvert

Supreme Court of California

May 20, 1993, Decided

No. S023721

Reporter

5 Cal. 4th 84 *; 851 P.2d 776 **; 19 Cal. Rptr. 2d 494 ***; 1993 Cal. LEXIS 2474 ****; 93 Daily Journal DAR 6409; 93 Cal. Daily Op. Service 3739

ANNA JOHNSON, Plaintiff and Appellant, v.
MARK CALVERT et al., Defendants and
Respondents.

Prior History: [****1] Superior Court of Orange County, Nos. X633190 and AD 57638, Richard N. Parslow, Jr., Judge.

Disposition: The judgment of the Court of Appeal is affirmed.

Core Terms

surrogacy, gestational, genetic, birth, woman, natural mother, parental rights, child born, procreate, reproduce, egg, reproductive technology, fertilize, biological, pregnancy, best interests of the child, parent and child, couple, public policy, maternity, paternity, mother and child, fetus, blood testing, in vitro, technology, embryo, parenthood, relinquish, female

Case Summary

Procedural Posture

Appellant surrogate sought review of an order from Court of Appeal for the Fourth District, Division Three (California), which, under the Uniform Parentage Act, [Cal Civ. Code §§ 7000-721](#) (repealed 1994), affirmed the trial court's ruling that respondents, genetic parents, were the natural parents of a child born as a result of a surrogacy contract.

Overview

Appellant surrogate entered into a contract with respondents, genetic parents, whereby she would gestate a zygote conceived of respondents genetic material. Respondents filed a declaratory judgment action seeking a determination that they were the natural parents of the child. The appellate court affirmed the trial court's holding that they were. On further appeal, the court affirmed, holding that although the Uniform Parentage Act, [Cal Civ. Code §§ 7000-721](#) (repealed 1994), recognized both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means did not coincide in one woman, she who intended to procreate the child and raise as her own, was the natural mother. The court held that the surrogacy contract was not barred by public policy. The court held that the determination that respondents were the natural parents of the child did not deprive appellant of her constitutional rights as appellant was not exercising her own right to make procreative choices. Rather she agreed to provide a necessary and profoundly important service without any expectation that she would raise the child as her own.

Outcome

The court affirmed the judgment that respondents, genetic parents, were the natural parents of a child gestated by appellant surrogate. Although the Uniform Parentage Act recognized both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when

the two means did not coincide in one woman, she who intended to procreate the child and raise as her own, was the natural mother.

LexisNexis® Headnotes

Constitutional Law > Equal Protection > Parentage

Family Law > Parental Duties & Rights > Nonmarital Children > General Overview

Family Law > Paternity & Surrogacy > General Overview

Family Law > Paternity & Surrogacy > Establishing Paternity > General Overview

HN1 Equal Protection, Parentage

[Cal. Civ. Code § 7001](#) (repealed 1994) and [Cal. Civ. Code § 7002](#) (repealed 1994) replace the distinction between legitimate and illegitimate children with the concept of the "parent and child relationship." The "parent and child relationship" means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship. [Cal. Civ. Code § 7001](#) (repealed 1994). The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents. [Cal. Civ. Code § 7002](#) (repealed 1994). The "parent and child relationship" is thus a legal relationship encompassing two kinds of parents, "natural" and "adoptive."

Family Law > Paternity & Surrogacy > Proof of

Paternity > General Overview

Governments > Legislation > Expiration, Repeal & Suspension

Family Law > Paternity & Surrogacy > General Overview

Family Law > Paternity & Surrogacy > Establishing Paternity > Uniform Parentage Act

HN2 Paternity & Surrogacy, Proof of Paternity

Any interested party, presumably including a genetic mother, may bring an action to determine the existence of a mother and child relationship. [Cal. Civ. Code § 7015](#) (repealed 1994). [Cal. Civ. Code § 7003](#) (repealed 1994) provides, in relevant part, that between a child and the natural mother a parent and child relationship may be established by proof of her having given birth to the child, or under the Uniform Parentage Act (Act), [Cal. Civ. Code §§ 7000-721](#) (repealed 1994). [Cal. Civ. Code § 7003 \(1\)](#) (repealed 1994). Apart from [Cal. Civ. Code § 7003](#) (repealed 1994), the Act sets forth no specific means by which a natural mother can establish a parent and child relationship. However, it declares that, insofar as practicable, provisions applicable to the father and child relationship apply in an action to determine the existence or nonexistence of a mother and child relationship. [Cal. Civ. Code § 7015](#) (repealed 1994).

Family Law > ... > Proof of Paternity > Types of Evidence > Blood Tests

Governments > Legislation > Expiration, Repeal & Suspension

Evidence > ... > Scientific Evidence > Bodily Evidence > Blood & Bodily Fluids

Family Law > Paternity & Surrogacy > General Overview

Family Law > Paternity &
 Surrogacy > Establishing Paternity > General
 Overview

Family Law > ... > Proof of
 Paternity > Inferences &
 Presumptions > General Overview

HN3 Types of Evidence, Blood Tests

A man can establish a father and child relationship by the means set forth in [Cal. Civ. Code § 7004](#) (repealed 1994). [Cal. Civ. Code § 7006](#) (repealed 1994) and [Cal. Civ. Code § 7004](#) (repealed 1994). Paternity is presumed under [Cal. Civ. Code § 7004](#) (repealed 1994) if the man meets the conditions set forth in [Cal. Evid. Code § 621](#) (repealed 1994). [Cal. Civ. Code § 7004\(a\)](#) (repealed 1994). [Cal. Civ. Code § 7006](#) (repealed 1994) applies, by its terms, when determining the questioned paternity of a child born to a married woman, and contemplates reliance on evidence derived from blood testing. [Cal. Evid. Code §§ 621\(a\)](#) and [\(b\)](#) (repealed 1994), and Uniform Act on Blood Tests to Determine Paternity, [Cal. Evid. Code §§ 890-897](#) (repealed 1994).

Evidence > ... > Scientific Evidence > Bodily
 Evidence > Blood & Bodily Fluids

Family Law > ... > Proof of Paternity > Types
 of Evidence > Blood Tests

Family Law > Paternity & Surrogacy > General
 Overview

Family Law > ... > Proof of
 Paternity > Inferences &
 Presumptions > General Overview

Family Law > ... > Proof of
 Paternity > Inferences &
 Presumptions > Rebuttals

HN4 Bodily Evidence, Blood & Bodily Fluids

[Cal. Evid. Code § 892](#) (repealed 1994) provides that blood testing may be ordered in an action when paternity is a relevant fact. When maternity is disputed, genetic evidence derived from blood testing is likewise admissible. [Cal. Evid. Code § 892](#) (repealed 1994). The Evidence Code further provides that if the court finds the conclusions of all the experts, as disclosed by the evidence based on the blood tests, are that the alleged father is not the father of the child, the question of paternity is resolved accordingly. [Cal. Evid. Code § 895](#) (repealed 1994). By parity of reasoning, blood testing may also be dispositive of the question of maternity. Further, there is a rebuttable presumption of paternity (hence, maternity as well) on the finding of a certain number of genetic markers. [Cal. Evid. Code § 895.5](#) (repealed 1994).

Family Law > Paternity & Surrogacy > General
 Overview

Healthcare Law > ... > Reproductive
 Services > Reproductive Technology > General
 Overview

HN5 Family Law, Paternity & Surrogacy

For any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible.

Evidence > ... > Scientific Evidence > Bodily
 Evidence > Blood & Bodily Fluids

Family Law > Paternity & Surrogacy > General
 Overview

HN6 Bodily Evidence, Blood & Bodily Fluids

There is no clear legislative preference in [Cal. Civ. Code § 7003](#) (repealed 1994) as between blood testing evidence and proof of having given birth.

Family Law > Paternity &
Surrogacy > Establishing Paternity > Uniform
Parentage Act

Family Law > Paternity & Surrogacy > General
Overview

HN7 Establishing Paternity, Uniform Parentage Act

Although the Uniform Parentage Act (Act), [Cal Civ. Code §§ 7000-721](#) (repealed 1994) recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child--that is, she who intended to bring about the birth of a child that she intended to raise as her own--is the natural mother under California law.

Contracts Law > Defenses > Public Policy
Violations

Family Law > Parental Duties &
Rights > Termination of Rights > General
Overview

Family Law > Paternity & Surrogacy > General
Overview

Family Law > Paternity &
Surrogacy > Surrogacy > Agreements

HN8 Defenses, Public Policy Violations

Surrogacy contracts do not implicate the policies underlying the statutes governing termination of parental rights.

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

Family Law > Paternity &
Surrogacy > Surrogacy > Agreements

Family Law > Paternity & Surrogacy > General
Overview

Family Law > Paternity &
Surrogacy > Surrogacy > General Overview

HN9 Privacy, Personal Decisions

A woman who enters into a gestational surrogacy arrangement is not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service without (by definition) any expectation that she will raise the resulting child as her own.

Governments > Courts > Authority to
Adjudicate

Healthcare Law > ... > Reproductive
Services > Reproductive
Technology > Artificial Insemination

Healthcare Law > Medical Treatment > General
Overview

Healthcare Law > ... > Reproductive
Services > Reproductive Technology > General
Overview

HN10 Courts, Authority to Adjudicate

It is not the role of the judiciary to inhibit the use of reproductive technology when the legislature has not seen fit to do so.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A childless married couple and another woman entered into a contract providing that an embryo created by the gametes of the couple would be implanted in the other woman's uterus, that the child born would be the couple's child, and that the

surrogate mother would relinquish all parental rights to the child, in return for which the couple would pay the surrogate a specified fee and buy her a life insurance policy. The surrogate became pregnant, but relations between her and the couple deteriorated. After the surrogate made a demand suggesting she might refuse to surrender the child, the couple sued for a declaration they were the legal parents of the unborn child, and the surrogate then filed her own action to be declared the mother. The cases were consolidated, the child was born, a blood test excluded the surrogate as the genetic mother, and the trial court ordered that the couple temporarily keep the child, whom the surrogate could visit. At trial, the court ruled that the couple were the child's genetic, biological, and natural father and mother, that the surrogate had no parental rights to the child, and that the contract was legal and enforceable against the surrogate's claims. It also terminated the visitation order. (Superior Court of Orange County, Nos. X633190 and AD 57638, Richard N. Parslow, Jr., Judge.) The Court of Appeal, Fourth Dist., Div. Three, No. G010225, affirmed.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that, although the Uniform Parentage Act ([Civ. Code, § 7000 et seq.](#)) recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child is the natural mother under California law. The court further held that the surrogacy agreement was not facially inconsistent with public policy, gestational surrogacy does not entail involuntary servitude, and termination of the surrogate's claims to the child was not otherwise unconstitutional. (Opinion by Panelli, J., with Lucas, C. J., Mosk, Baxter and George, JJ., concurring. Separate concurring opinion by Arabian, J. Separate dissenting opinion by Kennard, J.)

Headnotes

[CA\(1a\)](#) (1a) [CA\(1b\)](#) (1b) [CA\(1c\)](#) (1c)

Parent and Child § 13—Parentage of Children—Definitions and Distinctions—"Natural Mother": Words, Phrases, and Maxims—"Natural Mother."

--For any child, California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible. Although the Uniform Parentage Act ([Civ. Code, § 7000 et seq.](#)) recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child--that is, she who intended to bring about the birth of a child that she intended to raise as her own--is the natural mother under California law.

[See 10 **Witkin**, Summary of Cal. Law (9th ed. 1989) Parent and Child, § 412.]

[CA\(2\)](#) (2)

Parent and Child § 16—Parentage of Children—Support, Care, and Education—Presumptions Concerning Parentage—Applicability—Establishment of Maternity.

--The presumptions of [Civ. Code, § 7004](#), concerning natural fatherhood, although applicable under [Civ. Code, § 7015](#), to an action to determine the existence or nonexistence of a mother and child relationship, did not apply to a dispute over which of two women was the natural mother of a child. Because there was no question as to who was claiming the mother and child relationship and the factual basis of each woman's claim was obvious--one produced the egg (fertilized by her husband) and the other bore it to term--it was unnecessary to resort to an evidentiary presumption to ascertain the identity of the natural mother. Rather, the case called for a purely legal determination as between the two claimants.

CA(3a) (3a) CA(3b) (3b)**Parent and Child § 17—Parentage of Children—Support, Care, and Education—Proof of Parentage—Genetic Evidence—To Establish Maternity.**

--The term "natural," in the provision of the Uniform Parentage Act ([Civ. Code, § 7000 et seq.](#)) that parentage may be established between a child and the natural mother by proof of her having given birth to the child ([Civ. Code, § 7003, subd. \(1\)](#)), means simply a mother who is not an adoptive mother. The provisions of the act as to paternity being applicable also to maternity insofar as practicable ([Civ. Code, § 7015](#)), genetic evidence derived from blood testing ([Evid. Code, § 892](#)) is also admissible as an alternative to proof of having given birth. Blood testing may be dispositive of the question of maternity ([Evid. Code, § 895](#)), and there is a rebuttable presumption of maternity on the finding of a certain number of genetic markers ([Evid. Code, § 895.5](#)).

CA(4) (4)**Parent and Child § 13—Parentage of Children—Surrogacy Contract—Validity—Public Policy.**

--A contract providing that an embryo created by the gametes of a husband and wife would be implanted in another woman's uterus, that the child born would be the married couple's child, and that the surrogate mother would relinquish all parental rights to the child, in return for which the couple would pay the surrogate a specified fee and buy her a life insurance policy, did not offend the state or federal Constitution or public policy. It did not violate the policy embodied in the adoption statutes and the prohibition of payment for consent to adoption of a child ([Pen. Code, § 273](#)), nor did it implicate the policies underlying the statutes governing termination of parental rights ([Welf. & Inst. Code, § 202](#)). The contract also presented no potential for involuntary servitude ([U.S. Const., 13th Amend.](#); [Cal. Const., art. I, § 6](#); [Pen. Code, §](#)

[181](#)): extrinsic evidence of coercion or duress was utterly lacking, and the contract left to the surrogate any decisions regarding abortion.

Counsel: Richard C. Gilbert and Diane J. Marlowe for Plaintiff and Appellant.

Van Deusen, Youmans & Walmsley, Christian R. Van Deusen and Robert R. Walmsley for Defendants and Respondents.

Harold LaFlamme, Michelle Ben-Hur, John L. Dodd and Karen J. Dodd for Minor.

Jon Davidson, Paul L. Hoffman, Carol A. Sobel, Rogers & Wells, Rebecca C. Klipfel and Suzanne M. Madison as Amici Curiae.

Judges: Opinion by Panelli, J., with Lucas, C. J., Mosk, Baxter and George, JJ., concurring. Separate concurring opinion by Arabian, J. Separate dissenting opinion by Kennard, J.

Opinion by: PANELLI, J.

Opinion

[*87] [**777] [***495] In this case we address several of the legal questions raised by recent advances in reproductive technology. When, pursuant to a surrogacy agreement, a zygote ¹ [***496] formed of the gametes ² of a husband and [**778] wife is implanted in the uterus of another woman, who carries the resulting fetus to term and gives birth to a child not genetically related to her, who is the child's "natural mother" under California law? Does a determination [****2] that the wife is the child's natural mother work a deprivation of the gestating woman's constitutional rights? And is such an agreement barred by any public policy of this state?

¹ An organism produced by the union of two gametes. (McGraw-Hill Dict. of Scientific and Technical Terms (4th ed. 1989) p. 783.)

² A cell that participates in fertilization and development of a new organism, also known as a germ cell or sex cell. (McGraw-Hill Dict. of Scientific and Technical Terms, *supra*, p. 2087.)

We conclude that the husband and wife are the child's natural parents, and that this result does not offend the state or federal Constitution or public policy.

FACTS³

[**3]** Mark and Crispina Calvert are a married couple who desired to have a child. Crispina was forced to undergo a hysterectomy in 1984. Her ovaries remained capable of producing eggs, however, and the couple eventually considered surrogacy. In 1989 Anna Johnson heard about Crispina's plight from a coworker and offered to serve as a surrogate for the Calverts.

On January 15, 1990, Mark, Crispina, and Anna signed a contract providing that an embryo created by the sperm of Mark and the egg of Crispina would be implanted in Anna and the child born would be taken into Mark and Crispina's home "as their child." Anna agreed she would relinquish "all parental rights" to the child in favor of Mark and Crispina. In return, Mark and Crispina would pay Anna \$ 10,000 in a series of installments, the last to be paid six weeks after the child's birth. Mark and Crispina were also to pay for a \$ 200,000 life insurance policy on Anna's life.⁴

The **[****4]** zygote was implanted on January 19, 1990. Less than a month later, an ultrasound test confirmed Anna was pregnant.

Unfortunately, relations deteriorated between the two sides. Mark learned that Anna had not disclosed she had suffered several stillbirths and miscarriages. Anna felt Mark and Crispina did not do enough to obtain the required **[*88]** insurance policy. She also felt abandoned during an onset of premature labor in June.

In July 1990, Anna sent Mark and Crispina a letter

demanding the balance of the payments due her or else she would refuse to give up the child. The following month, Mark and Crispina responded with a lawsuit, seeking a declaration they were the legal parents of the unborn child. Anna filed her own action to be declared the mother of the child, and the two cases were eventually consolidated. The parties agreed to an independent guardian ad litem for the purposes of the suit.

The child was born on September 19, 1990, and blood samples were obtained from both Anna and the child for analysis. The blood test results excluded Anna as the genetic mother. The parties agreed to a court order providing that the child would remain with Mark and Crispina **[****5]** on a temporary basis with visits by Anna.

At trial in October 1990, the parties stipulated that Mark and Crispina were the child's genetic parents. After hearing evidence and arguments, the trial court ruled that Mark and Crispina were the child's "genetic, biological and natural" father and mother, that Anna had no "parental" rights to the child, and that the surrogacy contract was legal and enforceable against Anna's claims. The court also terminated the order allowing visitation. Anna appealed from the trial court's judgment. The Court of Appeal for the Fourth District, Division Three, affirmed. We granted review.

DISCUSSION

DETERMINING MATERNITY UNDER THE UNIFORM PARENTAGE ACT

The Uniform Parentage Act (the Act) was part of a package of legislation introduced **[***497]** in 1975 as Senate Bill No. 347. The legislation's purpose was to eliminate the **[**779]** legal distinction between legitimate and illegitimate children. The Act followed in the wake of certain United States Supreme Court decisions mandating equal treatment of legitimate and illegitimate children. (See, e.g., [*Levy v. Louisiana* \(1968\) 391 U.S. 68 \[20 L.Ed.2d 436, 88 S.Ct. 1509\]](#) **[****6]** [state could not deny illegitimate child right to

³ The statement of facts and the discussion of the legislative history of the Uniform Parentage Act, *post*, pages 88-89, are adapted from the opinion of the Court of Appeal.

⁴ At the time of the agreement, Anna already had a daughter, Erica, born in 1987.

bring tort action for wrongful death of parent if it gave legitimate child the same right]; [Glon v. American Guarantee Co. \(1968\) 391 U.S. 73 \[20 L.Ed.2d 441, 88 S.Ct. 1515\]](#) [state could not deny parent of illegitimate child right to bring tort action for wrongful death of child if it gave parent of legitimate child the same right].) A press release issued on October 2, 1975, described Senate Bill No. 347 this way: "The bill, as amended, would revise or repeal various laws which [***89**] now provide for labeling children as legitimate or illegitimate and defining their legal rights and those of their parents accordingly. In place of these cruel and outmoded provisions, SB 347 would enact the Uniform Parentage Act which bases parent and child rights on the existence of a parent and child relationship rather than on the marital status of the parents."

The pertinent portion of Senate Bill No. 347, which passed with negligible opposition, became part 7 of division 4 of the [California Civil Code, sections 7000- 7021](#).⁵

[****7] [HN1](#)

[Civil Code sections 7001](#) and [7002](#) replace the distinction between legitimate and illegitimate children with the concept of the "parent and child relationship." The "parent and child relationship" means "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship." ([Civ. Code, § 7001](#).) "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." ([Civ. Code, § 7002](#).) The "parent and child relationship" is thus a legal relationship encompassing two kinds of parents, "natural" and

"adoptive."

Passage of the Act clearly was not motivated by the need to resolve surrogacy disputes, which were virtually unknown in 1975. Yet it facially applies to *any* parentage determination, including the rare case in which a child's maternity is in issue. We are invited to disregard the Act and decide this case according to other criteria, including constitutional precepts and our sense of the demands of public policy. We feel [****8] constrained, however, to decline the invitation. Not uncommonly, courts must construe statutes in factual settings not contemplated by the enacting legislature. For example, in [People v. Salemme \(1992\) 2 Cal.App.4th 775 \[3 Cal.Rptr.2d 398\]](#), the court upheld a conviction of burglary when the felony the defendant entered the residence to commit was that of the fraudulent sale of securities. This scenario likely was not within the Legislature's contemplation when it enacted [Penal Code section 459](#). Nonetheless, the burglary statute, on its face, addressed the defendant's conduct and was properly interpreted to apply to it. Similarly, the Act offers a mechanism to resolve this dispute, albeit one not specifically tooled for it. We therefore proceed to analyze the parties' contentions within the Act's framework.

[CA\(1a\)](#) (1a) These contentions are readily summarized. Anna, of course, predicates her claim of maternity on the fact that she gave birth to the child. The [***90**] Calverts contend that Crispina's genetic relationship to the child establishes that she is his mother. Counsel for the minor joins in that contention and argues, in addition, [****9] that several of the presumptions created by the Act dictate the same result. As will appear, we conclude that presentation of blood test evidence is one means of establishing maternity, as is proof of having given birth, [***498] but that the presumptions cited by minor's counsel do not apply to this case.

[**780] We turn to those few provisions of the Act directly addressing the determination of

⁵ Effective January 1, 1994, [Civil Code sections 7000- 7021](#) have been repealed and replaced with equivalent provisions in the Family Code. (Stats. 1992, ch. 162, § 4; see [Fam. Code, § 7600- 7650](#) [eff. Jan. 1, 1994].)

maternity. [HN2](#) "Any interested party," presumably including a genetic mother, "may bring an action to determine the existence . . . of a mother and child relationship." ([Civ. Code, § 7015.](#)) [Civil Code section 7003](#) provides, in relevant part, that between a child and the natural mother a parent and child relationship "may be established by proof of her having given birth to the child, or under [the Act]." ([Civ. Code, § 7003, subd. \(1\)](#), italics added.) Apart from [Civil Code section 7003](#), the Act sets forth no specific means by which a natural mother can establish a parent and child relationship. However, it declares that, insofar as practicable, provisions applicable to the father and child relationship apply in an action to determine the existence or nonexistence of a mother and child [\[****10\]](#) relationship. ([Civ. Code, § 7015.](#)) Thus, it is appropriate to examine those provisions as well.

[HN3](#) A man can establish a father and child relationship by the means set forth in [Civil Code section 7004](#). ([Civ. Code, § 7006, 7004.](#)) Paternity is presumed under that section if the man meets the conditions set forth in [section 621 of the Evidence Code](#). ([Civ. Code, § 7004, subd. \(a\)](#).) The latter statute applies, by its terms, when determining the questioned paternity of a child born to a married woman, and contemplates reliance on evidence derived from blood testing. ([Evid. Code, § 621, subs. \(a\), \(b\)](#)); [6 \[****11\]](#) see [Evid. Code, § 890-897](#) [Uniform Act on Blood Tests to Determine Paternity].) Alternatively, [Civil Code section 7004](#) creates a presumption of paternity based on the

man's conduct toward the child (e.g., receiving the child into his home [\[*91\]](#) and openly holding the child out as his natural child) or his marriage or attempted marriage to the child's natural mother under specified conditions. ⁷

[\[****12\]](#)

[\[**781\]](#) [\[***499\]](#) [CA\(2\)](#) (2) In our view, the presumptions contained in [Civil Code section 7004](#) do not apply here. They describe situations in which substantial evidence points to a particular

⁷ [Civil Code section 7004](#) provides as follows: "(a) A man is presumed to be the natural father of a child if he meets the conditions as set forth in [Section 621 of the Evidence Code](#) or in any of the following paragraphs: [P] (1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court. [P] (2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following are true: [P] (i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce. [P] (ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation. [P] (3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true: [P] (i) With his consent, he is named as the child's father on the child's birth certificate. [P] (ii) He is obligated to support the child under a written voluntary promise or by court order. [P] (4) He receives the child into his home and openly holds out the child as his natural child. [P] (5) If the child was born and resides in a nation with which the United States engages in an Orderly Departure Program or successor program, he acknowledges that he is the child's father in a declaration under penalty of perjury, as specified in [Section 2015.5 of the Code of Civil Procedure](#). [P] This paragraph shall remain in effect only until January 1, 1997, and on that date shall become inoperative. [P] . . . [P] (c) Except as provided in [Section 621](#) and [621.1 of the Evidence Code](#), a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise under this section which conflict with each other, the presumption which, on the facts, is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man."

⁶ [Evidence Code section 621](#) provides in relevant part as follows: "(a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage. [P] (b) Notwithstanding subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with [Section 890](#)) of Division 7, are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly." Effective January 1, 1994, [Evidence Code sections 621](#) and [890 through 897](#) have been repealed and replaced with equivalent provisions of the Family Code. (Stats. 1992, ch. 162, § 8, 9; see [Fam. Code, § 7500- 7501, 7550- 7557](#) [eff. Jan. 1, 1994].)

man as the natural father of the child. (9B West's U.Laws Ann. (1987) Unif. Parentage Act, com. foll. § 4, p. 299.) In this case, there is no question as to who is claiming the mother and child relationship, and the factual basis of each woman's claim is obvious. Thus, there is no need to resort to an evidentiary presumption to ascertain the identity of the natural mother. Instead, we must make the purely legal determination as between the two claimants.

Significantly for this case, [HN4 Evidence Code section 892](#) provides that blood testing may be ordered in an action when paternity is a relevant fact.

[CA\(3a\) \(3a\)](#) When maternity is disputed, genetic evidence derived from blood testing is likewise admissible. ([Evid. Code, § 892](#); see [Civ. Code, § 7015](#).) The Evidence Code further provides that if the court finds the conclusions of all the experts, as disclosed by the evidence based on the [*92] blood tests, are that the alleged father is not the father of the child, the question of paternity is resolved accordingly. [****13] ([Evid. Code, § 895](#).) By parity of reasoning, blood testing may also be dispositive of the question of maternity. Further, there is a rebuttable presumption of paternity (hence, maternity as well) on the finding of a certain number of genetic markers. ([Evid. Code, § 895.5](#).)

[CA\(1b\) \(1b\)](#) Disregarding the presumptions of paternity that have no application to this case, then, we are left with the undisputed evidence that Anna, not Crispina, gave birth to the child and that Crispina, not Anna, is genetically related to him. Both women thus have adduced evidence of a mother and child relationship as contemplated by the Act. ([Civ. Code, § 7003, subd. \(1\), 7004, subd. \(a\), 7015](#); [Evid. Code, § 621, 892](#).) Yet [HN5](#) for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome

biologically possible.⁸

[****14] [CA\(3b\) \(3b\)](#) We see [HN6](#) no clear legislative preference in [Civil Code section 7003](#) as between blood testing evidence and proof of having given birth.⁹ "May" indicates that proof of having given birth is a permitted method of establishing a mother and child relationship, although perhaps not the exclusive one. The disjunctive "or" indicates that blood test evidence, as prescribed in the Act, constitutes an alternative to proof of having given birth. It may be that the language of the Act merely reflects "the ancient dictum *mater est quam [gestatio] demonstrat* (by gestation the mother is demonstrated). This phrase, by its use of the word 'demonstrated,' has always reflected an ambiguity in the meaning of the presumption. It is arguable that, while gestation may demonstrate maternal status, it is not the sine qua non of motherhood. Rather, it is possible that the common law viewed genetic consanguinity as the basis for maternal [**782] rights. Under this [***500] latter interpretation, gestation [*93] simply would be irrefutable evidence of the more fundamental genetic relationship." (Hill, *What Does It Mean to*

⁸ We decline to accept the contention of amicus curiae the American Civil Liberties Union (ACLU) that we should find the child has two mothers. Even though rising divorce rates have made multiple parent arrangements common in our society, we see no compelling reason to recognize such a situation here. The Calverts are the genetic and intending parents of their son and have provided him, by all accounts, with a stable, intact, and nurturing home. To recognize parental rights in a third party with whom the Calvert family has had little contact since shortly after the child's birth would diminish Crispina's role as mother.

⁹ The Court of Appeal interpreted [Civil Code section 7003, subdivision \(1\)](#), to mean that only a "natural" mother can establish a mother and child relationship by proof of having given birth, and that a woman must first demonstrate, through blood test evidence, that she is the "natural" mother of the child before her evidence of having given birth can establish that she is the child's natural mother. We disagree with the Court of Appeal's reading of the statute. In our view, the term "natural" as used in subdivision (1) of [Civil Code section 7003](#) simply refers to a mother who is not an adoptive mother. [Section 7003](#) does not purport to answer the question before us, i.e., who is to be deemed the natural mother when the biological functions essential to bringing a child into the world have been allocated between two women.

Be a "Parent"? The Claims of Biology as the Basis for Parental [****15] *Rights* (1991) [66 N.Y.U. L.Rev. 353, 370](#), fns. omitted.) This ambiguity, highlighted by the problems arising from the use of artificial reproductive techniques, is nowhere explicitly resolved in the Act.

[****16] [CA\(1c\)](#) (1c) Because two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties' intentions as manifested in the surrogacy agreement. Mark and Crispina are a couple who desired to have a child of their own genes but are physically unable to do so without the help of reproductive technology. They affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist. Anna agreed to facilitate the procreation of Mark's and Crispina's child. The parties' aim was to bring Mark's and Crispina's child into the world, not for Mark and Crispina to donate a zygote to Anna. Crispina from the outset intended to be the child's mother. Although the gestative function Anna performed was necessary to bring about the child's birth, it is safe to say that Anna would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother. No reason appears why Anna's later change of heart should vitiate the determination that Crispina [****17] is the child's natural mother.

We conclude that [HN7](#) although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child--that is, she who intended to bring about the birth of a child that she intended to raise as her own--is the natural mother under California law.¹⁰

¹⁰ Thus, under our analysis, in a true "egg donation" situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law.

[****18] Our conclusion finds support in the writings of several legal commentators. (See Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology* [*94] *as the Basis for Parental Rights*, *supra*, [66 N.Y.U. L.Rev. 353](#); Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality* (1990) Wis. L.Rev. 297 [Shultz]; Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies* (1986) [96 Yale L.J. 187, 197-202](#) [Note].) Professor Hill, arguing that the genetic relationship per se should not be accorded priority in the determination of the parent-child relationship in the surrogacy context, notes that "while all of the players in the procreative arrangement are necessary in bringing a child into the world, *the child would not have been born but for the efforts of the intended parents*. . . . [P] . . . [T]he intended parents are the first cause, or the prime movers, of the procreative relationship." (Hill, *op. cit. supra*, at p. 415, italics in original.)

Similarly, Professor Shultz observes [****19] that recent developments in the field of reproductive [**783] [***501] technology "dramatically extend affirmative intentionality. . . . Steps can be taken to bring into being a child who would not otherwise have existed." (Shultz, *op. cit. supra*, [p. 309](#).) "Within the context of artificial reproductive techniques," Professor Shultz argues, "intentions

The dissent would decide *parentage* based on the best interests of the child. Such an approach raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody. Logically, the determination of parentage must precede, and should not be dictated by, eventual custody decisions. The implicit assumption of the dissent is that a recognition of the genetic intending mother as the natural mother may sometimes harm the child. This assumption overlooks California's dependency laws, which are designed to protect *all* children irrespective of the manner of birth or conception. Moreover, the best interests standard poorly serves the child in the present situation: it fosters instability during litigation and, if applied to recognize the gestator as the natural mother, results in a split of custody between the natural father and the gestator, an outcome not likely to benefit the child. Further, it may be argued that, by voluntarily contracting away any rights to the child, the gestator has, in effect, conceded the best interests of the child are not with her.

that are voluntarily chosen, deliberate, express and bargained- for ought presumptively to determine legal parenthood." (*Id.*, at p. 323, fn. omitted.)

Another commentator has cogently suggested, in connection with reproductive technology, that "[t]he mental concept of the child is a controlling factor of its creation, and the originators of that concept merit full credit as conceivers. The mental concept must be recognized as independently valuable; it creates expectations in the initiating parents of a child, and it creates expectations in society for adequate performance on the part of the initiators as parents of the child." (Note, *op. cit. supra*, 96 Yale L.J. at p. 196.)

Moreover, as Professor Shultz recognizes, the interests of children, particularly at the outset of their lives, are "[un]likely to run contrary [****20] to those of adults who choose to bring them into being." (Shultz, *op. cit. supra*, at p. 397.) Thus, "[h]onoring the plans and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike." (*Ibid.*) Under Anna's interpretation of the Act, by contrast, a woman who agreed to gestate a fetus genetically related to the intending parents would, contrary to her expectations, be held to be the child's natural mother, with all the responsibilities that ruling would entail, if the intending mother declined to accept the child after its birth. In what we must hope will be the extremely rare situation in [*95] which neither the gestator nor the woman who provided the ovum for fertilization is willing to assume custody of the child after birth, a rule recognizing the intending parents as the child's legal, natural parents should best promote certainty and stability for the child.

CA(4) (4) In deciding the issue of maternity under the Act we have felt free to take into account the parties' intentions, as expressed in the surrogacy contract, because in our view the agreement is not, on its face, [****21] inconsistent with public policy.

Preliminarily, Mark and Crispina urge us to interpret the Legislature's 1992 passage of a bill that would have regulated surrogacy as an expression of this state's public policy despite the fact that Governor Wilson's veto prevented the bill from becoming law. Senate Bill No. 937 contained a finding that surrogate contracts are not against sound public and social policy. (Sen. Bill No. 937 (1991-1992 Reg. Sess.)) Had Senate Bill No. 937 become law, there would be no room for argument to the contrary. The veto, however, raises a question whether the legislative declaration truly expresses California's public policy.

In the Governor's veto message we find, not unequivocal agreement with the Legislature's public policy assessment, but rather reservations about the practice of surrogate parenting. "Surrogacy is a relatively recent phenomenon. The full moral and psychological dimensions of this practice are not yet clear. In fact, they are just beginning to emerge. Only two published court opinions in California have treated this nettlesome subject. . . . Comprehensive regulation of this difficult moral issue is premature [P] To the [****22] extent surrogacy continues to be practical, it can be governed by the legal framework already established in the family law area." (Governor's veto message to Sen. on Sen. Bill No. 937 (Sept. 26, 1992) Sen. Daily File (1991-1992 Reg. Sess.) p. 68.) Given this less than ringing endorsement of surrogate parenting, we conclude that the passage of Senate Bill No. 937, in and of itself, does not establish that surrogacy contracts are consistent with public policy. (Of course, neither do we draw the opposite conclusion from the fact of the Governor's veto.)

Anna urges that surrogacy contracts violate several social policies. Relying on her contention that she is the child's legal, natural mother, she cites the public policy embodied in Penal Code section 273, prohibiting [**784] [****502] the payment for consent to adoption of a child.¹¹ She argues further

¹¹ Penal Code section 273 provides, in pertinent part, as follows: "(a)

that the policies underlying the adoption laws of this state are violated by the [*96] surrogacy contract because it in effect constitutes a prebirth waiver of her parental rights.

[****23] We disagree. Gestational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes. The parties voluntarily agreed to participate in in vitro fertilization and related medical procedures before the child was conceived; at the time when Anna entered into the contract, therefore, she was not vulnerable to financial inducements to part with her own expected offspring. As discussed above, Anna was not the genetic mother of the child. The payments to Anna under the contract were meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up "parental" rights to the child. Payments were due both during the pregnancy and after the child's birth. We are, accordingly, unpersuaded that the contract used in this case violates the public policies embodied in [Penal Code section 273](#) and the adoption statutes. For the same reasons, we conclude [HN8](#) these contracts do not implicate the policies underlying the statutes governing

termination of parental rights. (See [Welf. & Inst. Code, § 202.](#))

It has been suggested that gestational surrogacy may run afoul of prohibitions on involuntary servitude. (See [U.S. \[****24\] Const., Amend. XIII](#); [Cal. Const., art. I, § 6](#); [Pen. Code, § 181.](#)) Involuntary servitude has been recognized in cases of criminal punishment for refusal to work. ([Pollock v. Williams \(1944\) 322 U.S. 4, 18 \[88 L.Ed. 1095, 1104, 64 S.Ct. 792, 799\]](#); see, generally, 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 411-414, pp. 591-596.) We see no potential for that evil in the contract at issue here, and extrinsic evidence of coercion or duress is utterly lacking. We note that although at one point the contract purports to give Mark and Crispina the sole right to determine whether to abort the pregnancy, at another point it acknowledges: "All parties understand that a pregnant woman has the [*97] absolute right to abort or not abort any fetus she is carrying. Any promise to the contrary is unenforceable." We therefore need not determine the validity of a surrogacy contract purporting to deprive the gestator of her freedom to terminate the pregnancy.

Finally, Anna and some commentators have expressed concern that surrogacy contracts tend to exploit or dehumanize women, especially women of lower economic [****25] status. Anna's objections center around the psychological harm she asserts may result from the gestator's relinquishing the child to whom she has given birth. Some have also cautioned that the practice of surrogacy may encourage society to view children as commodities, subject to trade at their parents' will.

We are all too aware that the proper forum for resolution of this issue is the Legislature, where empirical data, largely lacking from this record, can be studied and rules of general applicability developed. [**785] [****503] However, in light of our responsibility to decide this case, we have considered as best we can its possible

It is a misdemeanor for any person or agency to offer to pay money or anything of value, or to pay money or anything of value, to a parent for the placement for adoption, for the consent to an adoption, or for cooperation in the completion of an adoption of his or her child. [P] (b) This section does not make it unlawful to pay the maternity-connected medical or hospital and necessary living expenses of the mother preceding and during confinement as an act of charity, as long as the payment is not contingent upon placement of the child for adoption, consent to the adoption, or cooperation in the completion of the adoption."

See also [Penal Code section 181](#), which provides: "Every person who holds, or attempts to hold, any person in involuntary servitude, or assumes, or attempts to assume, rights of ownership over any person, or who sells, or attempts to sell, any person to another, or receives money or anything of value, in consideration of placing any person in the custody, or under the power or control of another, or who buys, or attempts to buy, any person, or pays money, or delivers anything of value, to another, in consideration of having any person placed in his custody, or under his power or control, or who knowingly aids or assists in any manner any one thus offending, is punishable by imprisonment in the state prison for two, three, or four years."

consequences.

We are unpersuaded that gestational surrogacy arrangements are so likely to cause the untoward results Anna cites as to demand their invalidation on public policy grounds. Although common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment. We are likewise unpersuaded [****26] by the claim that surrogacy will foster the attitude that children are mere commodities; no evidence is offered to support it. The limited data available seem to reflect an absence of significant adverse effects of surrogacy on all participants.¹²

The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genes. Certainly in the present case it cannot seriously be argued that Anna, a licensed vocational nurse who had done well in school and who had previously borne a child, lacked [****27] the intellectual wherewithal or life experience necessary to make an informed decision to enter into the surrogacy contract.

[*98] CONSTITUTIONALITY OF THE DETERMINATION THAT ANNA JOHNSON IS NOT THE NATURAL MOTHER

Anna argues at length that her right to the continued companionship of the child is protected under the federal Constitution.

First, we note the constitutional rights that are *not* implicated here.

There is no issue of procedural due process: although Anna broadly contends that the procedures prescribed for adoptions should be followed in the situation of a gestational surrogate's relinquishment to the genetic parents of the child she has carried and delivered, she cites no specific deficiency in the notice or hearing this matter received.

Furthermore, neither Anna nor amicus curiae ACLU articulates a claim under the equal protection clause, and we are unable to discern in these facts the necessary predicate to its operation. This is because a woman who voluntarily agrees to gestate and deliver for a married couple a child who is their genetic offspring is situated differently from the wife who provides the ovum for fertilization, intending to mother the resulting [****28] child.

Anna relies mainly on theories of substantive due process, privacy, and procreative freedom, citing a number of decisions recognizing the fundamental liberty interest of natural parents in the custody and care of their children. (See, e.g., [*Santosky v. Kramer* \(1982\) 455 U.S. 745, 768 \[71 L.Ed.2d 599, 616, 102 S.Ct. 1388\]](#); [*Lassiter v. Department of Social Services* \(1981\) 452 U.S. 18, 27 \[68 L.Ed.2d 640, 649, 101 S.Ct. 2153\]](#); [*Smith v. Organization of Foster Families* \(1977\) 431 U.S. 816, 842 \[53 L.Ed.2d 14, 33-34, 97 S.Ct. 2094\]](#); [*Stanley v. Illinois* \(1972\) 405 U.S. 645, 651 \[31 L.Ed.2d 551, 558, 92 S.Ct. 1208\]](#).) Most of the cases Anna cites deal with the rights of unwed fathers in the face of attempts to terminate their parental relationship to their children. (See, e.g., [*Stanley v. Illinois, supra*, 405 U.S. at pp. 658-659 \[31 L.Ed.2d at pp. 562-563\]](#); [*Quilloin v. Walcott* \(1978\) 434 U.S. 246, 247-248 \[54 L.Ed.2d 511, 515-516, 98 S.Ct. 549\]](#); [****29] [*Caban v. Mohammed* \(1979\) 441 U.S. 380 \[60 L.Ed.2d 297, 99 S.Ct. 1760\]](#); [*Lehr v. Robertson* \(1983\) 463 U.S. 248 \[77 L.Ed.2d 614, 103 S.Ct. 2985\]](#).) These cases do not support recognition of parental rights for a gestational

¹² See Andrews and Douglass, *Alternative Reproduction* (1991) 65 [*So. Cal. L. Rev.*](#) 623, 673-678.

surrogate. Although Anna quotes language stressing the primacy of a developed **[**786]** **[***504]** parent-child relationship in assessing unwed fathers' rights (see [Lehr v. Robertson, supra, 463 U.S. at pp. 260-262 \[77 L.Ed.2d at pp. 625-627\]](#)), certain language in the cases reinforces the importance of genetic parents' rights. ([Lehr v. Robertson, supra, 463 U.S. at p. 262 \[77 L.Ed.2d at p. 627\]](#) ["The significance of the biological connection is that it offers the natural **[*99]** father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship **[****30]** and make uniquely valuable contributions to the child's development."]; see also [Adoption of Kelsey S. \(1992\) 1 Cal.4th 816, 838 \[4 Cal.Rptr.2d 615, 823 P.2d 1216\]](#) ["The biological connection between father and child is unique and worthy of constitutional protection if the father grasps the opportunity to develop that biological connection into a full and enduring relationship."].)

Anna's argument depends on a prior determination that she is indeed the child's mother. Since Crispina is the child's mother under California law because she, not Anna, provided the ovum for the in vitro fertilization procedure, intending to raise the child as her own, it follows that any constitutional interests Anna possesses in this situation are something less than those of a mother. As counsel for the minor points out, the issue in this case is not whether Anna's asserted rights as a natural mother were unconstitutionally violated, but rather whether the determination that she is not the legal natural mother at all is constitutional.¹³

[**31]** Anna relies principally on the decision

¹³The trial court analogized Anna's relationship with the child to that of a foster mother, whose liberty interest, if any, in her relationship with the foster child is surely more attenuated than that of the natural parents with the child. (See [Smith v. Organization of Foster Families, supra, 431 U.S. at pp. 845-847 \[53 L.Ed.2d at pp. 35-37\]](#) [declining to define the constitutional contours of the foster relationship].)

of the United States Supreme Court in [Michael H. v. Gerald D. \(1989\) 491 U.S. 110 \[105 L.Ed.2d 91, 109 S.Ct. 2333\]](#), to support her claim to a constitutionally protected liberty interest in the companionship of the child, based on her status as "birth mother." In that case, a plurality of the court held that a state may constitutionally deny a man parental rights with respect to a child he fathered during a liaison with the wife of another man, since it is the marital family that traditionally has been accorded a protected liberty interest, as reflected in the historic presumption of legitimacy of a child born into such a family. ([491 U.S. at pp. 124-125 \[105 L.Ed.2d at pp. 106-107\]](#) (plur. opn. by Scalia, J.)) The reasoning of the plurality in *Michael H.* does not assist Anna. Society has not traditionally protected the right of a woman who gestates and delivers a baby pursuant to an agreement with a couple who supply the zygote from which the baby develops and who intend to raise the child as their own; such arrangements **[****32]** are of too recent an origin to claim the protection of tradition. To the extent that tradition has a bearing on the present case, we believe it supports the claim of the couple who exercise their right to procreate in order to form a family of their own, albeit through novel medical procedures.

[*100] Moreover, if we were to conclude that Anna enjoys some sort of liberty interest in the companionship of the child, then the liberty interests of Mark and Crispina, the child's natural parents, in their procreative choices and their relationship with the child would perforce be infringed. Any parental rights Anna might successfully assert could come only at Crispina's expense. As we have seen, Anna has no parental rights to the child under California law, and she fails to persuade us that sufficiently strong policy reasons exist to accord her a protected liberty interest in the companionship of the child when such an interest would necessarily detract from or impair the parental bond enjoyed by Mark and Crispina.

Amicus curiae ACLU urges that Anna's right of

privacy, embodied in the California Constitution ([Cal. Const., art. I, § 1](#)), requires recognition and protection of her [****33] status as "birth mother." We cannot [**787] [***505] agree. Certainly it is true that our state Constitution has been construed to provide California citizens with privacy protections encompassing procreative decisionmaking--broader, indeed, than those recognized by the federal Constitution. (Compare [Committee to Defend Reproductive Rights v. Myers \(1981\) 29 Cal.3d 252, 263 \[172 Cal.Rptr. 866, 625 P.2d 779, 20 A.L.R.4th 1118\]](#) with [Harris v. McRae \(1980\) 448 U.S. 297, 315-318 \[65 L.Ed.2d 784, 803-806, 100 S.Ct. 2671\]](#) [reaching opposing results on the question of whether state and federal Constitutions, respectively, permit legislative denial of funding for abortions for indigent women].) However, amicus curiae fails to articulate persuasively how Anna's claim falls within even the broad parameters of the state right of privacy. Amicus curiae appears to assume that the choice to gestate and deliver a baby for its genetic parents pursuant to a surrogacy agreement is the equivalent, in constitutional weight, of the decision whether [****34] to bear a child of one's own. We disagree. [HN9](#) A woman who enters into a gestational surrogacy arrangement is not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service without (by definition) any expectation that she will raise the resulting child as her own.

Drawing an analogy to artificial insemination, Anna argues that Mark and Crispina were mere genetic donors who are entitled to no constitutional protection. That characterization of the facts is, however, inaccurate. Mark and Crispina never intended to "donate" genetic material to anyone. Rather, they intended to procreate a child genetically related to them by the only available means. [Civil Code section 7005](#), governing artificial insemination, has no application here.¹⁴

[****35] Finally, Anna argues that the Act's failure to address novel reproductive techniques such as in vitro fertilization indicates legislative disapproval of [*101] such practices. Given that the Act was drafted long before such techniques were developed, we cannot agree. Moreover, we may not arrogate to ourselves the power to disapprove them. [HN10](#) It is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy. Rather, our task has been to resolve the dispute before us, interpreting the Act's use of the term "natural mother" ([Civ. Code, § 7003, subd. \(1\)](#)) when the biological functions essential to bringing a child into the world have been allocated between two women.

DISPOSITION

The judgment of the Court of Appeal is affirmed.

Lucas, C. J., Mosk, J., Baxter, J., and George, J., concurred.

Concur by: ARABIAN, J.,

Concur

Concurring.

supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and retain the husband's consent as part of the medical record, where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown. [P] (b) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."

¹⁴ [Civil Code section 7005](#) provides as follows: "(a) If, under the

I concur in the decision to find under the Uniform Parentage Act that Crispina Calvert is the natural mother of the child she at all times intended to parent and raise as her own with [****36] her husband Mark, the child's natural father. That determination answers the question on which this court granted review, and in my view sufficiently [**788] [***506] resolves the controversy between the parties to warrant no further analysis. I therefore decline to subscribe to the dictum in which the majority find surrogacy contracts "not . . . inconsistent with public policy." (Maj. opn., ante, pp. 95-97.)

Surrogacy contracts touch upon one of the most, if not *the* most, sensitive subjects of human endeavor. Not only does the birth of a new generation perpetuate our species, it allows every parent to contribute, both genetically and socially, to our collective understanding of what it means to be human. Every child also offers the opportunity of a unique lifetime relationship, potentially more satisfying and fulfilling than any other pursuit. (See [Adoption of Kelsey S. \(1992\) 1 Cal.4th 816, 837 \[4 Cal.Rptr.2d 615, 823 P.2d 1216\]](#).)

[*102] The multiplicity of considerations at issue in a surrogacy situation plainly transcend traditional principles of contract law and require careful, nonadversarial analysis. [****37] For this reason, I do not think it wise for this court to venture unnecessarily into terrain more appropriately cleared by the Legislature in the first instance. In this regard, the Florida Supreme Court made the following pertinent observations; although the factual context obviously differs, socially and morally it compares in the most profound respects: "Because the issue with all its ramifications is fraught with complexity and encompasses the interests of the law, both civil and criminal, medical ethics and social morality, it is not one which is well-suited for resolution in an adversary judicial proceeding. It is the type [of] issue which is more suitably addressed in the legislative forum, where fact finding can be less confined and the viewpoints of all interested institutions and disciplines can be

presented and synthesized. In this manner only can the subject be dealt with comprehensively and the interests of all institutions and individuals be properly accommodated." ([Satz v. Perlmutter \(Fla. 1980\) 379 So.2d 359, 360](#), affg. (Fla. Dist. Ct. App. 1978) 362 So.2d 160.) The New Jersey Supreme Court echoed similar cautionary [****38] tones in [Matter of Conroy \(1985\) 98 N.J. 321 \[486 A.2d 1209, 48 A.L.R.4th 1\]](#): "As an elected body, the Legislature is better able than any other single institution to reflect the social values at stake. In addition, it has the resources and ability to synthesize vast quantities of data and opinions from a variety of fields and to formulate general guidelines that may be applicable to a broad range of situations." ([Id.](#), 486 A.2d at pp. 1220-1221; accord, [Matter of Guardianship of Hamlin \(1984\) 102 Wn.2d 810, 821-822 \[689 P.2d 1372, 1378-1379\]](#).)

Clearly, this court should not avoid proper resolution of the issue before it. "[T]he law, equity and justice must not themselves quail and be helpless in the face of modern technological marvels presenting questions hitherto unthought of." ([In re Quinlan \(1976\) 70 N.J. 10, 44 \[355 A.2d 647, 665, 79 A.L.R.3d 205\]](#), cert. den. *sub nom.* *Garger v. New Jersey*, 429 U.S. 922 [50 L.Ed.2d 289, 97 S.Ct. 319].) [****39] Nevertheless, I would not move beyond the available legal mechanism into such socially and morally uncharted waters. The implications of addressing the general soundness of surrogacy contracts are vast and profound. To date, the legislative process has failed to produce a satisfactory answer. This court should be chastened and not emboldened by that failure.

Dissent by: KENNARD, J.,

Dissent

Dissenting.

When a woman who wants to have a child provides

her fertilized ovum to another woman who carries it through pregnancy and gives birth to a child, who is the child's legal mother? Unlike the majority, I do not agree that the determinative consideration should be the intent to have the child that originated with the woman who contributed [*103] the ovum. In my view, the woman who provided the fertilized ovum and the woman who gave birth to the child both have substantial claims to legal motherhood. Pregnancy entails a unique commitment, both psychological and emotional, to an unborn child. No less substantial, however, is the contribution of the woman from whose egg the child developed and without whose desire the child would not exist.

[**789] [***507] For each child, California law accords [****40] the legal rights and responsibilities of parenthood to only one "natural mother." When, as here, the female reproductive role is divided between two women, California law requires courts to make a decision as to which woman is the child's natural mother, but provides no standards by which to make that decision. The majority's resort to "intent" to break the "tie" between the genetic and gestational mothers is unsupported by statute, and, in the absence of appropriate protections in the law to guard against abuse of surrogacy arrangements, it is ill-advised. To determine who is the legal mother of a child born of a gestational surrogacy arrangement, I would apply the standard most protective of child welfare--the best interests of the child.

I. FACTUAL BACKGROUND

This case arises from an agreement made between Mark and Crispina Calvert, a married couple, and Anna Johnson, a single woman. As the result of a hysterectomy, Crispina was unable to become pregnant, although her ovaries could still produce eggs. When she and her husband Mark desired to have a child, they arranged with Anna for Anna's impregnation with an embryo formed from Crispina's egg and Mark's sperm. Mark and [****41] Crispina agreed to pay Anna installment payments totaling \$ 10,000, the last installment not

due until six weeks after Anna gave birth. In exchange, Anna agreed to carry the child to term and, after giving birth, to relinquish her parental rights to the child.

Six months into the pregnancy, Anna's relationship with Mark and Crispina broke down. Both sides filed lawsuits seeking declarations of parental rights in the unborn child. While these consolidated actions were still pending, on September 19, 1990, Anna gave birth. By agreement of the parties, the court awarded immediate custody of the child to Mark and Crispina, but granted visitation rights to Anna.

The matter went to trial in October 1990. The parties stipulated that Mark and Crispina were the genetic parents of the child to whom Anna had given birth. The trial court ruled in favor of Mark and Crispina, concluding that as the child's "genetic" and "biological" father and mother, they were also his "natural" father and mother. The Court of Appeal affirmed.

[*104] We granted review to address an issue of first impression: Under California law, how does a court determine who is the legal mother of a child born of [****42] a gestational surrogacy arrangement?

II. THIS OPINION'S APPROACH

The determination of a question of parental rights to a child born of a surrogacy arrangement was before the New Jersey Supreme Court in [*Matter of Baby M.* \(1988\) 109 N.J. 396 \[537 A.2d 1227, 77 A.L.R.4th 1\]](#), a case that received worldwide attention. But in the surrogacy arrangement at issue there the woman who gave birth to the child, Marybeth Whitehead, had been impregnated by artificial insemination with the sperm of the intending father, William Stern. Whitehead thus provided the genetic material and carried the fetus to term. This case is different, because here those two aspects of the female role in reproduction were divided between two women. This process is known as "gestational" surrogacy, to distinguish it

from the surrogacy arrangement involved in *Baby M.*¹

[****43] [**790] [***508] In this opinion, I first discuss gestational surrogacy in light of the medical advances that have made it a reality. I next consider the wider social and philosophical implications of using gestational surrogacy to give birth to a child, and set out some of the suggested models for deciding the child's parentage in this situation. I then review a comprehensive model legislative scheme, not enacted in California, designed to accommodate the interests of all participants in surrogacy arrangements. I next turn to California's Uniform Parentage Act, and critique the majority's reliance on "intent" as the determinative factor under that act in deciding who is the "natural," and thus legal, mother of a child born of a gestational surrogacy arrangement. Finally, I explain why, in the absence of legislation designed to address the unique problems of gestational surrogacy, courts deciding who is the legal mother of a child born of gestational surrogacy should look to the best interests of that child.

[*105] III. GESTATIONAL SURROGACY

Recent advances in medical technology have dramatically expanded the means of human reproduction. Among the new technologies

¹The terms "surrogacy" and "surrogate" have been criticized as being inaccurate, particularly when applied to the type of arrangement involved in *Baby M.*, in which the child a woman bears, intending to relinquish at birth, was formed from her own egg. (See Capron & Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood*, in *Surrogate Motherhood* (Gostin edit. 1990) p. 72, fn. 2; Annas, *Fairy Tales Surrogate Mothers Tell*, in *Surrogate Motherhood*, *supra*, at p. 46 [suggesting that the phrase "surrogate mother" derives from Harlow's monkey studies, in which the responses of newborn monkeys were tested by isolating them in cages with cloth or wire "surrogate mothers."].)

Because "gestational surrogacy" is now widely used to describe the situation in which one woman agrees to be impregnated with an embryo formed from another woman's fertilized egg, I use the phrase throughout this opinion and occasionally also refer to the woman who gestates the fetus as the "surrogate."

are [****44] in vitro fertilization, embryo and gamete freezing and storage, gamete intra-fallopian transfer, and embryo transplantation. (Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, [1990 Wis.L.Rev. 297, 299](#) fn. 5 [hereafter *Reproductive Technology*].) Gestational surrogacy is the result of two of these techniques: in vitro fertilization and embryo transplantation. (See Shalev, *Birth Power: The Case for Surrogacy* (Yale U. Press 1989) p. 115.)

In vitro fertilization or IVF is the fertilization of a human egg outside the human body in a laboratory. Children that have been conceived this way are often called "test tube babies," because their actual conception took place in a petri dish. The first live birth of a child conceived in vitro occurred in 1979 in Great Britain after 20 years of research by a British team. (Shalev, *Birth Power: The Case for Surrogacy*, *supra*, at p. 105.)

To facilitate the retrieval or "harvesting" of eggs for in vitro fertilization, a woman ingests fertility hormones to induce "superovulation" or the production of multiple eggs. The eggs are then removed through aspiration, [****45] a nonsurgical technique, or through an invasive surgical procedure known as laparoscopy. (See generally *Developments in the Law: Medical Technology and the Law* (1990) [103 Harv.L.Rev. 1519, 1537-1542](#) [hereafter *Medical Technology*].) To undergo superovulation and egg retrieval is taxing, both physically and emotionally; the hormones used for superovulation produce bodily changes similar to those experienced in pregnancy, while the surgical removal of mature eggs has been likened to caesarian-section childbirth. (*Id.*, at p. 1540; Shalev, *Birth Power: The Case for Surrogacy*, *supra*, at pp. 117-118.)

After removal, eggs are exposed to live sperm in a petri dish. If an egg is fertilized, the resulting zygote is allowed to divide and become multicellular before uterine implantation. The expense and low success rate of in vitro fertilization

demonstrate just how much prospective parents are willing to endure to achieve biological parenthood. (*Medical Technology, supra*, [103 Harv.L.Rev. at p. 1539.](#))

Generally, an egg fertilized in vitro is implanted in the uterus of the woman who produced it. The technique, however, [****46] allows for embryo transplantation, which is the transfer of an embryo formed from one woman's egg to the uterus of another woman who will gestate the fetus to term. This can [*106] take place in at least three different situations: (1) a woman may donate an egg that, when fertilized, will be implanted in the uterus of a woman who intends to raise the child; (2) the woman who provides the egg may herself intend to raise the child carried to term by a gestational surrogate; or (3) a couple desiring a child may arrange for a surrogate to gestate an embryo produced from an egg and sperm, both donated (perhaps by close relatives of the couple). (Goodwin, *Determination of Legal Parentage in Egg Donation*, [***509] *Embryo [**791] Transplantation, and Gestational Surrogacy Arrangements* (1992) 26 Fam.L.Q. 275, 276-277 [hereafter *Determination of Legal Parentage*].)

The division of the female reproductive role in gestational surrogacy points up the three discrete aspects of motherhood: genetic, gestational and social. The woman who contributes the egg that becomes the fetus has played the genetic role of motherhood; the gestational aspect is [****47] provided by the woman who carries the fetus to term and gives birth to the child; and the woman who ultimately raises the child and assumes the responsibilities of parenthood is the child's social mother. (Shalev, *Birth Power: The Case for Surrogacy, supra*, at p. 115; see also Macklin, *Artificial Means of Reproduction and Our Understanding of the Family* (1991) 21 Hastings Center Rep. 5, 6.)

IV. POLICY CONSIDERATIONS

The ethical, moral and legal implications of using gestational surrogacy for human reproduction have

engendered substantial debate. A review of the scholarly literature that addresses gestational surrogacy reveals little consensus on the desirability of surrogacy arrangements, particularly those involving paid surrogacy, or on how best to decide questions of the parentage of children born of such arrangements.

Surrogacy proponents generally contend that gestational surrogacy, like the other reproductive technologies that extend the ability to procreate to persons who might not otherwise be able to have children, enhances "individual freedom, fulfillment and responsibility." (Shultz, *Reproductive Technology, supra*, [1990 Wis.L.Rev. 297, 303.](#)) [****48] Under this view, women capable of bearing children should be allowed to freely agree to be paid to do so by infertile couples desiring to form a family. (Shalev, *Birth Power: The Case for Surrogacy, supra*, at p. 145 [arguing for a "free market in reproduction" in which the "reproducing woman" operates as an "autonomous moral and economic agent"]; see also Posner, *Economic Analysis of Law* (3d ed. 1986) p. 139; Landes & Posner, *The Economics of the Baby Shortage* (1978) 7 J. Legal Stud. 323 [proposing a "market in babies"].) The "surrogate mother" is expected "to weigh the prospective investment in her birthing labor" [*107] before entering into the arrangement, and, if her "autonomous reproductive decision" is "voluntary," she should be held responsible for it so as "to fulfill the expectations of the other parties . . ." (Shalev, *Birth Power: The Case for Surrogacy, supra*, at p. 96.)

One constitutional law scholar argues that the use of techniques such as gestational surrogacy is constitutionally protected and should be restricted only on a showing of a compelling state interest. (Robertson, *Procreative Liberty and the Control of Conception*, [****49] *Pregnancy, and Childbirth* (1983) [69 Va.L.Rev. 405](#); Robertson, *Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction*, in *Surrogate Motherhood, supra*, pp. 24-26, 35; Robertson, *Embryos, Families, and Procreative Liberty: The*

Legal Structure of the New Reproduction (1986) [59 So.Cal.L.Rev. 939, 960](#).) Professor Robertson reasons that procreation is itself protected under decisions of the United States Supreme Court that affirm the basic civil right to marry and raise children. (Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, *supra*, [69 Va.L.Rev. at p. 414](#), fn. 22, 23, citing [Meyer v. Nebraska \(1923\) 262 U.S. 390, 399 \[67 L.Ed. 1042, 1045, 43 S.Ct. 625, 29 A.L.R. 1446\]](#) ["right . . . to marry, establish a home and bring up children" protected by the Fourteenth Amendment]; [Skinner v. Oklahoma \(1942\) 316 U.S. 535, 541 \[86 L.Ed. 1655, 1660, 62 S.Ct. 1110\]](#) [describing marriage and procreation as basic human civil [****50] rights]; [Stanley v. Illinois \(1972\) 405 U.S. 645, 651 \[31 L.Ed.2d 551, 558-559, 92 S.Ct. 1208\]](#) [emphasizing the importance of the rights "to conceive and raise one's children"].) From this premise, he argues that the right to procreate should extend to persons who cannot conceive or bear children. (Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, *supra*, [69 Va.L.Rev. at p. 411](#) ["Sterility bars one from conceiving or bearing only to the extent that medicine [**792] [****510] or society cannot overcome the particular cause of infertility"]; Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, *supra*, [59 So.Cal.L.Rev. at p. 960](#) ["The use of noncoital techniques . . . should . . . also be protected."].)

Professor Robertson's thesis of broad application of the right of privacy for all procreational techniques has been questioned, however, in light of recent United States Supreme Court jurisprudence. (See *Medical Technology*, *supra*, [****51] [103 Harv.L.Rev. 1519, 1530](#), citing [Michael H. v. Gerald D. \(1989\) 491 U.S. 110 \[105 L.Ed.2d 91, 109 S.Ct. 2333\]](#), as evidence of the high court's reluctance "to extend the right of privacy to new relationships and activities" that the court has not perceived to merit "traditional protection.")

Surrogacy critics, however, maintain that the

payment of money for the gestation and relinquishment of a child threatens the economic exploitation [***108**] of poor women who may be induced to engage in commercial surrogacy arrangements out of financial need. (Capron & Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood*, in *Surrogate Motherhood*, *supra*, p. 62.) Some fear the development of a "breeder" class of poor women who will be regularly employed to bear children for the economically advantaged. (See *Women and Children Used in Systems of Surrogacy: Position Statement of the Institute on Women and Technology*, in *Surrogate Motherhood*, *supra*, at p. 322; and Corea, *Junk Liberty*, testimony before Cal. Assem. Judiciary Com., April 5, 1988, in *Surrogate Motherhood*, *supra*, at pp. [****52] 325, 335.) Others suggest that women who enter into surrogacy arrangements may underestimate the psychological impact of relinquishing a child they have nurtured in their bodies for nine months. (See Macklin, *Artificial Means of Reproduction and Our Understanding of the Family*, *supra*, 21 *Hastings Center Rep.* 5, 10.)

Gestational surrogacy is also said to be "dehumanizing" (Capron & Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood*, in *Surrogate Motherhood*, *supra*, at p. 62) and to "commodify" women and children by treating the female reproductive capacity and the children born of gestational surrogacy arrangements as products that can be bought and sold (Radin, *Market-Inalienability* (1987) [100 Harv.L.Rev. 1849, 1930-1932](#)). The commodification of women and children, it is feared, will reinforce oppressive gender stereotypes and threaten the well-being of all children. (*Medical Technology*, *supra*, [103 Harv.L.Rev. 1519, 1550](#); Annas, *Fairy Tales Surrogate Mothers Tell*, in *Surrogate Motherhood*, *supra*, [****53] p. 50.) Some critics foresee promotion of an ever-expanding "business of surrogacy brokerage." (E.g., Goodwin, *Determination of Legal Parentage*, *supra*, 26 *Fam.L.Q.* at p. 283.)

Whether surrogacy contracts are viewed as personal service agreements or agreements for the sale of the child born as the result of the agreement, commentators critical of contractual surrogacy view these contracts as contrary to public policy and thus not enforceable. (Radin, *Market-Inalienability*, *supra*, [100 Harv.L.Rev. at p. 1924](#), fn. 261; Capron & Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood*, *supra*, in *Surrogate Motherhood*, at pp. 62-63; see also Krimmel, *Can Surrogate Parenting Be Stopped? An Inspection of the Constitutional and Pragmatic Aspects of Outlawing Surrogate Mother Arrangements* (1992) 27 Val.U.L.Rev. 1, 4-5.)

Organizations representing diverse viewpoints share many of the concerns highlighted by the legal commentators. For example, the American Medical Association considers the conception of a child for relinquishment after birth [*109] to pose grave ethical problems. (Rep. of the Judicial Council, in [****54] *Surrogate Motherhood*, *supra*, at p. 304.) Likewise, the official position of the Catholic Church is that surrogacy arrangements are " 'contrary to the unity of marriage and to the dignity of the procreation of the human person.' " (Magisterium of the Catholic Church, *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation: Replies to Certain Questions* [**793] [****511] of the Day 25 (Feb. 22, 1987), cited in Radin, *Market-Inalienability*, *supra*, [100 Harv.L.Rev. 1849, 1928](#), fn. 271.)

The policy statement of the New York State Task Force on Life and the Law sums up the broad range of ethical problems that commercial surrogacy arrangements are viewed to present: "The gestation of children as a service for others in exchange for a fee is a radical departure from the way in which society understands and values pregnancy. It substitutes commercial values for the web of social, affective and moral meanings associated with human reproduction This transformation has profound implications for child-bearing, for women, and for the relationship between parents

and the children they bring into the world. [P] . . . [P] Surrogate parenting allows [****55] the genetic, gestational and social components of parenthood to be fragmented, creating unprecedented relationships among people bound together by contractual obligation rather than by the bonds of kinship and caring. . . . [P] . . . [P] . . . Surrogate parenting alters deep-rooted social and moral assumptions about the relationship between parents and children. . . . [P] . . . [It] is premised on the ability and willingness of women to abdicate [their parental] responsibility without moral compunction or regret [and] makes the obligations that accompany parenthood alienable and negotiable." (New York State Task Force on Life and the Law, *Surrogate Parenting: Analysis and Recommendations for Public Policy* (May 1988) in *Surrogate Motherhood*, *supra*, at pp. 317-318.)

Proponents and critics of gestational surrogacy propose widely differing approaches for deciding who should be the legal mother of a child born of a gestational surrogacy arrangement. Surrogacy advocates propose to enforce pre-conception contracts in which gestational mothers have agreed to relinquish parental rights, and, thus, would make "bargained-for intentions determinative of legal parenthood." (Shultz, [****56] *Reproductive Technology*, *supra*, [1990 Wis.L.Rev. at p. 323](#).) Professor Robertson, for instance, contends that "The right to noncoital, collaborative reproduction also includes the right of the parties to agree how they should allocate their obligations and entitlements with respect to the child. Legal presumptions of paternity and maternity would be overridden by this agreement of the parties." (Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, *supra*, [69 Va.L.Rev. 405, 436](#); see also Shalev, *Birth Power: The Case* [*110] for Surrogacy, *supra*, at p. 141 [arguing for enforcing the parties' legal expectations].)

Surrogacy critics, on the other hand, consider the unique female role in human reproduction as the determinative factor in questions of legal parentage.

They reason that although males and females both contribute genetic material for the child, the act of gestating the fetus falls only on the female. (See Radin, *Market-Inalienability*, *supra*, [100 Harv.L.Rev. 1849, 1932](#), fn. 285 [pointing out the "asymmetrical" interests [****57] of males and females in human reproduction].) Accordingly, in their view, a woman who, as the result of gestational surrogacy, is not genetically related to the child she bears is like any other woman who gives birth to a child. In either situation the woman giving birth is the child's mother. (See Capron & Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood*, in *Surrogate Motherhood*, *supra*, at pp. 64-65.) Under this approach, the laws governing adoption should govern the parental rights to a child born of gestational surrogacy. Upon the birth of the child, the gestational mother can decide whether or not to relinquish her parental rights in favor of the genetic mother. (*Ibid.*)

V. MODEL LEGISLATION

The debate over whom the law should recognize as the legal mother of a child born of a gestational surrogacy arrangement prompted the National Conference of Commissioners on Uniform State Laws to propose the Uniform Status of Children of Assisted Conception Act. (9B West's U. Laws Ann. (1992 Supp.) Uniform Status of Children of Assisted Conception Act (1988 Act) pp. 122-137 [hereafter also [***512] USCACA].) [**794] This model legislation [****58] addresses many of the concerns discussed above.

The commissioners gave careful consideration to the competing interests of the various participants in assisted conception arrangements, and sought to accommodate those interests in the model legislation. Their overriding concern, however, was the well-being of children born of gestational surrogacy and other types of assisted conception. As the foreword to the model legislation notes, the extraordinary circumstances of these children's births deprive them of parentage in the traditional sense. (9B West's U. Laws Ann. (1992 Supp.)

USCACA, *supra*, at p. 123.) Thus, the intent of the proposed legislation was to define with precision the legal status of these children as well as to codify the rights of the other participants in a surrogacy arrangement. The commissioners proposed alternative versions of the USCACA: one that would disallow gestational surrogacy and another that would permit it only under court supervision.

[*111] In its key components, the proposed legislation provides that "a woman who gives birth to a child is the child's mother" (USCACA, § 2) unless a court has approved a surrogacy agreement before conception [****59] (USCACA, § 5, 6). In the absence of such court approval, any surrogacy agreement would be void. (USCACA, § 5, subd. (b).) If, however, the arrangement for gestational surrogacy has court approval, "the intended parents are the parents of the child." (USCACA, § 8, subd. (a)(1).)

To obtain court approval, the parties to the surrogacy arrangement must file a petition. (USCACA, § 6, subd. (a).) The model legislation provides for the court to appoint a guardian ad litem for the intended child and legal counsel for the surrogate mother. (*Ibid.*) Before approving a surrogacy arrangement, the trial court must conduct a hearing and enter detailed findings, including the following: medical evidence shows the intended mother's inability to bear a child or that for her to do so poses an unreasonable risk to the unborn child or to the physical or mental health of the intended mother; all parties to the surrogacy agreement (including the surrogate's husband if she has one) meet the standards of fitness of adoptive parents; the agreement was voluntary and all parties understand its terms; the surrogate mother has undergone at least one successful pregnancy and medical evidence shows that [****60] another pregnancy will not endanger her physical or mental health or pose an unreasonable risk to the unborn child; and all parties have received professional mental health counseling pertaining to the effect of the surrogacy arrangement. (USCACA, § 6, subd. (b).) These provisions serve to minimize the

potential for overreaching and to ensure that all parties to a surrogacy arrangement understand their respective roles and obligations.

The USCACA offers predictability in delineating the parentage of children born of gestational surrogacy arrangements. Under the model legislation, if enacted, there would never be a question as to who has the legal responsibility for a child born of a gestational surrogacy arrangement: If the couple who initiated the surrogacy had complied with the provisions of the legislation, they would be the child's legal parents. If they had not, the rights and responsibilities of parenthood would go to the woman who gave birth to the child and her spouse.

Because California Legislature has not enacted the Uniform Status of Children of Assisted Conception Act, its provisions were not followed in this case.

[*112] VI. THE UNIFORM PARENTAGE ACT

The only [****61] California statute defining parental rights is the Uniform Parentage Act (hereafter also UPA). (See [Civ. Code, § 7000 et seq.](#)).² The Legislature enacted the UPA to abolish the concept of illegitimacy and to replace it with the concept of parentage. ([Adoption of Kelsey S. \(1992\) 1 Cal.4th 816, 828 \[4 Cal.Rptr.2d 615, 823 P.2d 1216\]](#).) The UPA was never intended by the Legislature to govern the issues arising from new reproductive technologies [***513] such as gestational [**795] surrogacy. Nevertheless, the UPA is on its face broadly applicable, and it is in any event the only statutory guidance this court has in resolving this case.

The provisions of the UPA "extend[] equally to every child and to every parent, regardless of the marital status of the parents." ([§ 7002](#).) The parent-child relationship defined by the UPA accords a child's parents both rights and obligations. ([§ 7001](#).) [****62] A primary focus of the UPA is

the determination of paternity and enforcement of financial responsibility. ([§ 7006](#) [actions to determine paternity], 7012 [specifying financial support obligations].)

When a child is born by gestational surrogacy, as happened here, the two women who played biological roles in creating the child will both have statutory claims under the UPA to being the child's natural mother. The UPA permits a woman to establish that she is "the natural mother" of a child by "proof of . . . having given birth to the child . . ." ([§ 7003, subd. \(1\)](#).) Thus, a gestational mother qualifies as a "natural mother" under the statute. (*Ibid.*) Alternatively, the UPA allows a woman to prove she is a mother in the same manner as a man may prove he is a father. ([§ 7003, subd. \(1\)](#), [7015](#) [permitting actions to establish a mother and child relationship using parts of the UPA "applicable to the father and child relationship"].) A man may demonstrate he is a child's natural father through genetic marker evidence derived from blood testing. ([§ 7004, subd. \(a\)](#); [Evid. Code, § 621, 892, 895](#).) Accordingly, a genetic mother may also demonstrate she is a child's natural mother through [****63] such genetic evidence. Here, both Anna, the gestational mother, and Crispina, the genetic mother, have offered proof acceptable under the UPA to qualify as the child's natural mother.

By its use of the phrase "*the* natural mother," however, the UPA contemplates that a child will have only one natural mother. ([§ 7003, subd. \(1\)](#), *italics added*.) But the UPA provides no standards for determining who that natural mother should be when, as here, two different women can offer biological proof of being the natural mother of the same child under its [*113] provisions. Thus, the UPA by its terms cannot resolve the conflict in this case.

VII. ANALYSIS OF THE MAJORITY'S "INTENT" TEST

Faced with the failure of current statutory law to adequately address the issue of who is a child's

² Further undesignated statutory references are to the Civil Code.

natural mother when two women qualify under the UPA, the majority breaks the "tie" by resort to a criterion not found in the UPA--the "intent" of the genetic mother to be the child's mother.

This case presents a difficult issue. The majority's resolution of that issue deserves serious consideration. Ultimately, however, I cannot agree that "intent" is the appropriate test for resolving this case.

The [****64] majority offers four arguments in support of its conclusion to rely on the intent of the genetic mother as the exclusive determinant for deciding who is the natural mother of a child born of gestational surrogacy. Careful examination, however, demonstrates that none of the arguments mandates the majority's conclusion.

The first argument that the majority uses in support of its conclusion that the intent of the genetic mother to bear a child should be dispositive of the question of motherhood is "but-for" causation. Specifically, the majority relies on a commentator who writes that in a gestational surrogacy arrangement, " 'the child would not have been born *but* for the efforts of the intended parents." (Maj. opn., ante, at p. 94, quoting Hill, *What Does It Mean to Be a "Parent"?* *The Claims of Biology as the Basis for Parental Rights* (1991) [66 N.Y.U. L.Rev. 353, 415](#), original italics omitted, italics added.)

The majority's resort to "but-for" causation is curious. The concept of "but-for" causation is a "test used in determining tort liability . . ." (Black's Law Dict. (6th ed. 1990) p. 200.) In California, the test for causation is whether [****65] the conduct was a "substantial factor" in bringing about the event. ([Mitchell v. Gonzales \(1991\) 54 Cal.3d 1041, 1049, 1054, 1056 \[1 Cal.Rptr.2d 913\]](#) [disapproving [**796] [****514] "but-for" jury instruction in tort cases].) Neither test for causation assists the majority, as I shall discuss.

The proposition that a woman who gives birth to a child after carrying it for nine months is a

"substantial factor" in the child's birth cannot reasonably be debated. Nor can it reasonably be questioned that "but for" the gestational mother, there would not be a child. Thus, the majority's reliance on principles of causation is misplaced. Neither the "but for" nor the "substantial factor" test of causation provides any basis for preferring the [*114] genetic mother's intent as the determinative factor in gestational surrogacy cases: Both the genetic and the gestational mothers are indispensable to the birth of a child in a gestational surrogacy arrangement.

Behind the majority's reliance on "but-for" causation as justification for its intent test is a second, closely related argument. The majority draws its second rationale from a student [****66] note: " 'The mental concept of the child is a controlling factor of its creation, and the originators of that concept merit full credit as conceivers.' " (Maj. opn., ante, at p. 94, quoting Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies* (1986) [96 Yale L.J. 187, 196](#).)

The "originators of the concept" rationale seems comfortingly familiar. The reason it seems familiar, however, is that it is a rationale that is frequently advanced as justifying the law's protection of intellectual property. As stated by one author, "an idea belongs to its creator because the idea is a manifestation of the creator's personality or self." (Hughes, *The Philosophy of Intellectual Property* (1988) [77 Geo. L.J. 287, 330](#).) Thus, it may be argued, just as a song or invention is protected as the property of the "originator of the concept," so too a child should be regarded as belonging to the originator of the concept of the child, the genetic mother.

The problem with this argument, of course, is that children are not property. Unlike songs or inventions, rights in children cannot be sold for consideration, or made [****67] freely available to the general public. Our most fundamental notions of personhood tell us it is inappropriate to treat children as property. Although the law may justly

recognize that the originator of a concept has certain property rights in that concept, the originator of the concept of a child can have no such rights, because children cannot be owned as property. Accordingly, I cannot endorse the majority's "originators of the concept" or intellectual property rationale for employing intent to break the "tie" between the genetic mother and the gestational mother of the child.

Next, the majority offers as its third rationale the notion that bargained-for expectations support its conclusion regarding the dispositive significance of the genetic mother's intent. Specifically, the majority states that " 'intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood.' " (Maj. opn., *ante*, at p. 94, quoting Schultz, *Reproductive Technology*, *supra*, [1990 Wis. L.Rev. at p. 323.](#))

It is commonplace that, in real [****68] or personal property transactions governed by contracts, "intentions that are voluntarily chosen, deliberate, express and [*115] bargained-for" ought presumptively to be enforced and, when one party seeks to escape performance, the court may order specific performance. (See, e.g., § 3384 et seq.; 11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 21, p. 698.) But the courts will not compel performance of all contract obligations. For instance, even when a party to a contract for personal services (such as employment) has wilfully breached the contract, the courts will not order specific enforcement of an obligation to perform that personal service. (§ 3390; see 11 Witkin, Summary of Cal. Law, *supra*, Equity, § 59, p. 736.) The unsuitability of applying the notion that, because contract intentions are "voluntarily chosen, deliberate, express and bargained-for," their performance ought to be compelled by the courts is even more clear when the concept of specific performance is used to determine the course of the life of a child. Just [***515] as children [**797] are not the intellectual property of their parents, neither are they the personal

property of anyone, and [****69] their delivery cannot be ordered as a contract remedy on the same terms that a court would, for example, order a breaching party to deliver a truckload of nuts and bolts.

Thus, three of the majority's four arguments in support of its exclusive reliance on the intent of the genetic mother as determinative in gestational surrogacy cases cannot withstand analysis. And, as I shall discuss shortly, the majority's fourth rationale has merit, but does not support the majority's conclusion. But before turning to the majority's fourth rationale, I shall discuss two additional considerations, not noted by the majority, that in my view also weigh against utilizing the intent of the genetic mother as the sole determinant of the result in this case and others like it.

First, in making the intent of the genetic mother who wants to have a child the dispositive factor, the majority renders a certain result preordained and inflexible in every such case: as between an intending genetic mother and a gestational mother, the genetic mother will, under the majority's analysis, always prevail. The majority recognizes no meaningful contribution by a woman who agrees to carry a fetus to term for the [****70] genetic mother beyond that of mere employment to perform a specified biological function.

The majority's approach entirely devalues the substantial claims of motherhood by a gestational mother such as Anna. True, a woman who enters into a surrogacy arrangement intending to raise the child has by her intent manifested an assumption of parental responsibility in addition to her biological contribution of providing the genetic material. (See [Adoption of Kelsey S.](#), *supra*, [1 Cal.4th at pp. 838, 849.](#)) But the gestational mother's biological contribution of carrying a child for nine months and giving birth is likewise an assumption of parental responsibility. (See Dolgin, *Just a Gene: [**116] Judicial Assumptions About Parenthood* (1993) [40 UCLA L.Rev. 637, 659.](#)) A pregnant woman's

commitment to the unborn child she carries is not just physical; it is psychological and emotional as well. The United States Supreme Court made a closely related point in [Lehr v. Robertson \(1983\) 463 U.S. 248 \[77 L.Ed.2d 614, 103 S.Ct. 2985\]](#), explaining [****71] that a father's assertion of parental rights depended on his having assumed responsibility for the child after its birth, whereas a mother's "parental relationship is clear" because she "carries and bears the child." (*Id. at p. 260, fn. 16 [77 L.Ed.2d at p. 626]*, quoting [Caban v. Mohammed \(1979\) 441 U.S. 380, 397 \[60 L.Ed.2d 297, 310, 99 S.Ct. 1760\]](#) (dis. opn. of Stewart, J.).)

³ This court too has acknowledged that a pregnant woman and her unborn child comprise a "unique physical unit" and that the welfare of each is "intertwined and inseparable." ([Burgess v. Superior Court \(1992\) 2 Cal.4th 1064, 1080 \[9 Cal.Rptr.2d 615, 831 P.2d 1197\]](#).) Indeed, a fetus would never develop into a living child absent its nurturing by the pregnant woman. (See Tribe, American Constitutional Law (2d ed. 1988) at p. 1357, citing Law, *Rethinking Sex and the Constitution* (1984) [132 U.Pa.L.Rev. 955, 1023](#).) A pregnant woman intending to bring a child into the world is more than [**798] [****516] a [****72] mere container or breeding animal; she

is a conscious agent of creation no less than the genetic mother, and her humanity is implicated on a deep level. Her role should not be devalued.

[****73] To summarize, the woman who carried the fetus to term and brought a child into the world has, like the genetic mother, a substantial claim to be the natural mother of the child. The gestational mother has made an indispensable and unique biological contribution, and has also gone beyond biology in an intangible respect that, though difficult to label, cannot be denied. Accordingly, I cannot agree with the majority's devaluation of the role of the gestational mother.

I find the majority's reliance on "intent" unsatisfactory for yet another reason. By making intent determinative of parental rights to a child born of [*117] a gestational surrogacy arrangement, the majority would permit enforcement of a gestational surrogacy agreement without requiring any of the protections that would be afforded by the Uniform Status of Children of Assisted Conception Act. Under that act, the granting of parental rights to a couple that initiates a gestational surrogacy arrangement would be conditioned upon compliance with the legislation's other provisions. They include court oversight of the gestational surrogacy arrangement before conception, legal counsel for the woman who agrees to gestate [****74] the child, a showing of need for the surrogacy, medical and mental health evaluations, and a requirement that all parties meet the standards of fitness of adoptive parents. (USCACA, § 5, 6.)

In my view, protective requirements such as those set forth in the USCACA are necessary to minimize any possibility in gestational surrogacy arrangements for overreaching or abuse by a party with economic advantage. As the New Jersey Supreme Court recognized, it will be a rare instance when a low income infertile couple can employ an upper income surrogate. ([Matter of Baby M., supra, 537 A.2d 1227, 1249](#).) The model act's carefully drafted provisions would assure that the

³ In my view, the United States Supreme Court's decision in [Lehr v. Robertson, supra, 463 U.S. 248](#), does not, despite the language I have just quoted, compel a conclusion that either the gestational mother or the genetic mother in a gestational surrogacy arrangement has, at the birth of the child, a fully vested and matured constitutional right to be a parent. Rather, I read the quoted language as indicating that the high court considers that a woman who conceives by traditional means and carries a fetus to term is a parent, and that a critical indicator of parenting status for a woman is gestation. Gestation is neither necessary nor sufficient to establish motherhood; it is, however, a factor the significance of which cannot be ignored, as the majority in effect does.

This reading of *Lehr v. Robertson* seems consistent with the plurality opinion in [Michael H. v. Gerald D., supra, 491 U.S. 110, 123 \[105 L.Ed.2d 91, 105-106\]](#), holding that a claim to fatherhood premised on biology plus "an established parental relationship" did not necessarily warrant constitutional protection. The court's precedents are, however, not entirely clear as to what will establish motherhood in a gestational surrogacy case, undoubtedly because the court has never dealt with such a case.

surrogacy arrangement is a matter of medical necessity on the part of the intending parents, and not merely the product of a desire to avoid the inconveniences of pregnancy, together with the financial ability to do so. Also, by requiring both pre-conception psychological counseling for all parties and judicial approval, the model act would assure that parties enter into a surrogacy arrangement only if they are legally and psychologically capable of doing so and [****75] fully understand all the risks involved, and that the surrogacy arrangement would not be substantially detrimental to the interests of any individual. Moreover, by requiring judicial approval, the model act would significantly discourage the rapid expansion of commercial surrogacy brokerage and the resulting commodification of the products of pregnancy. In contrast, here the majority's grant of parental rights to the intending mother contains no provisions for the procedural protections suggested by the commissioners who drafted the model act. The majority opinion is a sweeping endorsement of unregulated gestational surrogacy.

The majority's final argument in support of using the intent of the genetic mother as the exclusive determinant of the outcome in gestational surrogacy cases is that preferring the intending mother serves the child's interests, which are " '[u]nlikely to run contrary to those of adults who choose to bring [the child] into being.' " (Maj. opn., *ante*, at p. 94, quoting Schultz, *Reproductive Technology*, *supra*, [1990 Wis. L.Rev. at p. 397](#).)

I agree with [****76] the majority that the best interests of the child is an important goal; indeed, as I shall explain, the best interests of the child, rather than the [*118] intent of the genetic mother, is the proper standard to apply in the absence of legislation. The problem with the majority's rule of intent is that application of this inflexible rule will not serve the child's best interests in every case.

I express no view on whether the best interests of the child in this case will be served by determining that the genetic mother is or is not the natural

mother under California's Uniform Parentage Act. [***517] It may be that in [**799] this case the child's interests will be best served by recognizing Crispina as the natural mother. But this court is not just making a rule to resolve this case. Because the UPA does not adequately address the situation of gestational surrogacy, this court is of necessity making a rule that, unless new legislation is enacted, will govern all future cases of gestational surrogacy in California. And all future cases will not be alike. The genetic mother and her spouse may be, in most cases, considerably more affluent than the gestational mother. But [****77] "[t]he mere fact that a couple is willing to pay a good deal of money to obtain a child does not vouchsafe that they will be suitable parents . . ." (Capron & Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood*, in *Surrogate Motherhood*, *supra*, at pp. 65-66.) It requires little imagination to foresee cases in which the genetic mothers are, for example, unstable or substance abusers, or in which the genetic mothers' life circumstances change dramatically during the gestational mothers' pregnancies, while the gestational mothers, though of a less advantaged socioeconomic class, are stable, mature, capable and willing to provide a loving family environment in which the child will flourish. Under those circumstances, the majority's rigid reliance on the intent of the genetic mother will not serve the best interests of the child.

VIII. THE BEST INTERESTS OF THE CHILD

As I have discussed, in California the existing statutory law applicable to this case is the Uniform Parentage Act which was never designed to govern the new reproductive technology of gestational surrogacy. Under the UPA, both the genetic mother and the gestational mother have an [****78] equal right to be the child's natural mother. But the UPA allows one natural mother for each child, and thus this court is required to make a choice. To break this "tie" between the genetic mother and the gestational mother, the majority uses the legal concept of intent. In so doing, the majority has

articulated a rationale for using the concept of intent that is grounded in principles of tort, intellectual property and commercial contract law.

But, as I have pointed out, we are not deciding a case involving the commission of a tort, the ownership of intellectual property, or the delivery of goods under a commercial contract; we are deciding the fate of a child. In [*119] the absence of legislation that is designed to address the unique problems of gestational surrogacy, this court should look not to tort, property or contract law, but to family law, as the governing paradigm and source of a rule of decision.

The allocation of parental rights and responsibilities necessarily impacts the welfare of a minor child. And in issues of child welfare, the standard that courts frequently apply is the best interests of the child. (See § 222.20, 222.36, 224.64 [matters relating to [****79] adoption and temporary placement], 4600 [child custody], 4601 [visitation].) Indeed, it is highly significant that the UPA itself looks to a child's best interests in deciding another question of parental rights. (§ 7017, subd. (d)(2).) This "best interests" standard serves to assure that in the judicial resolution of disputes affecting a child's well-being, protection of the minor child is the foremost consideration. Consequently, I would apply "the best interests of the child" standard to determine who can best assume the social and legal responsibilities of motherhood for a child born of a gestational surrogacy arrangement.⁴

⁴ In a footnote responding to this opinion, the majority confuses questions of custody, which I do not address, with the issue of maternal parentage, which I do address. (See maj. opn., *ante*, at p. 93, fn. 10.) The majority suggests that it is somehow inappropriate for a court to look to the child's best interests when deciding a question of parentage under the UPA; this is refuted by the express terms of the UPA itself, which, as noted above, requires the court to consider the child's best interests in deciding another question of parentage. (§ 7017, subd. (d)(2).)

The majority is also wrong when it suggests that the "best interests" approach for resolving the disputed issue of parentage, more than the majority's "intent" approach, raises the "specter of governmental interference" in fundamentally private matters. (Maj. opn., *ante*, at

[****80] [**800] [***518] The determination of a child's best interests does not depend on the parties' relative economic circumstances, which in a gestational surrogacy situation will usually favor the genetic mother and her spouse. (See *Matter of Baby M.*, *supra*, 537 A.2d at p. 1249.) As this court has recognized, however, superior wealth does not necessarily equate with good parenting. (See *Burchard v. Garay* (1986) 42 Cal.3d 531, 540 [229 Cal.Rptr. 800, 724 P.2d 486, 62 A.L.R.4th 237].)

[*120] Factors that are pertinent to good parenting, and thus that are in a child's best interests, include the ability to nurture the child physically and psychologically (Cahill, *The Ethics of Surrogate Motherhood: Biology, Freedom, and Moral Obligation*, in *Surrogate Motherhood*, *supra*, at p. 160), and to provide ethical and intellectual guidance (see *In re Marriage of Carney* (1979) 24 Cal.3d 725, 739 [157 Cal.Rptr. 383, 598 P.2d 36, 3 A.L.R.4th 1028]). Also crucial to a child's [****81] best interests is the "well recognized right" of every child "to stability and continuity." (*Burchard v. Garay*, *supra*, 42 Cal.3d at p. 546 (conc. opn. of Mosk, J.).) The intent of the genetic mother to procreate a child is certainly relevant to the question of the child's best interests; alone, however, it should not be dispositive.

Here, the child born of the gestational surrogacy arrangement between Anna Johnson and Mark and Crispina Calvert has lived continuously with Mark

p. 93, fn. 10.) This court's grant of review to decide who is the natural mother of the child placed one branch of government squarely in the middle of this controversy--as did the parties' decisions to resort to the court system in the first place. Judicial resolution of family law matters, by its nature, necessarily involves some governmental interference in what would otherwise be private concerns.

On another point, the majority writes that the gestational mother could "voluntarily contract[] away any rights to the child," and that this would represent a "concession" as to the child's best interests. (Maj. opn., *ante*, at p. 93, fn. 10.) It is questionable whether the parentage of children is a proper subject of contract. But even assuming that a parent could contract away parental rights to a child--for instance, by selling the child into slavery--this would not logically amount to a binding "concession" that such a sale would be in the child's best interests.

and Crispina since his birth in September 1990. The trial court awarded parental rights to Mark and Crispina, concluding that as a matter of law they were the child's "genetic, biological and natural" parents.⁵ In reaching that conclusion, the trial court did not treat Anna's statutory claim to be the child's legal mother as equal to Crispina's, nor did the trial court consider the child's best interests in deciding between those two equal statutory claims. Accordingly, I would remand the matter to the trial court to undertake that evaluation.

[**82] CONCLUSION**

Recent advances in medical technology have made it possible for the human female reproductive role to be divided between two women, the genetic mother and the gestational mother. Such gestational surrogacy arrangements call for sensitivity to each of the adult participants. But the paramount concern must be the well-being of the child that gestational surrogacy has made possible.

The model legislation proposed by the National Conference of Commissioners on Uniform Laws would protect such children's well-being by precisely defining their parentage. Such precision is not possible using a "best interests of the child" standard, which requires a case-by-case evaluation after the birth of the child. But that evaluation would afford many protections similar to those set out in USCACA, such as judicial oversight, legal counsel, and an opportunity for the court to determine who best can provide for the child.

I recognize that, for couples such as Mark and Crispina, gestational surrogacy offers the only hope of raising a child who is genetically related to **[*121]** both. But the desire for a genetically related child does not diminish the substantial concerns expressed **[****83]** by a broad spectrum of commentators that surrogacy left unregulated poses a fundamental threat to the well-being of **[**801]** **[***519]** women and children. This threat could largely be allayed by legislation

permitting gestational surrogacy, but under court supervision and with the type of procedural requirements proposed in the USCACA that serve to protect all of those affected by a gestational surrogacy arrangement, particularly the child. In my view, the Legislature should turn its attention to the complex issues posed by gestational surrogacy

In this opinion, I do not purport to offer a perfect solution to the difficult questions posed by gestational surrogacy; perhaps there can be no perfect solution. But in the absence of legislation specifically designed to address the complex issues of gestational surrogacy and to protect against potential abuses, I cannot join the majority's uncritical validation of gestational surrogacy.

I would reverse the judgment of the Court of Appeal, and remand the case to the trial court for a determination of disputed parentage on the basis of the best interests of the child.

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⁵ It is uncontested that Mark is the natural father of this child.



Caution

As of: October 18, 2026 7:03 AM Z

Kirchberg v. Feenstra

Supreme Court of the United States

December 10, 1980, Argued ; March 23, 1981, Decided

No. 79-1388

Reporter

450 U.S. 455 *; 101 S. Ct. 1195 **; 67 L. Ed. 2d 428 ***; 1981 U.S. LEXIS 82 ****; 49 U.S.L.W. 4270

KIRCHBERG v. FEENSTRA ET AL.

Prior History: [****1] APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Disposition: [609 F.2d 727](#), affirmed.

Core Terms

mortgage, disposition of community property, counterclaim

Case Summary

Procedural Posture

Appellant attorney sought a declaratory judgment in the United States District Court for the Eastern District of Louisiana against appellee wife that he was not liable under the Truth in Lending Act for non-disclosure of a mortgage he held on her home. The husband unilaterally executed the mortgage for legal services under a state statute. The Court of Appeals for the Fifth Circuit invalidated the statute. The attorney appealed.

Overview

While incarcerated on a charge arising from a criminal complaint filed by the wife that alleged he molested their minor daughter, the husband retained the attorney to represent him. The husband signed a note for legal services, and executed a mortgage in favor of the attorney on the home he owned with his wife. The wife was never informed,

and her consent was not required because a state statute, La. Civ. Code Ann. art. 2404 (1971), gave the husband exclusive control over the disposition of community property. The attorney argued that even if art. 2404 violated the [Equal Protection Clause of the Fourteenth Amendment](#), the mortgage he held was valid because the court of appeals limited its ruling to prospective application. While this case was on appeal, the Louisiana legislature repealed art. 2404 and substantially rewrote the civil code provisions regarding community property. The new provisions did not take effect until after the mortgage was executed. The court held that the mortgage executed on the wife's home by her husband was void as having been executed and recorded without her consent pursuant to an unconstitutional state statute.

Outcome

The judgment invalidating the Louisiana statute that gave a husband the unilateral right to dispose of property was affirmed.

LexisNexis® Headnotes

Family Law > Marital Duties & Rights > General Overview

HN1 Family Law, Marital Duties & Rights

La. Civ. Code Ann. art. 2404 provided: The husband is the head and master of the partnership

or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

Constitutional Law > Substantive Due Process > Scope

HN2 Constitutional Law, Substantive Due Process

The burden is on those defending the discrimination to make out the claimed justification.

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Family Law > Marital Duties & Rights > General Overview

HN3 Types of Contracts, Lease Agreements

[*La. Civ. Code Ann. art 2334*](#) provided: Where the title to immovable property stands in the names of both the husband and the wife, it may not be leased, mortgaged or sold by the husband without the wife's consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such a declaration in the mortgage and conveyance records of the parish in which the property is situated.

Constitutional Law > Equal Protection > Gender & Sex

HN4 Equal Protection, Gender & Sex

The burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an exceedingly persuasive justification for the challenged classification.

Lawyers' Edition Display

Decision

Louisiana law allowing husband to dispose of property jointly held with wife without wife's consent, held violative of [*equal protection clause of Fourteenth Amendment*](#).

Summary

A man who jointly owned a home with his wife executed a mortgage on the home to secure a debt owed by the husband alone. The wife was not informed of the mortgage, and her consent was not required because a Louisiana statute gave the husband exclusive control over the disposition of jointly owned community property. After the husband and wife separated and the husband left the state, the mortgagee sought payment from the wife on the note executed by her husband, but she refused to pay the obligation. The mortgagee then began foreclosure proceedings on the home and filed an action in the United States District Court for the Eastern District of Louisiana, seeking a declaratory judgment against the wife that the mortgagee was not liable under the Truth in Lending Act ([*15 USCS 1601 et seq.*](#)) for any nondisclosures concerning the mortgage he held on the home. The wife asserted a counterclaim challenging the constitutionality of the state statute, and the state and its governor were joined as third-party defendants on the counterclaim. The District Court granted the state's motion for summary judgment ([*430 F Supp 642*](#)), but while an appeal was pending before the United States Court of Appeals for the Fifth Circuit the statute was changed and the "head and master" concept of the old law was abandoned and instead granted spouses equal control over the disposition of community property. Nevertheless, since the new law did not take effect until after the mortgage was executed, the Court of Appeals considered the constitutionality of the old statute and held that it violated the [*equal protection clause of the*](#)

[Fourteenth Amendment \(609 F2d 727\).](#)

On appeal, the United States Supreme Court affirmed. In an opinion by Marshall, J., joined by Burger, Ch. J., and Brennan, White, Blackmun, Powell, and Stevens, JJ., it was held that the statute embodied gender-based discrimination and violated the [equal protection clause of the Fourteenth Amendment](#), since the state failed to show that the classification created by the statute was tailored to further an important government interest and since a provision in the statute permitting the wife to avoid its discriminatory impact by making a "declaration of authentic act" prohibiting her husband from executing their mortgage on her home without her consent could not be asserted as a substitute for showing that the statute furthered an important government interest.

Stewart, J., joined by Rehnquist, J., concurred in the result, agreeing that the statute violated the [Fourteenth Amendment](#), but expressing the view that the Supreme Court should have held that the Court of Appeals' explicit announcement that its holding was to apply only prospectively meant that no other mortgage executed before the date of the Court of Appeals' decision was invalid by reason of its decision.

Headnotes

LAW §348.5 > equal protection -- sex discrimination -
- husband as master of joint property -- > Headnote:
[LEdHN\[1A\]](#) [1A][LEdHN\[1B\]](#) [1B]

A state statute which makes the husband the "head and master" of property held jointly with his wife and which permits him to dispose of such property without the wife's consent embodies gender-based discrimination and violates the [equal protection clause of the Fourteenth Amendment](#), the state having failed to show that the classification created by the statute is tailored to further an important government interest; the fact that the statute permits

the wife to avoid its discriminatory impact by making a "declaration of authentic act" prohibiting her husband from executing a mortgage on her home without her consent cannot be asserted as a substitute for showing that the statute furthers an important government interest.

LAW §316 > equal protection -- sex discrimination --
absence of insurmountable barrier -- > Headnote:
[LEdHN\[2\]](#) [2]

For purposes of analyzing a state statute under the [equal protection clause of the Fourteenth Amendment](#), the absence of an insurmountable barrier will not redeem an otherwise unconstitutionally discriminatory law.

EVIDENCE §99(1) > burden of proof equal protection
-- justification for classification -- > Headnote:
[LEdHN\[3\]](#) [3]

For purposes of the [equal protection clause of the Fourteenth Amendment](#), the burden is on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an exceedingly persuasive justification for the challenged classification.

JUDGMENT §199 > conclusiveness -- party to action -
- effect of decision applied prospectively -- > Headnote:
[LEdHN\[4\]](#) [4]

The decision of a Federal Court of Appeals invalidating a state statute permitting a husband to dispose of property held jointly with his wife without the wife's consent, which decision was to be applied prospectively only, applies to a mortgage executed by the husband on property held

jointly with his wife, which mortgage formed the basis of the instant suit by the mortgagee against the wife, where the controversy involves the validity of a single mortgage rather than an abstract disagreement over the constitutionality of a state statute, and in passing on the validity of the statute, the Court of Appeals clearly intended to resolve that controversy adversely to the mortgagee.

Syllabus

In 1974, the husband of appellee Feenstra (hereafter appellee), without her knowledge, executed a mortgage on their jointly owned home as security on the husband's promissory note to appellant. The husband executed the mortgage pursuant to a now superseded Louisiana statute (Art. 2404) that gave a husband the unilateral right to dispose of jointly owned community property without his spouse's consent. In 1976, after appellee refused to pay her husband's note, appellant commenced foreclosure proceedings and instituted the instant action in Federal District Court for declaratory relief. Appellee asserted a counterclaim challenging the constitutionality of Art. 2404, and Louisiana and its Governor were joined as third-party defendants on the counterclaim. The District Court granted the State's motion for summary judgment. While appellee's appeal to the Court of Appeals was pending, Louisiana completely revised its community-property code provisions so as to grant spouses equal control over the disposition of such property. Because the new code did not take effect until [****2] January 1, 1980, it did not control the mortgage executed by appellee's husband. The Court of Appeals held that Art. 2404 violated the [Equal Protection Clause of the Fourteenth Amendment](#), but limited its decision to prospective application because the ruling "would create a substantial hardship with respect to property rights and obligations within the State of Louisiana."

Held:

1. Article 2404 violated the [Equal Protection Clause](#). Gender-based discrimination is unconstitutional absent a showing that the classification substantially furthers an important governmental interest, and it is immaterial that under the earlier statutory provisions appellee could have made a "declaration by authentic act" prohibiting her husband from executing a mortgage on her home without her consent. The "absence of an insurmountable barrier" will not redeem an otherwise unconstitutionally discriminatory law. [Trimble v. Gordon, 430 U.S. 762, 774](#). Because appellant has failed to offer any justification for the challenged classification and because the State, by declining to appeal from the decision below, has apparently abandoned any claim that an important government [****3] objective was served by Art. 2404, the Court of Appeals' judgment is affirmed. Pp. 459-461.

2. There is no ambiguity on the only other question properly before this Court, which is whether the Court of Appeals' prospective decision applies to the mortgage in this case. The dispute between the parties at its core involves the validity of a single mortgage -- that executed by appellee's husband -- and in passing on the constitutionality of Art. 2404, the Court of Appeals clearly intended to resolve that controversy adversely to appellant. Pp. 461-463.

Counsel: Alan Ford Schoenberger argued the cause pro hac vice for appellant. With him on the brief was Karl J. Kirchberg, pro se.

Barbara Hausman-Smith argued the cause and filed a brief for appellee Feenstra. *

Judges: MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEWART, J., filed an opinion concurring in the result, in which

* Sybil H. Pollet and Phyllis N. Segal filed a brief for the NOW Legal Defense and Education Fund et al. as amici curiae urging affirmance.

REHNQUIST, J., joined, post, p. 463.

Opinion by: MARSHALL

Opinion

[*456] [***431] [**1197] JUSTICE MARSHALL [****4] delivered the opinion of the Court.

[LEdHN\[1A\]](#) [1A]In this appeal we consider the constitutionality of a now superseded Louisiana statute that gave a husband, as "head and master" of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent. Concluding that the provision violates the [Equal Protection Clause of the Fourteenth Amendment](#), we affirm the judgment of the Court of Appeals for the Fifth Circuit invalidating the statute.

I

In 1974, appellee Joan Feenstra filed a criminal complaint against her husband, Harold Feenstra, charging him with molesting their minor daughter. While incarcerated on that [*457] charge, Mr. Feenstra retained appellant Karl Kirchberg, an attorney, to represent him. Mr. Feenstra signed a \$ 3,000 promissory note in prepayment for legal services to be performed by appellant Kirchberg. As security on this note, Mr. Feenstra executed a mortgage in favor of appellant on the home he jointly owned with his wife. Mrs. Feenstra was not informed of the mortgage, and her consent was not required because a state statute, former Art. 2404 of the Louisiana Civil Code Ann. (West 1971), gave her husband exclusive control [****5] over the disposition of community property.¹

¹ [HN1](#) Article 2404, in effect at the time Mr. Feenstra executed the mortgage in favor of appellant, provided in pertinent part:

"The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife."

Mrs. [***432] Feenstra eventually dropped the charge against her husband. He did not return home, but instead obtained a legal separation from his wife and moved out of the State. Mrs. Feenstra first learned of the existence of the mortgage in 1976, when appellant Kirchberg threatened to foreclose on her home unless she paid him the amount outstanding on the promissory note executed by her husband. After Mrs. Feenstra refused to pay the obligation, Kirchberg obtained an order of executory process directing the local sheriff to [****6] seize and sell the Feenstra home.

Anticipating Mrs. Feenstra's defense to the foreclosure action, Kirchberg in March 1976 filed this action in the United States District Court for the Eastern District of Louisiana, seeking a declaratory judgment against Mrs. Feenstra that he was not liable under the Truth in Lending Act, [15 U. S. C. § 1601 et seq.](#), for any nondisclosures concerning the mortgage he held on the Feenstra home. In her answer to Kirchberg's complaint, Mrs. Feenstra alleged as a counterclaim that Kirchberg has violated the Act, but also included a second counterclaim [*458] challenging the constitutionality of the statutory scheme that empowered her husband unilaterally to execute a mortgage on their jointly owned home. The State of Louisiana and its Governor were joined as third-party defendants on the constitutional counterclaim. The governmental parties, joined by appellant, moved for summary judgment on this claim. The District Court, characterizing Mrs. Feenstra's counterclaim as an attack on "the bedrock of Louisiana's community property system," granted the State's motion for summary judgment. [430 F.Supp. 642, 644 \(1977\)](#).²

[****7] While Mrs. Feenstra's appeal from the

This provision has been repealed. See *infra*, at 458, and nn. 3 and 4.

² After the District Court granted summary judgment against appellee Feenstra on her constitutional challenge to the head and master statute, she and appellant Kirchberg agreed to the dismissal with prejudice of their Truth in Lending Act claims.

District Court's order was pending before the Court of Appeals for the Fifth Circuit, the Louisiana Legislature completely revised its code provisions relating to community property. In so doing, the State abandoned the "head and master" concept embodied in Art. 2404, and instead granted spouses equal control over the disposition of **[**1198]** community property. [La. Civ. Code Ann., Art. 2346](#) (West Supp. 1981). ³ **[****8]** The new code also provided that community immovables could not be alienated, leased, or otherwise encumbered without the concurrence of both spouses. [La. Civ. Code Ann., Art. 2347](#) (West Supp. 1981). ⁴ These provisions, however, did not take effect until January 1, 1980, and the Court of Appeals was therefore required to consider whether Art. 2404, the Civil Code provision which had authorized **[***433]** Mr. Feenstra to mortgage his home in 1974 without his wife's knowledge or consent, violated the [Equal Protection Clause of the Fourteenth Amendment](#).

[*459] Because this provision explicitly discriminated on the basis of gender, the Court of Appeals properly inquired whether the statutory grant to the husband of exclusive control over disposition of community property was substantially related to the achievement of an important governmental objective. See, e. g., [Wengler v. Druggist Mutual Ins. Co., 446 U.S. 142 \(1980\)](#); [Craig v. Boren, 429 U.S. 190 \(1976\)](#). The court noted that the State had advanced only one justification for the provision -- that "[one] of the two spouses has to be designated as the manager of the community." ⁵ The court agreed that the State had an interest in defining the manner in which

community property was to be managed, but found that the State had failed to show why the mandatory designation of the husband as manager of the property was necessary to further that interest. The court therefore concluded that **[****9]** Art. 2404 violated the [Equal Protection Clause](#). However, because the court believed that a retroactive application of its decision "would create a substantial hardship with respect to property rights and obligations within the State of Louisiana," the decision was limited to prospective application. [609 F.2d 727, 735-736 \(1979\)](#). Only Kirchberg appealed the judgment of the Court of Appeals to this Court. We noted probable jurisdiction. [446 U.S. 917 \(1980\)](#). ⁶

[**10] II**

[LEdHN\[1B\]](#) [1B]By granting the husband exclusive control over the disposition of community property, Art. 2404 clearly embodies the **[*460]** type of express gender-based discrimination that we have found unconstitutional absent a showing that the classification is tailored to further an important governmental interest. In defending the constitutionality of Art. 2404, appellant Kirchberg does not claim that the provision serves any such interest. ⁷ Instead, appellant attempts to distinguish this Court's

³Article 2346 provides that "[each] spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law."

⁴However, either spouse may renounce his or her right to concur in the disposition of community immovables. [La. Civ. Code Ann., Art. 2348](#) (West Supp. 1981).

⁵This assertion was made in the State's brief before the Court of Appeals. [609 F.2d 727, 735 \(1979\)](#).

⁶The State and the Governor, as appellees, subsequently filed a motion to dismiss Kirchberg's appeal on the ground that extensive revisions in the State's community property law, see *supra*, at 458, and nn. 3 and 4, had rendered moot the controversy over the constitutionality of Art. 2404. However, because these legislative changes were effective only as of January 1, 1980, they do not govern the mortgage executed by Mr. Feenstra in 1974. The suggestion of mootness was therefore rejected. [449 U.S. 916 \(1980\)](#).

⁷Nor will this Court speculate about the existence of such a justification. [HN2](#) "The burden . . . is on those defending the discrimination to make out the claimed justification . . ." [Wengler v. Druggist Mutual Ins. Co., 446 U.S. 142, 151 \(1980\)](#). We note, however, that the failure of the State to appeal from the decision of the Court of Appeals and the decision of the Louisiana Legislature to replace Art. 2404 with a gender-neutral statute, suggest that appellant would be hard pressed to show that the challenged provision substantially furthered an important governmental interest.

decisions in cases such as [Craig v. Boren, supra](#), and [Orr v. Orr, 440 U.S. 268 \[**1199\] \(1979\)](#), which struck down similar gender-based statutory classifications, by arguing that appellee Feenstra, as opposed to [***434] the disadvantaged individuals in those cases, could have taken steps to avoid the discriminatory impact of Art. 2404. Appellant notes that under Art. 2334 of the Louisiana Civil Code, in effect at the time Mr. Feenstra executed the mortgage, Mrs. Feenstra could have made a "declaration by authentic act" prohibiting her husband from executing a mortgage on her home without her consent.⁸ By failing to take advantage of this [****11] procedure, Mrs. Feenstra, in appellant's view, became the "architect of [*461] her own predicament" and therefore should not be heard to complain of the discriminatory impact of Art. 2404.

[****12] [LEdHN\[2\]](#) [2][LEdHN\[3\]](#) [3]By focusing on steps that Mrs. Feenstra could have taken to preclude her husband from mortgaging their home without her consent, however, appellant overlooks the critical question: Whether Art. 2404 substantially furthers an important government interest. As we have previously noted, the "absence of an insurmountable barrier" will not redeem an otherwise unconstitutionally discriminatory law. [Trimble v. Gordon, 430 U.S. 762, 774 \(1977\)](#). See [Frontiero v. Richardson, 411 U.S. 677 \(1973\)](#). Cf. [Taylor v. Louisiana, 419 U.S. 522 \(1975\)](#); [Reed v. Reed, 404 U.S. 71 \(1971\)](#).

⁸ [HN3](#) Article 2334, as it existed in 1974, provided:

"Where the title to immovable property stands in the names of both the husband and the wife, it may not be leased, mortgaged or sold by the husband without the wife's consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such a declaration in the mortgage and conveyance records of the parish in which the property is situated."

This Article has been replaced with a new code provision prohibiting either spouse from alienating or encumbering community immovables without the consent of the other spouse. See n. 3, *supra*.

Instead [HN4](#) the burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an "exceedingly persuasive justification" for the challenged classification. *Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273 (1979)*. See also [Wengler v. Druggist Mutual Ins. Co., supra, at 151](#). Because appellant has failed to offer such a justification, and because the State, by declining to appeal from the decision below, has apparently [****13] abandoned any claim that an important government objective was served by the statute, we affirm the judgment of the Court of Appeals invalidating Art. 2404.⁹

III

[LEdHN\[4\]](#) [4]Appellant's final contention is that even if Art. 2404 violates the [Equal Protection Clause of the Fourteenth Amendment](#), the mortgage he holds on the Feenstra home is nonetheless [*462] valid because the Court of [***435] Appeals limited its ruling to prospective application. Appellant asserts that the opinion [****14] of the Court of Appeals is ambiguous on whether the court intended to apply its prospective ruling to his mortgage, which was executed in 1974, or only to those dispositions of community property made pursuant to Art. 2404 between December 12, 1979, the date of the court's decision, and January 1, 1980, the effective date of Louisiana's new community property law. Appellant urges this Court to adopt the latter interpretation on the ground that a contrary decision would create grave uncertainties concerning the validity of mortgages executed unilaterally by husbands between 1974 and the date of the Court of Appeals' decision.

⁹ In so ruling, we also reject appellant's secondary argument that the constitutional challenge to Art. 2404 should be rejected because the provision was an integral part of the State's community property law and its invalidation would call into question the constitutionality of related provisions of the Louisiana Civil Code. The issue before us is not whether the State's community property law, as it existed in 1974, could have functioned without Art. 2404, but rather whether that provision unconstitutionally discriminated on the basis of sex.

[**1200] We decline to address appellant's concerns about the potential impact of the Court of Appeals' decision on other mortgages executed pursuant to Art. 2404. The only question properly before us is whether the decision of the Court of Appeals applies to the mortgage in this case, and on that issue we find no ambiguity.¹⁰ This case arose not from any abstract disagreement between the parties over the constitutionality of Art. 2404, but from appellant's attempt to foreclose on the mortgage he held on the Feenstra home. Appellant brought this declaratory [****15] judgment action to further that end, and the counterclaim asserted by Mrs. Feenstra specifically sought as relief "a declaratory judgment that the mortgage executed on [her] home by her husband . . . is void as having been executed and recorded without her consent pursuant to an unconstitutional state statute." Thus, the dispute between the parties at its core involves the validity of a single [*463] mortgage, and in passing on the constitutionality of Art. 2404, the Court of Appeals clearly intended to resolve that controversy adversely to appellant.

Accordingly, the judgment [****16] of the Court of Appeals is affirmed.

So ordered.

Concur by: STEWART

Concur

JUSTICE STEWART, with whom JUSTICE REHNQUIST joins, concurring in the result.

Since men and women were similarly situated for all relevant purposes with respect to the management and disposition of community

property, I agree that Art. 2404 of the Louisiana Civil Code Ann. (West 1971), which allowed husbands but not wives to execute mortgages on jointly owned real estate without spousal consent, violated the [Equal Protection Clause of the Fourteenth Amendment](#). See *Michael M. v. Sonoma County Superior Court*, *post*, at 477-479 (STEWART, J., concurring).

While it is clear that the Court is correct in holding that the judgment of the Court of Appeals applied to the particular mortgage executed by Mr. Feenstra, it is equally clear that [***436] that court's explicit announcement that its holding was to apply only prospectively means that no other mortgage executed before the date of the decision of the Court of Appeals is invalid by reason of its decision.

References

16A Am Jur 2d, *Constitutional Law* 769

7 Am Jur Pl & Pr Forms (Rev), *Constitutional Law*, [****17] Form 22.1

USCS, [Constitution, 14th Amendment](#)

US L Ed Digest, *Constitutional Law* 348.5

L Ed Index to Annos, *Equal Protection of Law; Sex Discrimination*

Federal Quick Index, *Equal Protection of the Laws; Sex Discrimination*

Annotation References:

Validity, under [equal protection clause of Fourteenth Amendment](#), of gender-based classifications arising by operation of state law. [60 L Ed 2d 1188](#).

Sex discrimination. [27 L Ed 2d 935](#).

¹⁰ Indeed, appellant's view that some ambiguity exists concerning the applicability of the Fifth Circuit's decision to the mortgage he held on the Feenstra home appears to be of recent vintage. Appellant Kirchberg never sought clarification from the Court of Appeals on the scope of its decision, and apparently regarded the court's judgment to be sufficiently adverse and binding on him to warrant seeking review on the merits before this Court.



Kuffel v. Seaside Oil Co.

Court of Appeal of California, Fifth Appellate District

May 6, 1977

Civ. No. 2888

Reporter

69 Cal. App. 3d 555 *; 138 Cal. Rptr. 575 **; 1977 Cal. App. LEXIS 1444 ***

LORREN J. KUFFEL et al., Plaintiffs and
Appellants, v. SEASIDE OIL COMPANY,
Defendant and Respondent

Subsequent History: [***1] A petition for a rehearing was denied June 2, 1977, and appellants' petition for a hearing by the Supreme Court was denied June 30, 1977.

Prior History: Superior Court of Stanislaus County, No. 92712, Francis W. Halley, Judge.

Disposition: The judgment is affirmed.

Case Summary

Procedural Posture

The appellate court reversed the decision of the Superior Court of Stanislaus County (California) on the issue of damages and remanded for retrial on that issue, in an action brought by appellant service station operators against respondent oil company for wrongful termination of a contract to sell respondent's gasoline. Following a retrial, appellants sought review of the trial court's judgment.

Overview

The first trial of appellant service station operators' claim for wrongful termination of a contract to sell respondent oil company's gasoline resulted in an award to appellant of \$ 212,269.48 in general damages and \$ 10,000 in punitive damages. The appellate court reversed and remanded the cause for retrial on the issue of damages. On retrial,

appellants were awarded \$ 16,775.11 in compensatory damages and \$ 5,591.70 in punitive damages, and sought review. The appellate court affirmed. The trial court properly adopted an exhibit prepared by respondent, which indicated the difference in annual net profits between appellants' actual sales of gasoline and the projected sales of respondent's gasoline for the same period. Also, although the trial court erred by not making requested special findings on appellants' projected gross and net profits from the sale of respondent's gasoline over the unexpired term of the contract, appellant was not prejudiced because the trial court's memorandum opinion disclosed that it had adopted respondent's exhibit as the method of calculating damages.

Outcome

The appellate court affirmed the trial court's calculation of compensatory damages in appellant service station operators' suit for wrongful termination of a contract for the sale of respondent oil company's gasoline. Further, the trial court's error in failing to make requested special findings did not require reversal when the trial court filed a memorandum opinion which disclosed the method used to calculate damages.

LexisNexis® Headnotes

Contracts Law > ... > Types of
Damages > Compensatory Damages > General

Overview

HN1 In awarding damages for the loss of profits, net profits, not gross profits, are the proper measure of recovery.

Contracts Law > ... > Types of
Damages > Compensatory Damages > General
Overview

HN2 The proper measure of damages is the loss of net profits and not any mere difference in special allowances.

Civil Procedure > Trials > Bench Trials
Civil Procedure > Appeals > Reviewability of Lower
Court Decisions > Preservation for Review

HN3 When findings on material subsidiary issues of fact are requested or when the omission of such findings is brought to the trial court's attention prior to entry of judgment, the trial court is required to make such findings. If it does not do so, it cannot be inferred on appeal that the trial court found in favor of the prevailing party on the issues covered by the requested findings. [*Cal. Civ. Proc. Code §634*](#). A "material" issue of fact is one which is relevant and essential to the judgment and closely and directly related to the trial court's determination of the ultimate issues in the case. [*§634*](#).

Civil Procedure > Trials > Bench Trials

HN4 Special findings are not required on every subsidiary matter on which evidence is received at trial, even though the subsidiary matter is relevant to the ultimate issues of fact. For example, where damages are the product of many interwoven elements, the trial court is not required to make separate findings on each element.

Civil Procedure > Judgments > Relief From

Judgments > General Overview

Civil Procedure > ... > Standards of
Review > Harmless & Invited Errors > General
Overview

HN5 See [*Cal. Const. art. IV, § 13*](#).

Civil Procedure > ... > Standards of
Review > Harmless & Invited Errors > General
Overview

HN6 The phrase "miscarriage of justice, " in [*Cal. Const. art. IV, § 13*](#), means that a judgment cannot be reversed unless the reviewing court, after an examination of the entire cause, including the evidence, is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. This rule of appellate review applies to the finding of "nonprejudicial error" in civil cases involving the omission of findings of fact.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

In the retrial of a case based on a gasoline supplier's wrongful termination of its contract with the proprietors of a service station, the cause, on the first appeal, having been remanded on the issue of damages, the trial court, adopting the calculations derived from exhibits presented by both parties, awarded damages to the proprietors in the amount of \$ 16,775.11. Under the contract, the proprietors had been entitled to a basic margin on the gasoline sold plus "rental" and "delivery" allowances of 2 cents and 1 cent per gallon respectively, and for the four-year balance of the term, following the wrongful termination by defendant, which had been their sole supplier, the proprietors had been obliged to buy their gasoline from alternative sources. The trial court's damage award was based on the

difference, not merely between the cost components of the respective products, such as the rental and delivery allowances, but between the net profits the proprietors could reasonably have anticipated making from the sale of the original supplier's gasoline for the four-year period and the net profits they actually made from the sale of the alternative suppliers' gasoline during the four years. (Superior Court of Stanislaus County, No. 92712, Francis W. Halley, Judge.)

On appeal by the proprietors, the Court of Appeal affirmed, holding that, because the proprietors were entitled to compensatory damages only for the loss of actual or prospective profits naturally and directly resulting from the wrongful termination, the trial court had applied the correct rule in calculating the damages, and that the exhibits used by the trial court for its calculations had constituted substantial evidence to support the amount of the award. With respect to the proprietors' claim of reversible error for the trial court's failure to make special findings of fact on six questions submitted by them, the court held that four of the questions related to facts too remote in the chain of determination of the ultimate question of the measure of damages, and therefore did not require special findings. The other two questions, on the proprietors' projected gross and net profit from sales of the original gasoline over the unexpired balance of the contract term, related to material subsidiary facts on which special findings should have been made under [Code Civ. Proc., § 634](#); because, however, the requested details appeared in the memorandum opinion filed by the court, the failure to make special findings on them did not amount to prejudicial error. (Opinion by Franson, J., with Gargano, Acting P. J., and Hopper, J., concurring.)

Headnotes

[CA\(1\)](#) (1)

Damages § 15—Measure of Damages—For Breach

of Contract.

--In awarding damages for the loss of profits in a breach of contract case, net profits, not gross profits, are the proper measure of recovery.

[CA\(2\)](#) (2)

Damages § 15—Measure of Damages—Breach of Contract—Wrongful Termination.

--Retailers of gasoline and of associated products, seeking damages from their sole suppliers who wilfully terminated their sales contract four years before it expired, were entitled to be compensated for the loss of actual or prospective profits naturally and directly resulting from the wrongful termination.

[CA\(3\)](#) (3)

Damages § 15—Measure of Damages—Breach of Contract—Wrongful Termination—Gasoline Sales.

--Where the sole suppliers of gasoline wrongfully terminated their contract with the proprietors of a service station, the proprietors were entitled to compensatory damages based on the difference between the net profits they would reasonably have anticipated making from the sale of such gasoline for the four-year unexpired term of the sales contract (including "rental" and "delivery" allowances) and the net profits they actually made from the sale of their alternative suppliers' gasoline over that period. Thus, a damage award of \$ 16,775.11, calculated on such basis, was proper where the calculations, as adopted by the trial court, were derived from both parties' exhibits covering the projected retail price, volume, and wholesale cost of the original supplier's gasoline for the four-year period, as compared with the actual prices paid for the alternative gasolines and the business expenses actually incurred by the proprietors during the same period, and where such exhibits,

disregarding the proprietors' conjectural claim as to an expected increase in annual sales of the original gasoline, were supported by substantial evidence.

does not do so, the inference cannot be made on appeal that the trial court found in favor of the prevailing party on such issues.

[CA\(4a\)](#) (4a) [CA\(4b\)](#) (4b) [CA\(4c\)](#) (4c) [CA\(4d\)](#) (4d)

Damages § 35—Procedure—Review—Wrongful Termination of Contract—Failure to Make Requested Special Findings—Harmless Error.

--Where the sole suppliers of gasoline to the proprietors of a service station wrongfully terminated the sales contract under which the proprietors were entitled to a basic margin on the gasoline sold plus "rental" and "delivery" allowances of 2 cents and 1 cent per gallon respectively, and where, for the next four unexpired years of the contract, the proprietors were obliged to buy their gasoline from two alternative suppliers, the trial court, in the proprietors' subsequent action for damages, was required under [Code Civ. Proc., § 634](#), to respond to their request for special findings of fact on their projected gross and net profit from sales of the original gasoline over the four-year balance of the contract term as being directly related to the ultimate question of the amount of damages to which they were entitled. The trial court's failure to make such findings, however, did not constitute prejudicial error, where the requested details appeared in the memorandum opinion filed by the court.

[CA\(5a\)](#) (5a) [CA\(5b\)](#) (5b)

Trial § 137—Findings of Fact and Conclusions of Law—Findings on Material Issues—Effect of Failure to Find.

--When findings on material subsidiary issues of facts are requested in a civil case, or when the omission of such findings is brought to the trial court's attention prior to entry of judgment, the trial court, subject to pragmatic limitations imposed as a matter of judicial policy, is required to make such findings, and, under [Code Civ. Proc., § 634](#), if it

[CA\(6a\)](#) (6a) [CA\(6b\)](#) (6b)

Trial § 137—Findings of Fact and Conclusions of Law—Findings on Material Issues—Effect of Failure to Find—Pragmatic Limitations.

--As a pragmatic limitation, imposed as a matter of judicial policy, on the requirement in a civil case of special findings by the trial court on material subsidiary issues when so requested or when the omission of such findings is brought to the court's attention prior to judgment ([Code Civ. Proc., § 634](#)), such findings are not required on every subsidiary matter on which evidence is received at trial, even though the subsidiary matter is relevant to the ultimate issues of fact. For example, where damages are the product of many interwoven elements, the trial court is not required to make separate findings on each element.

[CA\(7\)](#) (7)

Trial § 136—Findings of Fact and Conclusions of Law—Findings on Material Issues—"Material Issues."

--Within the meaning of [Code Civ. Proc., § 634](#), relating to the effect of a trial court's failure to make written findings of fact when so required, a "material" issue of fact is one that is relevant and essential to the judgment and closely and directly related to the trial court's determination of the ultimate issues in the case.

[CA\(8\)](#) (8)

Trial § 151—Findings of Fact and Conclusions of Law—Purpose of Rule Abrogating Doctrine of Implied Findings.

--The purpose of the rule abrogating the doctrine

of implied findings where the omitted findings are brought to the trial court's attention ([Code Civ. Proc., § 634](#)) is to alleviate the frustration of losing litigants and their attorneys confronted with noncommunicative trial judges who do not explain their rulings in any memorandum opinion and who frequently, with the aid of successful counsel, couch their findings of fact in terms so ultimate that it is extremely difficult, if not impossible, to determine either the factual basis or legal theory of the decision.

[CA\(9\)](#) (9)

Damages § 34—Wrongful Termination of Contract—Request for Special Findings—Facts Unnecessary to Ultimate Determination.

--Where the sole suppliers of gasoline to the proprietors of a service station wrongfully terminated the sales contract under which the proprietors were entitled to a basic margin on the gasoline sold plus "rental" and "delivery" allowances of 2 cents and 1 cent per gallon respectively, and where, for the next four unexpired years of the contract, the proprietors were obliged to buy their gasoline from two alternative sources, [Code Civ. Proc., § 634](#), did not require the trial court, in the proprietors' subsequent action for damages, to respond to their request for special findings of fact concerning any increases in the original supplier's sales of gasoline over the four-year balance of the contract term or the per gallon overhead cost to the proprietors of such gasoline before the contract was terminated. Such subsidiary facts were remote in the chain of determination of the ultimate question of the amount of damages to which they were entitled.

[CA\(10\)](#) (10)

Appellate Review § 170—Determination and Disposition of Cause—Harmless and Reversible Error—Miscarriage of Justice.

--Under [Cal. Const., art. VI, § 13](#), providing that a judgment shall not be set aside for procedural error unless such error has resulted in a miscarriage of justice, a judgment cannot be reversed unless the reviewing court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.

[CA\(11\)](#) (11)

Trial § 128—Trial by Court—Function of Memorandum Opinion With Respect to Findings and Conclusions.

--On appeal from a judgment in a civil case, the trial court's memorandum opinion may be used only for the purpose of explaining and interpreting the findings, and cannot be relied upon to fill the interstices in the findings and conclusions left void by the failure to find pursuant to a properly filed request under [Code Civ. Proc., § 634](#).

Counsel: Robert R. Elledge for Plaintiffs and Appellants.

Price, Martin & Crabtree and C. Rex Boyd for Defendant and Respondent.

Judges: Opinion by Franson, J., with Gargano, Acting P. J., and Hopper, J., concurring.

Opinion by: FRANSON

Opinion

[*559] [**577] This appeal is from a judgment on the retrial of the issue of damages arising out of the wrongful termination of a contract. The judgment in favor of appellants is for \$ 16,775.11, compensatory damages and \$ 5,591.70, punitive damages.¹

¹The first trial resulted in the award to appellant of \$ 212,269.48 in

[*2] [*560]** Appellants make two contentions: First, they claim that there is insufficient evidence to support the compensatory damage award. Appellants argue that they should have been awarded compensatory damages in the sum of \$ 49,508.56. Second, appellants claim that the trial court committed reversible error in not making special findings on a material issue of fact, as required by [Code of Civil Procedure section 634](#).

For the reasons to be stated, we hold both contentions to be without merit.

The pertinent facts on the question of compensatory damages are as follows: appellants have been engaged in the business of selling gasoline and related products from a service station in Riverbank, California, for approximately 30 years. They resold gasoline furnished by respondent Seaside Oil Company for approximately 20 years from 1946 to 1966.

In April of 1960 appellants negotiated a new 10-year contract with respondent. Under the contract, they received in addition to the basic margin on gasoline of 4 or 4 1/2 cents per gallon a 2-cent rental allowance and a 1-cent delivery allowance. This arrangement continued until May 18, 1966. On that date, upon representations by respondent **[***3]** that appellants would get a new contract on the same terms and conditions as the old, the contract was terminated. At the time of termination, the contract had an unexpired term of four years and eight days. A new contract was never received by appellants and deliveries of Seaside gasoline were terminated.

[578]** When respondent cut off appellants' gasoline supply, appellants acquired Goodrich gasoline from June 1966 through May 1968. In June 1968 appellants became Mobil Oil Company dealers and remained Mobil dealers for the remainder of the two-year unexpired term of the

contract with respondent.

The proper measure of compensatory damages in this case is stated in [Kuffel v. Seaside Oil Co., supra, 11 Cal.App.3d at page 366](#).

"It is clear that [appellants] were entitled to be compensated for the loss of actual or prospective profits naturally and directly resulting from the fraudulent termination of Seaside's sales contract [citation]. The court, therefore, could properly have awarded [appellants] the difference between the net profits they could reasonably have anticipated making from the sale of Seaside gasoline for the unexpired term of the sales **[*561]** **[***4]** contract and the net profits they actually made and reasonably could have anticipated making from the sale of Goodrich . . . brand gasoline [or Mobil brand gasoline] over the same period." ([11 Cal.App.3d at p. 361](#).)

[CA\(1\) \(1\)](#) "It is fundamental that [HN1](#) in awarding damages for the loss of profits, net profits, not gross profits, are the proper measure of recovery [citations]." ([11 Cal.App.3d at p. 366](#).)

On retrial, the court followed *Kuffel* and made the following findings of fact and conclusions of law on the issue of damages:

Findings of Fact

"No. 3. In the market conditions prevailing during said period, the net profits [appellants] could have reasonably anticipated making from the sale of Seaside gasoline at their station for the unexpired term of the sales contract would have exceeded the net profits they actually made from the sale of [Goodrich] and Mobil gasolines there over the same period, by the amount of \$ 16,775.11.

"No. 4. Compensatory damages sustained by [appellants] are fixed at \$ 16,775.11.

general damages and \$ 10,000 in punitive damages. In [Kuffel v. Seaside Oil Co. \(1970\) 11 Cal.App.3d 354 \[90 Cal.Rptr. 209\]](#), this court reversed the trial court on the damages issue and remanded the cause for retrial on that issue.

Conclusions of Law

"No. 5. To compensate the losses of actual and prospective profits naturally and directly resulting from the fraudulent termination of the Seaside [***5] sales contract, the [appellants] are properly entitled to receive compensatory damages in an amount equal to the difference between the net profits they could reasonably have anticipated making from the sale of Seaside gasoline for the unexpired term of the sales contract and the net profits they actually made from the sale of [Goodrich] and Mobil gasolines, respectively over the same period."

The trial court did not include in its findings or conclusions the calculations from which the \$ 16,775.11 figure for compensatory damages was derived. However, in its announcement of intended decision it noted that it was adopting respondent's evaluation of compensatory damages as set forth in respondent's exhibit Z.²

[*562] Discussion

CA(2) (2) Appellants are entitled to be compensated for the loss of actual or prospective profits naturally and directly resulting from the wrongful termination of its sales contract by respondent. (Kuffel [***6] v. Seaside Oil Co., supra, 11 Cal.App.3d at p. 361.) CA(3) (3) This means that appellants are entitled to the difference between the net profits they could reasonably have anticipated making from the sale of Seaside gasoline for the unexpired term of the sales contract and the net profits they actually made from the sale of Goodrich brand gasoline and Mobil brand gasoline over the same period. (Kuffel v. Seaside Oil Co., supra, 11 Cal.App.3d at pp. 361, 366.)

The trial court purported to apply the correct rule by adopting respondent's exhibit Z as the proper method of calculating the damages. Thus, the issue is whether respondent's [*579] exhibit Z and the exhibits from which it was derived constitute substantial evidence to support the trial court's

award of compensatory damages in the amount of \$ 16,775.11.

Exhibit Z was prepared by John Pearson, manager of the administrative services for respondent company. Mr. Pearson computed appellants' loss of net profits over the four-year period remaining on their contract with respondent by calculating the net profits appellants could reasonably have anticipated making from the sale of respondents' gasoline for the unexpired [***7] term of the contract and the net profits they actually made from the sale of Goodrich and Mobil brand gasoline over the same period.

Appellants' exhibit 16 and respondent's exhibit Q provided the actual and projected price, volume and cost for the period of June 1966 through May 1968, when appellants sold Goodrich gasoline. Appellants' exhibits 15 and 16 and respondent's exhibit Q provided these amounts for the period June 1968 through May 1970, when appellants sold Mobil gasoline. Appellants' exhibit 20 provided the expenses for the entire period in question, i.e., June 1966 through May 1970.

The projected price, volume and wholesale cost of Seaside gasoline for the four-year period in question were computed on respondent's exhibit Z as follows:

First, for the period in which appellants sold Goodrich gasoline the projected retail price of Seaside was equated with the actual retail price of Goodrich gasoline charged by appellants. (Respondent's exhibit Q.) [*563] The projected volume of Seaside which appellants would have sold was also equated with the actual volume of Goodrich sold by appellants. This was reasonable in light of testimony that Goodrich and Seaside gasolines [***8] were of equal quality and customer appeal and were priced competitively with one another.

Second, for the period in which appellants sold Mobil gasoline the projected retail price for Seaside was equated with the actual retail price charged by

² A copy of respondent's exhibit Z is attached as an appendix to this opinion.

another Seaside dealer in the same area. (Respondent's exhibit Q; appellants' exhibit 1.) This was reasonable in light of the fact that retail prices for Mobil, a major brand, are consistently higher than the retail prices charged by independent dealers such as Seaside. Therefore, it would have been inaccurate to use the actual retail price charged for Mobil as the projected retail price for Seaside. Because the Seaside dealer was in the same pricing area as were appellants, it was reasonable to use his retail prices to project those for appellants.

As to the projected volume of Seaside which appellants would have sold during the period they were selling Mobil, an average was taken of the actual volume of Seaside sold during appellants' last year with Seaside plus the volume of Goodrich sold by appellants during their two years with Goodrich. Again, this was reasonable because Seaside and Goodrich were both independents and it could be [***9] expected that a retailer would sell approximately the same volume of either. Respondent points out that this volume projection for Seaside is higher than the actual amounts of Mobil sold during the period June 1968 through May 1970. Such a projection is favorable to appellants since a higher projection for Seaside makes for a greater loss of profit.

Finally, as to the projected wholesale cost of Seaside gasoline during the entire four-year period in which appellants sold Goodrich and then Mobil gasoline, the following computation was made: Seaside's wholesale asking price ("dealer tank wagon price") was used as a base, with credit off for all special allowances or subsidies and dealer pricing programs to which appellants would have been entitled, assuming the sales contract with Seaside had continued in effect through May of 1970. Specifically, appellants were granted: (1) the 2-cent rental allowance for the entire four year period; (2) special allowances, including the 1-cent delivery allowance up to May 1, 1967, and thereafter allowances provided by a new Seaside pricing program adopted for all its dealers in place

of previous pricing programs with special allowances, which was [***10] [**580] more advantageous to appellant; and (3) all wholesale price changes. Such a computation closely approximated the wholesale cost of Seaside [*564] gasoline which appellants would have incurred had Seaside honored the remaining four-year term of the contract.

In respondent's exhibit Z the difference in annual net profits between appellants' sale of Goodrich and Mobil gasoline from June 1966 through May 1970 and the projected sales of Seaside for the same period came to \$ 16,775.11 and was adopted by the trial court as the amount of compensatory damages. Thus, the calculations set forth in exhibit Z are supported by substantial evidence.

Appellants' argument that their compensatory damages should be at least \$ 49,508.56 is based on the fallacious assumption that the measure of compensatory damages is not the difference in *net profits* but rather the difference in only one of the cost components of the respective products -- the allowances received by appellants. [HN2](#) The proper measure of damages is the loss of net profits and not any mere difference in special allowances. (See [Kuffel v. Seaside Oil Co., supra, 11 Cal.App.3d at p. 366.](#)) Stated otherwise, any [***11] loss in net profits over the four-year period in question is determined not on a comparative cost basis, or any component thereof, but rather on the comparative net profits from the sale of Goodrich and Mobil actually earned and those from the sale of Seaside which would have been earned. We point out that the allowances from Seaside were taken into consideration in computing projected profits over the four-year term as set forth in respondent's exhibit Z.

Appellants' contention that their annual volume of sales of Seaside over the unexpired term of the contract would have increased at an annual rate of 28.44 percent compounded over their last year's actual volume with Seaside is at best conjectural. In [Kuffel v. Seaside Oil Co., supra](#), this court held

that a 17.9 percent annual increase in volume proposed at the first trial was speculative and failed to take into account limitations imposed by potential population and traffic increases. (See [11 Cal.App.3d at pp. 366-367](#).) Moreover, appellants fail to explain why they would have tripled their volume of Seaside over the short span of four years while in the same market conditions their actual volume of Goodrich and Mobil [***12] declined. A reasonable inference can be derived from the record that changes in population, roadways, gasoline consumption patterns and other factors would have the same general effect on appellants' sales whether they sold Seaside or the Goodrich-Mobil brands of gasoline.

[*565] We conclude there is substantial evidence to support the compensatory damage award by the trial court.³

[CA\(4a\)](#) (4a) Appellants next contend that the judgment must be reversed because the trial court failed to make special findings which fully disclosed its method of determining the ultimate issue of damages.

[CA\(5a\)](#) (5a) [CA\(6a\)](#) (6a) [HN3](#) When findings on material subsidiary issues of fact are requested or when the omission of such findings is brought to the trial court's attention prior to entry of judgment, the trial court is required to make such findings. If it does not do so, it cannot be inferred on appeal that the trial [***13] court found in favor of the prevailing party on the issues covered by the requested findings. ([Code Civ. Proc., § 634](#); see [South Bay Irr. Dist. v. California-American Water Co. \(1976\) 61 Cal.App.3d 944, 992-994 \[133 Cal.Rptr. 166\]](#); [Morris v. Thogmartin \(1973\) 29 Cal.App.3d 922, 927-929 \[105 Cal.Rptr. 919\]](#).) [CA\(7\)](#) (7) A "material" issue of fact is one which is relevant and essential to the judgment and closely and directly related to the trial court's determination of the ultimate issues in the case. ([Code Civ. Proc.,](#)

[§ 634](#); see [South Bay Irr. Dist. v. California-American Water Co., supra, 61 Cal.App.3d at p. 994](#).)

[**581] [CA\(8\)](#) (8) The purpose of the rule abrogating the doctrine of implied findings where the omitted findings are brought to the trial court's attention is "to alleviate the frustration of losing litigants and their attorneys confronted with noncommunicative trial judges who did not explain their rulings in any memorandum opinion and who frequently (with the aid of successful counsel) couched their findings of fact in terms so 'ultimate' that it was extremely difficult, if not impossible, to determine either the factual basis or legal theory of the decision. [***14] . . ." ([DeArmond v. Southern Pacific Co. \(1967\) 253 Cal.App.2d 648, 658 \[61 Cal.Rptr. 844\]](#); [Morris v. Thogmartin, supra, 29 Cal.App.3d at p. 928](#); 4 Witkin, Cal. Procedure (2d ed. 1971) Trial, § 341, pp. 3142-3144.)

[CA\(5b\)](#) (5b) [CA\(6b\)](#) (6b) A pragmatic limitation on the requirement of findings on subsidiary issues has been imposed as a matter of judicial policy: [HN4](#) special findings are not required on every subsidiary matter on which evidence is received at trial, even though the subsidiary matter is relevant to the ultimate issues of fact. ([Coleman Engineering Co. v. North American Aviation, Inc. \(1966\) 65 Cal.2d 396, 410 \[55 Cal.Rptr. 1, 420 P.2d 713\]](#).) For example, where damages are the product of many interwoven elements, the trial court is not required to make separate findings on [*566] each element ([South Bay Irr. Dist. v. California-American Water Co., supra, 61 Cal.App.3d at p. 995](#)).

In the present case appellants requested six special findings of fact:

"1. To what extent would Kuffels' sales of Seaside gasoline have increased, by gallons and by grade, over the balance of the contract term.

"2. What would Kuffels' gross profit from sales of Seaside gasoline [***15] have been for the balance

³The punitive damage award was fixed at one-third of the compensatory damages, and appellants do not challenge the propriety of this award.

of the contract term.

"3. What was Kuffels' per gallon overhead cost in selling gasoline during the 6 year period of actual operation under the contract.

"4. What was Kuffels' per gallon overhead cost in selling gasoline during the most recent 4 year period of actual operation under the contract.

"5. What was Kuffels' per gallon overhead cost in selling gasoline during the most recent 2 year period of actual operation under the contract.

"6. What would [Kuffels'] net profit from the sales of Seaside gasoline have been over the balance of the contract term, had Kuffels been selling the same."

[CA\(9\)](#) (9) Because the ultimate question in determining the amount of damages was the difference in the net profits that appellants would have earned from the sale of Seaside gasoline if the contract had not been terminated and the net profits they actually earned from the sale of Goodrich and Mobil gasoline, it is clear that the facts concerning any increase in the sale of Seaside gasoline over the balance of the contract term (request No. 1) and the per gallon overhead cost to appellants of Seaside gasoline before the contract was terminated (request Nos. 3, 4 and 5) are *****16** subsidiary facts "remote in the chain of determination of the ultimate fact" and do not require special findings. ([South Bay Irr. Dist. v. California-American Water Co., supra, 61 Cal.App.3d at p. 994.](#)) [CA\(4b\)](#) (4b) On the other hand, appellants' gross and net profit from the sale of Seaside gasoline over the unexpired term of the contract (request Nos. 2 and 6) are closely and directly related to the determination of the ultimate finding as to the difference in net profits they would have earned under the Seaside contract and what they actually earned from the sales of Goodrich and Mobil gasoline. Hence, the trial court's ***567** failure to make the requested findings on the gross and net profit from sale of Seaside gasoline was error.

We turn now to whether the error in failing to make the requested findings requires a reversal of the judgment.

[CA\(10\)](#) (10) [California Constitution, article VI, section 13](#), provides in pertinent part [HN5](#) "No ****582** judgment shall be set aside, . . . , in any cause, . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted *****17** in a miscarriage of justice." [HN6](#) The phrase "miscarriage of justice" means that a judgment cannot be reversed unless "the [reviewing] court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." ([People v. Watson \(1956\) 46 Cal.2d 818, 836 \[299 P.2d 243\]](#); see also [Code Civ. Proc., § 475.](#)) This rule of appellate review has been applied to find "nonprejudicial error" in civil cases involving the omission of findings of fact. (4 Witkin, Cal. Procedure (2d ed. 1971) Trial, § 343, pp. 3144-3145.)

[CA\(4c\)](#) (4c) In the present case, the trial court filed a memorandum opinion in which it set forth the method used in calculating the \$ 16,775.11 compensatory damages suffered by appellants. It indicated that it was adopting respondent's calculation of damages, which is set forth in respondent's exhibit Z. Respondent's exhibit Z shows a projected cost of sales and gross profit on the sale of Seaside gasoline by appellants during the unexpired term of the contract. Thus, by the memorandum opinion appellants were fully advised *****18** of the actual findings of the trial court on the subsidiary issues on which it had requested written findings. The salutary purpose of [Code of Civil Procedure section 634](#) was accomplished without the entry of the written findings.

[CA\(11\)](#) (11) We are mindful of this court's

decision in [Morris v. Thogmartin, supra, 29 Cal.App.3d at page 930](#) wherein it is stated: ". . . [The] memorandum [opinion] may be used only for the purpose of explaining and interpreting the findings. The memorandum decision cannot be relied upon to fill the interstices in the findings and conclusions left void by the failure to find pursuant to a properly filed request under [section 634](#). [Citations.]"

This statement, however, does not purport to preclude an appellate court from considering the memorandum opinion for the purpose of **[*568]** exercising its constitutional duty of ascertaining whether appellant was prejudiced by the error in failing to make the requested findings.

[Union Sugar Co. v. Hollister Estate Co. \(1935\) 3 Cal.2d 740 \[47 P.2d 273\]](#), cited in [Morris v. Thogmartin, supra](#), supports our view of the proper rule. In that case, the Supreme Court carefully distinguished the **[***19]** impermissible use of a memorandum opinion for the purpose of impeaching contrary written findings or using the written opinion to determine whether the written findings are supported by the evidence, from the permissible use of the opinion for the purpose of discovering the process by which the trial judge arrived at his ultimate conclusions. ([3 Cal.2d at pp. 749-751](#).) After observing that the written opinion showed how the trial judge had computed the damages, the Supreme Court stated: "[The written opinion] shows that the court simply took the number of tons of beets which the respondent lost by reason of appellant's improvident farming methods, and the price these beets would have brought had they been produced, and by multiplying this tonnage by the price arrived at the loss or damage sustained by respondent. By this process the court found the damages sustained by respondent to be the precise amount which in its findings of fact it found the respondent had been damaged by appellant's improper farming methods. The opinion of the trial court does not, therefore, impeach any of its findings of fact in the sense that any statement therein is in conflict with any fact

found by **[***20]** the court. It simply explains the formal findings and shows the basis on which the court arrived at the amount of damages as fixed." ([3 Cal.2d at pp. 750-751](#); see also [South Bay Irr. Dist. v. California-American Water Co., supra, 61 Cal. \[**583\] App.3d at pp. 964, 995-996](#); [Wise v. Clapper \(1968\) 257 Cal.App.2d 770, 777, fn. 2 \[65 Cal.Rptr. 231\]](#); [Coakley v. Ajuria \(1930\) 209 Cal. 745, 749 \[290 P. 33\]](#).)

CA(4d) (4d) We, therefore, hold that although it was error for the trial court not to formally enter the two requested findings, the error does not compel a reversal of the judgment because the memorandum opinion fully sets forth the bases on which the court arrived at its ultimate finding of damages. Thus, appellants have not been prejudiced.

The judgment is affirmed.

[*569] Appendix I >100> >101>

 [Go to table1](#)

[*21]**

 [Go](#) [to](#) [table2](#)

Table1 ([Return to related document text](#))

DEFENDANTS' EXHIBIT Z			
KUFFEL GASOLINE SALES			
Operating Statements For Years Noted			
	Gasoline	Cost of	Gross Profit
	Sales	Sales	On Sales
June 66 thru May 67			
Rocket *	\$ 195,030.18	\$ 159,540.42	\$ 35,489.76
Seaside	195,030.18	151,228.08	43,802.10
June 67 thru May 68			
Rocket	153,653.13	119,320.67	34,332.46
Seaside	153,653.13	120,188.37	33,464.76
June 68 thru May 69			
Mobil	195,815.28	154,284.12	41,531.16
Seaside	201,142.44	155,557.47	45,584.97
June 69 thru May 70			
Mobil	** 182,949.97	142,303.65	39,746.32
Seaside	197,753.25	152,730.27	45,022.98

Table1 ([Return to related document text](#))**Table2** ([Return to related document text](#))

Net	Difference
Gasoline	in Net

* Rocket is another name for Goodrich.

** This figure should read 182,049.97.

69 Cal. App. 3d 555, *569; 138 Cal. Rptr. 575, **583; 1977 Cal. App. LEXIS 1444, ***21

	Expenses	Profit	Profit
June 66 thru May 67			
Rocket *	\$ 15,679.00	\$ 19,810.76	
Seaside	15,679.00	28,123.10	\$ 8,312.34
June 67 thru May 68			
Rocket	17,564.00	16,768.46	
Seaside	17,564.00	15,900.76	(867.70)
June 68 thru May 69			
Mobil	22,170.00	19,361.16	
Seaside	22,170.00	23,414.97	4,053.81
June 69 thru May 70			
Mobil	26,138.00	13,608.32	
Seaside	26,138.00	18,884.98	5,276.66
	Net Difference		\$ 16,775.11

Table2 ([Return to related document text](#))



Caution

As of: October 18, 2026 7:03 AM Z

Lakin v. Watkins Associated Industries

Supreme Court of California

December 16, 1993, Decided

No. S030179.

Reporter

6 Cal. 4th 644 *; 863 P.2d 179 **; 25 Cal. Rptr. 2d 109 ***; 1993 Cal. LEXIS 6126 ****; 93 Daily Journal DAR 16002; 93 Cal. Daily Op. Service 16002

COLLEEN LAKIN, Plaintiff and Appellant, v.
WATKINS ASSOCIATED INDUSTRIES et al.,
Defendants and Respondents.

Prior History: [****1] Superior Court of Los Angeles County, No. SCC-12628, Roy J. Brown, Judge.

Disposition: For the reasons stated the judgment of the Court of Appeal is reversed with directions to address the merits of the attorney fees issue and thereafter to reverse for further proceedings the order of the trial court on the prejudgment interest issue.

Core Terms

prejudgment interest, post judgment order, attorney's fees, personal injury, punitive damages, personal injury damages, burden of proof, trial court, emotional distress, general rule, subtract, truck, award of attorney's fees, nonappealable, compensatory damages, special verdict, collide, driver, cause of action, deny a motion, literally, italic

Case Summary

Procedural Posture

Appellant injured driver sought review from the Superior Court of Los Angeles County (California), which ruled in favor of respondents, corporation and driver, regarding appellant's motions for attorney fees and prejudgment interest. Appellant

asserted that denial of the motion for attorney fees was appealable and that she was entitled to prejudgment interest for the amount of her award.

Overview

Appellant injured driver was injured in an auto collision caused by respondent driver, who was employed by respondent corporation. Appellant was given false information and was accused of fabricating a claim. Appellant filed suit and, after obtaining a judgment, appellant moved for an award of attorney fees incurred in proving facts that respondents had refused to admit and appellant moved for an award of prejudgment interest. Appellant sought review after these motions were denied. On appeal, the court found that the order denying attorney fees was not preliminary to future proceedings and was not subject to appeal after a future judgment. Rather, it resembled an appealable order, as it affected the judgment or related to its enforcement in that it finally determined the rights of the parties arising from the judgment. As to the pre-judgment interest, the court held that appellant had the burden of proving what portion of the total award represented damages for personal injury and that she was entitled to interest thereon. Pre-judgment interest was not allowed as to the punitive damage award. The court reversed with directions to address the attorney fee and pre-judgment issues.

Outcome

The trial court's denial of appellant injured driver's motion for attorney fees was reversed and remanded with directions to address the merits of the motion because the order was appealable, as it

affected the judgment against respondents, driver and corporation. The denial of prejudgment interest was reversed and remanded with directions to address what part of the total award represented compensatory damages for appellant's personal injury.

LexisNexis® Headnotes

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Civil Procedure > Remedies > Judgment Interest > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

Torts > ... > Types of Damages > Costs & Attorney Fees > General Overview

Torts > ... > Types of Damages > Judgment Interest > Prejudgment Interest

Torts > Procedural Matters > Settlements > Settlement Offers

HN1 A postjudgment order denying an award of attorney fees, under [Cal. Civ. Proc. Code § 2033\(o\)](#), is appealable.

Civil Procedure > Remedies > Judgment Interest > General Overview

Evidence > Inferences & Presumptions > General Overview

Torts > Remedies > Damages > General Overview

Torts > Procedural Matters > Settlements > Settlement Offers

HN2 The plaintiff has the burden of proving what portion of the total award represents damages for personal injury.

Civil Procedure > ... > Methods of Discovery > Requests for Admissions > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN3 See [Cal. Civ. Proc. Code § 2033\(o\)](#).

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN4 *Cal. Civ. Proc. Code § 904.1* provides that an order made after an appealable judgment is itself appealable.

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN5 See *Cal. Civ. Proc. Code § 904.1*.

Civil Procedure > Judgments > Enforcement & Execution > Writs of Execution

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN6 Despite the inclusive language of *Cal. Civ. Proc. Code § 904.1*, not every postjudgment order that follows a final appealable judgment is appealable. To be appealable, a postjudgment order must satisfy two additional requirements. The first requirement is that the issues raised by the appeal from the order must be different from those arising from an appeal from the judgment. The second requirement is that the order must either affect the judgment or relate to it by enforcing it or staying its execution. Under this rule, a postjudgment order that does not affect the judgment or relate to its enforcement is not appealable.

[HN11](#) See [Cal. Civ. Proc. Code § 998\(b\)](#).

Civil Procedure > Appeals > Appellate
Jurisdiction > Final Judgment Rule

[HN7](#) Appealable postjudgment orders include both those granting affirmative relief and those denying it.

Civil Procedure > Appeals > Appellate
Jurisdiction > Final Judgment Rule

[HN8](#) Postjudgment orders that neither literally add to nor subtract from the judgment can nevertheless be appealable, as long as they affect the judgment or relate to its enforcement.

Civil Procedure > Remedies > Costs & Attorney
Fees > General Overview

Civil Procedure > Appeals > Appellate
Jurisdiction > Final Judgment Rule

[HN9](#) An order denying an award of attorney fees requested pursuant to [Cal. Civ. Proc. Code § 2033\(o\)](#), is a postjudgment order that affects the judgment or relates to its enforcement because it determines the rights and liabilities of the parties arising from the judgment, is not preliminary to later proceedings, and will not become subject to appeal after some future judgment. Therefore, it is appealable.

Civil Procedure > Remedies > Judgment
Interest > General Overview

Torts > ... > Types of Damages > Judgment
Interest > General Overview

[HN10](#) See [Cal. Civ. Code § 3291](#).

Civil Procedure > Settlements > Offers of
Judgment > General Overview

Governments > Legislation > Interpretation

[HN12](#) The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. An interpretation that renders related provisions nugatory must be avoided each sentence must be read not in isolation but in the light of the statutory scheme.

Evidence > Burdens of Proof > General Overview

Evidence > Burdens of Proof > Allocation

[HN13](#) The general rule allocating the burden of proof applies except as otherwise provided by law. The exception is included in recognition of the fact that the burden of proof is sometimes allocated in a manner that is at variance with the general rule. In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact.

Civil Procedure > ... > Jury Trials > Jury
Instructions > General Overview

Civil Procedure > ... > Jury
Trials > Verdicts > General Overview

Civil Procedure > ... > Jury
Trials > Verdicts > Special Verdicts

Torts > Remedies > Damages

Torts > ... > Types of Damages > Judgment
Interest > Prejudgment Interest

HN14 Personal injury defendants possess no special knowledge of the basis of a jury's award of damages; the plaintiffs in such cases can request special verdicts or devise other means of identifying damages awarded for personal injury.

Civil Procedure > Settlements > Offers of Judgment > General Overview

Civil Procedure > Remedies > Judgment
Interest > General Overview

Civil Procedure > Remedies > Judgment
Interest > Prejudgment Interest

Torts > ... > Types of Damages > Judgment
Interest > General Overview

Torts > ... > Types of Damages > Judgment
Interest > Prejudgment Interest

Torts > Procedural

Matters > Settlements > Settlement Offers

HN15 [Cal. Civ. Code § 3291](#) provides for prejudgment interest when a personal injury plaintiff obtains a "more favorable judgment" than the plaintiff's offer to compromise under [Cal. Civ. Proc. § 998](#).

Civil Procedure > Remedies > Judgment
Interest > General Overview

Civil Procedure > Remedies > Judgment
Interest > Prejudgment Interest

Torts > ... > Types of Damages > Judgment
Interest > General Overview

HN16 See [Cal. Civ. Code § 3287\(a\)](#).

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

Civil Procedure > Remedies > Judgment
Interest > General Overview

Civil Procedure > Remedies > Judgment
Interest > Prejudgment Interest

Torts > ... > Types of Damages > Judgment
Interest > Prejudgment Interest

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN17 Punitive damages are awarded for the sake of example and by way of punishing the defendant. By definition they are not intended to make the plaintiff whole by compensating for a loss suffered.

Civil Procedure > Remedies > Damages > Punitive Damages

Civil Procedure > Remedies > Judgment
Interest > General Overview

Civil Procedure > Remedies > Judgment
Interest > Prejudgment Interest

Torts > ... > Types of Damages > Judgment
Interest > General Overview

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN18 Cal. Civ. Proc. Code § 3291 does not authorize the award of prejudgment interest on punitive damages.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

Plaintiff, who was injured in an accident involving a truck, the driver of which gave false identification and insurance information, brought an action for negligence and intentional infliction of emotional distress against the driver and the company that owned the truck. Pursuant to [Code Civ. Proc., § 2033](#), plaintiff requested that defendants admit that a collision had occurred between their truck and her

car. Defendants responded that they had insufficient information to admit or deny the truth of this request. More than two years before trial, plaintiff made an offer to the company to compromise under [Code Civ. Proc., § 998, subd. \(b\)](#), in the amount of \$ 89,000, and the company did not accept. At trial plaintiff proved that the company's own records established, more than two years before her request for an admission, that the collision had occurred. The jury found for plaintiff and awarded \$ 100,000 against the company, including both compensatory and punitive damages. After judgment, the trial court denied plaintiff's motions for attorney fees under [Code Civ. Proc., § 2033, subd. \(o\)](#) (sanction for unwarranted failure to admit), and for prejudgment interest, which latter motion was made on the ground that her pretrial offer was less than the eventual judgment ([Civ. Code, § 3291](#)). (Superior Court of Los Angeles County, No. SCC-12628, Roy J. Brown, Judge.) The Court of Appeal, Second Dist., Div. Seven, No. B054960, dismissed the appeal as to the order denying attorney fees, concluding that the order was nonappealable. The Court of Appeal also affirmed the denial of prejudgment interest, reasoning that plaintiff failed to prove the damages were awarded exclusively for personal injury.

The Supreme Court reversed the judgment of the Court of Appeal with directions to address the merits of the attorney fees issue and thereafter to reverse the order of the trial court on the prejudgment interest issue and remand to the trial court for further proceedings on that issue. The court held that the postjudgment order denying attorney fees under [Code Civ. Proc., § 2033, subd. \(o\)](#), was an appealable order. The court also held that plaintiff bore the burden of proving what portion of the total award represented damages for personal injury and were thus eligible for prejudgment interest; however, plaintiff had not yet been given the opportunity to carry this burden, and thus remand was necessary. It further held that prejudgment interest under [Civ. Code, § 3291](#), may not be awarded on punitive damages. (Opinion by

Mosk, J., expressing the unanimous view of the court.)

Headnotes

[CA\(1a\)](#) (1a) [CA\(1b\)](#) (1b) [CA\(1c\)](#) (1c)

Appellate Review § 30—Decisions Appealable— Orders After Judgment—Order Denying Attorney Fees as Discovery Sanction.

--The trial court's denial of a personal injury plaintiff's postjudgment motion for attorney fees under [Code Civ. Proc., § 2033, subd. \(o\)](#) (sanction for unwarranted failure to admit discovery request), was an appealable order. Thus, the Court of Appeal erred in concluding that the denial neither added to nor subtracted from the relief granted in the judgment and dismissing the complaint. The order denying the fees plainly raised issues different from those of the judgment itself. Further, appealable postjudgment orders include both those granting affirmative relief and those denying it. Thus, postjudgment orders that neither literally add to nor subtract from the judgment can nevertheless be appealable, as long as they affect the judgment or relate to its enforcement. The order denying plaintiff's motion was a postjudgment order that affected the judgment or related to its enforcement, because it determined the rights and liabilities of the parties arising from the judgment, was not preliminary to later proceedings, and would not become subject to appeal after some future judgment.

[See 9 **Witkin**, Cal. Procedure (3d ed. 1985) Appeal, § 103.]

[CA\(2a\)](#) (2a) [CA\(2b\)](#) (2b)

Appellate Review § 30—Decisions Appealable— Orders After Judgment.

--Despite the inclusive language of *Code Civ. Proc.*, § 904.1, subd. (b), which provides that an

order made after an appealable judgment is itself appealable, not every postjudgment order that follows a final appealable judgment is appealable. To be appealable, a postjudgment order must satisfy two additional requirements. The first requirement is that the issues raised by the appeal from the order must be different from those arising from an appeal from the judgment. The reason for this general rule is that to allow the appeal from an order raising the same issues as those raised by the judgment would have the effect of allowing two appeals from the same ruling and might in some cases permit circumvention of the time limitations for appealing from the judgment. The second requirement is that the order must either affect the judgment or relate to it by enforcing it or staying its execution. Under this rule, a postjudgment order that does not affect the judgment or relate to its enforcement is not appealable.

CA(3) (3)

Damages § 8—Interest—Prejudgment Interest— Personal Injury—Action for Negligence and Emotional Distress: Interest § 4—Interest on Judgments.

--Plaintiff's action for negligence and intentional infliction of emotional distress against a trucking company and its driver, arising from an accident involving a truck, the driver of which gave false identification and insurance information, was an action for personal injuries within the meaning of Civ. Code, § 3291 (interest in personal injury action). Plaintiff's claims of emotional distress were not incidental to a substantial invasion of property interests. Rather, they were at the heart of her case. She presented evidence of emotional distress under both her theories: in the negligence cause of action, her emotional distress resulted from the accident itself, and in the cause of action for intentional infliction of emotional distress, her emotional distress resulted from her dealings with defendants subsequent to the accident. Although the events that formed the basis for her lawsuit did cause some

property damage, that fact alone did not defeat her claim for damages under a personal injury theory. Therefore, § 3291 prejudgment interest was available.

CA(4a) (4a) CA(4b) (4b)

Damages § 8—Interest—Prejudgment Interest— Personal Injury—Action for Negligence and Emotional Distress—Burden of Proof: Interest § 4—Interest on Judgments.

--In an action for negligence and intentional infliction of emotional distress against a trucking company and its driver, arising from an accident involving a truck, the driver of which gave false identification and insurance information, plaintiff bore the burden of proving what portion of the damages awarded her were damages for personal injury rather than property damage, and that they were therefore eligible for prejudgment interest pursuant to Civ. Code, § 3291 (judgment greater than amount of offer to compromise under Code Civ. Proc., § 998). The jury awarded plaintiff \$ 20,000 in compensatory damages, but the verdict did not state what portions were attributed to personal injury or to property damage. Even if plaintiff showed that a portion of these damages were for personal injury, the burden did not shift to defendants to demonstrate the magnitude of that portion. Shifting the burden would be contrary to Evid. Code, § 500, which provides that a party has the burden of proof as to each fact that is essential to the claim or defense that party is asserting.

CA(5) (5)

Damages § 8—Interest—Prejudgment Interest— Personal Injury: Interest § 4—Interest on Judgments.

--Prejudgment interest under Civ. Code, § 3291 (judgment greater than amount of offer to compromise under Code Civ. Proc., § 998), is limited to damages attributable to personal injury.

The second paragraph of [Civ. Code, § 3291](#), provides that if the plaintiff makes a pretrial offer to compromise that is not accepted and then "obtains a more favorable judgment, the judgment shall bear interest." Taken literally, this language requires a court to assess prejudgment interest on an entire judgment regardless of what portion of the award consisted of personal injury damages. However, this construction does not comport with the Legislature's intent. The first paragraph of [Civ. Code, § 3291](#), permits the plaintiff in "any action brought to recover damages for personal injury" to claim interest on damages. The Legislature intended to confine the availability of prejudgment interest to "damages for personal injury." To adopt the broader reading of the second paragraph would render the narrower language of the first paragraph nugatory. Further, the narrower construction also serves an important purpose of [Civ. Code, § 3291](#), i.e., to provide a statutory incentive to settle personal injury litigation where the plaintiff has been physically as well as economically impaired.

[CA\(6a\)](#) (6a) [CA\(6b\)](#) (6b)

Damages § 8—Interest—Prejudgment Interest—Personal Injury—Entitlement to Prejudgment Interest on Award of Punitive Damages: Interest § 4—Interest on Judgments.

--A plaintiff who is entitled to prejudgment interest pursuant to [Civ. Code, § 3291](#) (judgment greater than amount of offer to compromise under [Code Civ. Proc., § 998](#)), is not entitled to prejudgment interest for any portion of the judgment for punitive damages. Although [Civ. Code, § 3291](#), provides that "the judgment" shall bear interest, the operative language of the entire statute is "damages for personal injury." [Civ. Code, § 3291](#), was intended to encourage settlements in personal injury cases. Any connection there might be between the availability of prejudgment interest on punitive damages and the statutory purpose of providing an incentive to settle is too attenuated and speculative. Further, prejudgment interest has an additional

purpose of compensating personal injury plaintiffs for loss of use of money during the prejudgment period. Punitive damages are awarded for the sake of example and by way of punishing the defendant and are not intended to make the plaintiff whole by compensating for a loss suffered. To award prejudgment interest on punitive damages arising from personal injury actions would therefore give a windfall to the plaintiffs in those actions. (Disapproving to the extent contrary: [Greenfield v. Spectrum Investment Corp. \(1985\) 174 Cal.App.3d 111 \[219 Cal.Rptr. 805\]](#); [Morin v. ABA Recovery Service, Inc. \(1987\) 195 Cal.App.3d 200 \[240 Cal.Rptr. 509\]](#); [Bihun v. AT&T Information Systems, Inc. \(1993\) 13 Cal.App.4th 976 \[16 Cal.Rptr.2d 787\]](#).)

[CA\(7\)](#) (7)

Damages § 8—Interest—Prejudgment Interest—Personal Injury—Obtaining Judgment Greater Than Pretrial Offer—Inclusion of Punitive Damages: Interest § 4—Interest on Judgments.

--In an action for negligence and intentional infliction of emotional distress arising from a vehicle collision, plaintiff's award of punitive damages was included in the judgment for the purpose of determining whether the judgment was more favorable than her pretrial offer under [Civ. Code, § 3291](#) (plaintiff's entitlement to prejudgment interest where judgment is greater than amount of offer to compromise under [Code Civ. Proc., § 998](#)). Plaintiff had offered to compromise the case for \$ 89,000 and eventually obtained a jury verdict of \$ 100,000, including \$ 80,000 in punitive damages. Plaintiff was not required to subtract the punitive damage award before comparing the verdict with the offer. The plain language of [Civ. Code, § 3291](#), provides for a simple comparison in personal injury cases between the judgment and the offer to compromise; if the judgment is "more favorable," the plaintiff is eligible for prejudgment interest on the damages attributable to personal injury. The Legislature did not intend the judgment and the

offer to compromise to be apportioned between personal injury damages and other kinds of damages.

Counsel: R. Stevens Condie for Plaintiff and Appellant.

Parker, Stanbury, Babcock, Combs & Bergsten, Douglass H. Mori and Michael E. McCabe for Defendants and Respondents.

Judges: Opinion by Mosk, J., expressing the unanimous view of the court.

Opinion by: MOSK, J.

Opinion

[*648] [**181] [***111] We granted review to decide three issues. First, we must determine whether [HN1](#) a postjudgment order denying an award of attorney fees under [Code of Civil Procedure section 2033, subdivision \(o\)](#), is appealable. For the reasons that follow, we conclude that it is. Second, we must [*649] determine where the burden of proof lies when a plaintiff in a personal injury case claims prejudgment interest, under [Civil Code section 3291](#), on a judgment more favorable than her offer to compromise under [Code of Civil Procedure section 998, subdivision \(b\)](#). As will appear, we conclude [HN2](#) the plaintiff has the burden of proving [****2] what portion of the total award represents damages for personal injury; we further conclude that plaintiff herein has not yet had the opportunity to carry this burden. Accordingly, the judgment of the Court of Appeal on these issues holding to the contrary will be reversed. Finally, we must determine whether prejudgment interest under [Civil Code section 3291](#) may be awarded on punitive damages. We conclude that it may not.

I. FACTUAL AND PROCEDURAL BACKGROUND

At the scene of an accident in which a truck that defendant driver was operating on behalf of

defendant trucking company hit plaintiff's car, the driver identified himself falsely to plaintiff and gave her false insurance information. Later, a company official denied the accident had occurred and accused plaintiff of fabricating her claim. She sued for negligence and intentional infliction of emotional distress.

Pursuant to [Code of Civil Procedure section 2033](#), plaintiff requested that defendants admit a collision had occurred between their truck and her car. They replied that they had insufficient facts to admit or deny the truth of the request. More than two years before trial, plaintiff made an offer to the company to compromise [****3] under [Code of Civil Procedure section 998, subdivision \(b\)](#), in the amount of \$89,000. The company did not accept.

At trial plaintiff proved that the company's own dispatch records placed the truck driver at the scene of the accident on the day in question and that the company had conducted an internal investigation at the time of the accident--two years before her request for admission--and had concluded the collision had in fact occurred. The jury found for plaintiff, awarding her a total of \$100,000 against the company, including both compensatory and punitive damages.

[**182] [***112] After entry of judgment plaintiff moved for an award of attorney fees incurred in proving facts that defendants had refused to admit--specifically, the fact of the collision. ([Code Civ. Proc., § 2033, subd. \(o\)](#).) She also moved for an award of prejudgment interest on the ground that the amount of her pretrial offer to compromise was less than the eventual judgment. ([Civ. Code, § 3291](#).)

[*650] The court denied both motions. It ruled that plaintiff could not receive attorney fees because she had presented evidence of such fees in the context of her prayer for punitive damages; it concluded the jury intended [****4] the punitive award to include reimbursement for such fees. It further ruled that plaintiff could not receive prejudgment interest because she did not demand

such interest in her complaint.

Plaintiff appealed from this postjudgment order. Insofar as the order denied attorney fees, the Court of Appeal held it was nonappealable and dismissed that portion of her appeal. Insofar as the order denied prejudgment interest, the Court of Appeal held that [Civil Code section 3291](#) does not require a plaintiff to demand prejudgment interest in the complaint, but nevertheless affirmed the denial of prejudgment interest, reasoning that plaintiff failed to prove the damages were awarded exclusively for personal injury.

II. ATTORNEY FEES

[CA\(1a\)](#) (1a) Plaintiff first contends a postjudgment order granting or denying attorney fees is appealable. [Code of Civil Procedure section 2033, subdivision \(o\)](#), provides in relevant part: "[HN3](#) If a party fails to admit the . . . truth of any matter when requested to do so under this section, and if the party requesting that admission thereafter proves the . . . truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom [*****5](#) the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees." The statute mandates that the court "shall" make such an order unless (1) an objection to the request was sustained or a response was waived, (2) the admission was of no substantial importance, (3) the party failing to make the admission reasonably expected to prevail on the matter, or (4) there was other good reason for the failure to admit. (*Ibid.*)

The trial court denied plaintiff's motion for attorney fees, not because of any of the four statutory exceptions but because of concern that an award of attorney fees would constitute double recovery.¹ The Court of Appeal did not reach the merits of this

ruling; it concluded that the order denying attorney fees was not appealable as a postjudgment order. (See *Code Civ. Proc.*, § 904.1, *subd. (b)*.)

[*****6] [[*651](#)] [HN4](#)

Code of Civil Procedure section 904.1, subdivision (b), provides that an order made after an appealable judgment is itself appealable.² As this court long ago explained, "The necessity for this . . . provision is apparent, when it is considered that an appeal from the judgment would only bring up the record of the proceedings resulting in the rendition of the judgment, and that such an appeal may have been taken, and even disposed of here, by affirmance or reversal, *before* the order complained of was made in the Court below; so that while an appeal from a judgment might in some instances be safely relied upon for the review of an order entered before its rendition, it would afford no reliable remedy against such an order only entered *subsequently* to its rendition." ([Calderwood v. Peyser \(1871\) 42 Cal. 110, 116](#), italics in original.)

[*****7] [CA\(2a\)](#) (2a) [HN6](#)

[**183] [[***113](#)] Despite the inclusive language of *Code of Civil Procedure section 904.1, subdivision (b)*, not every postjudgment order that follows a final appealable judgment is appealable. To be appealable, a postjudgment order must satisfy two additional requirements.³ The Court of Appeal concluded that an order in the nature of a

² [HN5](#) *Code of Civil Procedure section 904.1* states in relevant part:

"An appeal may be taken from a superior court in the following cases:

"(a) From a judgment [with certain exceptions] . . .

"(b) From an order made after a judgment made appealable by subdivision (a)."

³ The prerequisite that the underlying judgment must itself be final is sometimes described as a third requirement of appealable postjudgment orders. (See, e.g., 9 Witkin, *Cal. Procedure* (3d ed. 1985) Appeal, § 101, p. 121; 1 Eisenberg et al., *Cal. Practice Guide: Civil Appeals & Writs* (The Rutter Group 1993) P 2:150, p. 2-43, rev. #1, 1991.) Here, the finality of the underlying judgment is not in dispute and was not part of the Court of Appeal's analysis.

¹ We do not decide whether a court would be powerless to deny a motion for attorney fees under [Code of Civil Procedure section 2033, subdivision \(o\)](#), when such an award would result in double recovery.

denial of attorney fees did not satisfy one of those requirements, and thus that appeal from the order was precluded. We conclude otherwise.

The first requirement--not discussed by the Court of Appeal--is that the issues raised by the [****8] appeal from the order must be different from those arising from an appeal from the judgment. (See [*Rooney v. Vermont Investment Corp. \(1973\) 10 Cal.3d 351 \[110 Cal.Rptr. 353, 515 P.2d 297\]*](#).)

"The reason for this general rule is that to allow the appeal from [an order raising the same issues as those raised by the judgment] would have the effect of allowing two appeals from the same ruling and might in some cases permit circumvention of the time limitations for appealing from the judgment." (*Id. at p. 358.*) [*CA\(1b\) \(1b\)*](#) In the present case, an appeal from the order denying attorney fees pursuant to [*Code of Civil Procedure section 2033, subdivision \(o\)*](#), plainly raises issues different from those arising from the judgment itself. Thus, this requirement is satisfied.

[*CA\(2b\) \(2b\)*](#) The second requirement--which the Court of Appeal found dispositive--is that "the order must either affect the judgment or relate to it by [*652] enforcing it or staying its execution." (*Olson v. Cory (1983) 35 Cal.3d 390, 400 [197 Cal.Rptr. 843, 673 P.2d 720]*.) Under this rule, a postjudgment order that does "not [****9] affect the judgment or relate to its enforcement [is] not appealable" (*Ibid.*) [*CA\(1c\) \(1c\)*](#) The Court of Appeal reasoned that the order here in issue did not affect the judgment or relate to its enforcement because it "leaves the judgment intact and neither adds to it nor subtracts from it." ([*Redevelopment Agency v. Goodman \(1975\) 53 Cal.App.3d 424, 429 \[125 Cal.Rptr. 818\]*](#).) This reasoning, however, is incomplete.

The rule that an appealable postjudgment order must affect the judgment or relate to its enforcement has existed for more than a century. In [*Griess v. State Investment etc. Co. \(1892\) 93 Cal. 411, 413 \[28 P. 1041\]*](#), we held that a postjudgment order denying a motion to amend the minutes of the

court was not appealable because "[i]t in no manner affected the judgment or bore any relation to it, either by way of enforcing it or staying its operation, nor did it concern any pending motion in the case itself. It was only the determination of the court that its minutes did not require correction, and the action of a court of record in such a matter is not subject to review by the ordinary [****10] process of appeal."

In the ensuing years we determined the appealability of a variety of postjudgment orders. It is instructive to review those we have held did not affect the judgment or relate to its enforcement, and hence were not appealable. All are orders that, although following an earlier judgment, are more accurately understood as being preliminary to a later judgment, at which time they will become ripe for appeal.

For example, we held not appealable a posttrial order excusing a plaintiff's failure to present a bill of exceptions for settlement before making a motion for a new trial; it would become appealable as part of an appeal from the later motion for a new trial. ([*Kaltschmidt v. Weber \(1902\) 136 Cal. 675, 676-677 \[69 P. 497\]*](#).) Similarly, an order denying a motion to amend an order vacating a judgment "could be reviewed by appeal only on an appeal from the subsequent final judgment." ([*City of San Diego v. Superior Court \(1950\) 36 Cal.2d 483, 486 \[224 P.2d 685\]*](#).) An order approving employment of additional counsel for a receiver with respect to an appeal "is not a [**184] [****11] matter affecting enforcement [****114] of the [preceding] judgment." ([*Raff v. Raff \(1964\) 61 Cal.2d 514, 519 \[39 Cal.Rptr. 366, 393 P.2d 678\]*](#).)

Other nonappealable orders have pertained to the preparation of a record for use in a future appeal: an order striking a court's certificate from a clerk's transcript ([*Lake v. Harris \(1926\) 198 Cal. 85, 89 \[243 P. 417\]*](#)); an order vacating an order to show cause in contempt proceedings for failure to [*653] prepare a reporter's transcript ([*Williams v. Superior Court \(1939\) 14 Cal.2d 656, 658, 666 \[96*](#)

[P.2d 334](#)]; an order granting a stay of proceedings on appeal, which "simply continued the time within which the appellant was required to prepare his record on appeal" (*Imperial Beverage Co. v. Superior Court* (1944) 24 Cal.2d 627, 632, 633 [150 P.2d 881]); an order refusing to correct and amend a transcript (*People v. Gross* (1955) 44 Cal.2d 859, 860-861 [285 P.2d 630]); and an order denying relief relative [****12] to a charge for preparing a transcript (*Summers v. Superior Court* (1959) 53 Cal.2d 295, 296, 297 [1 Cal.Rptr. 324, 347 P.2d 668]). All these "postjudgment" orders lacked finality in that they were also preparatory to later proceedings. To hold these orders "nonappealable" merely postponed their appeal until the conclusion of later proceedings; it did not deny it altogether.

For some time, courts--including this one--have used the "neither adds nor subtracts" standard here employed by the Court of Appeal as a yardstick to measure whether a postjudgment order affects the preceding judgment or relates to its enforcement. (See, e.g., *Lake v. Harris, supra*, 198 Cal. at p. 89.) This standard, however, has never been an exclusive statement of the necessary relationship between a judgment and an appealable postjudgment order. Although the standard can be useful in some circumstances, the effect on, or relationship to, the judgment required to make a postjudgment order appealable is not limited to a simple mathematical calculation. To conclude otherwise would mean that a postjudgment [****13] order *awarding* attorney fees--thereby adding to the judgment--was appealable, while a postjudgment order *denying* attorney fees--neither adding to nor subtracting from the judgment--was not. This is not the law. ⁴

⁴ [HN7](#) Appealable postjudgment orders include both those granting affirmative relief and those denying it. (See *Gilman v. Contra Costa County* (1857) 8 Cal. 52, 57.) It is true that on occasion an order granting a particular motion may be appealable while an order denying the same motion may not be, or vice versa. For example, this court noted in *Wood v. Peterson Farms Co.* (1931) 214 Cal. 94, 98 [3 P.2d 922], that although an order *denying* relief from default in the preparation of a reporter's transcript was appealable because it

[****14] Further, we have held appealable postjudgment orders making a final determination of rights or obligations of parties even though they did not necessarily add to or subtract from the judgment. An order terminating proceedings for a record on appeal was appealable because it was "necessarily a final determination of the matter," eliminating the possibility of appeal. (*Wood v. Peterson Farms Co., supra*, 214 Cal. 94, 98.) An order [*654] authorizing a receiver to make payments in his discretion was appealable, whether viewed as consistent or inconsistent with the preceding judgment. (*Raff v. Raff, supra*, 61 Cal.2d at pp. 517-518.) An order fixing attorney fees and requiring them to be paid was appealable. (*Id. at p. 519*.) An order denying a motion for judgment on an appeal bond was appealable because it "relates directly to the enforcement of a judgment." (*Merritt v. J. A. Stafford Co.* (1968) 68 Cal.2d 619, 622 [68 Cal.Rptr. 447, 440 P.2d 927].) ⁵

[****15] [**185] [***115] Thus, [HN8](#) postjudgment orders that neither literally add to nor subtract from the judgment can nevertheless be appealable, as long as they affect the judgment or relate to its enforcement. To say that a nonappealable postjudgment order neither adds to nor subtracts from the judgment is but one way of describing its lack of relationship to the judgment. Alternative formulations of that description include saying, for example, that a nonappealable postjudgment order " 'in no manner affected the

had "the effect of precluding an appellant from presenting his case on appeal," an order *granting* relief from default would not be appealable, presumably because it was not a final determination of the rights of the parties and would be appealable as part of the later appellate proceedings. There is, however, no parallel distinction to be made between an order granting attorney fees and an order denying them. In either case the resulting determination is final; in neither case would the ruling become appealable as part of later proceedings.

⁵ We note in addition that in *Fulton v. Fulton* (1934) 220 Cal. 726, 729 [32 P.2d 634], this court described--although without analysis, and with no reference to any effect on, or relationship to, the judgment--a postjudgment order denying attorney fees and costs on appeal as an appealable order not subject to review on appeal from the judgment.

judgment, or bore any relation to it, either by way of enforcing it or staying its operation.' [Citation.] Neither is it a final determination of any matter affecting the appellant in the proceeding before the court in which it was made." (*Kaltschmidt v. Weber, supra*, 136 Cal. 675, 676.) Similarly, nonappealable postjudgment orders "neither added to nor subtracted from the relief granted in the judgment, nor did they adjudicate any rights or establish any liabilities." (*Watson v. Pryor* (1920) 49 Cal.App. 554, 558 [193 P. 797].)

Unlike orders we have previously held nonappealable, the present [****16] order denying attorney fees is not preliminary to future proceedings and will not become subject to appeal after a future judgment. Rather, it resembles the orders we have held appealable. It affects the judgment or relates to its enforcement in that it finally determines the rights of the parties arising from the judgment. Moreover, it is plainly appealable under *Kaltschmidt v. Weber, supra*, 136 Cal. at page 676, as a final determination of a matter affecting plaintiff in the original proceeding, and under *Watson v. Pryor, supra*, 49 Cal.App. at page 558, as an adjudication of the right to attorney fees arising from the judgment.

In addition, numerous decisions of the Courts of Appeal have expressly or impliedly held appealable similar postjudgment orders concerning costs, interest, and attorney fees. Some examples include orders denying an award of attorney fees based on fee provisions in promissory notes (*Del Mar v. Caspe* (1990) 222 Cal.App.3d 1316, 1320 [272 Cal.Rptr. 446]), denying a [*655] motion to tax costs (*Norman I. Krug Real [****17] Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 45-46 [269 Cal.Rptr. 228]), denying a motion to recover litigation expenses (*San Diego Gas & Electric Co. v. 3250 Corp.* (1988) 205 Cal.App.3d 1075, 1087 [252 Cal.Rptr. 853]), denying attorney fees under *Civil Code section 1717* (*Commercial & Farmers Nat. Bank v. Edwards* (1979) 91 Cal.App.3d 699, 702 [154 Cal.Rptr. 345]), apportioning attorney fees among

attorneys (*Breckler v. Thaler* (1978) 87 Cal.App.3d 189, 193, 194-197 [151 Cal.Rptr. 50]), denying interest on a judgment (*Redevelopment Agency v. Goodman, supra*, 53 Cal.App.3d at p. 429), and denying a motion to vacate an order for attorney fees and costs (*MacLeod v. Tribune Publishing Co.* (1958) 157 Cal.App.2d 665, 669 [321 P.2d 881]). Although none of these orders either literally added to or subtracted from the relief accorded by the preceding judgments, each order nevertheless had a sufficient effect on the judgment [****18] or bore a sufficient relationship to its enforcement to be appealable.

Defendants attempt to distinguish postjudgment orders pertaining to attorney fees requested under *Code of Civil Procedure section 2033, subdivision (o)*, from other postjudgment orders pertaining to attorney fees held to be appealable. (See, e.g., *Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, 204, 205 [265 Cal.Rptr. 620] [order awarding attorney fees pursuant to contract is appealable]; *Henneberque v. City of Culver City* (1985) 172 Cal.App.3d 837, 840, 841-842 [218 Cal.Rptr. 704] [order awarding attorney fees under *Code of Civil Procedure section 1021.5* is appealable]; *Marini v. Municipal Court* (1979) 99 Cal.App.3d 829, 834-835 [160 Cal.Rptr. 465] [same].) It is true that the substantive issues arising under those and other theories on which attorney fees can be based may differ from the substantive issues arising from a request for the kind of [**186] attorney fees here in issue. We see no reason, however, [****116] to erect unique procedural barriers to recovery of the [****19] latter. To do so would thwart the Legislature's intent in enacting the statutory scheme that makes them available in the first place.

Defendants also rely on *Lubetzky v. Friedman* (1991) 228 Cal.App.3d 35 [278 Cal.Rptr. 706], which considered the appealability of an order denying sanctions. That case involved a complex sequence of events: the plaintiff filed suit, the trial court dismissed, the plaintiff appealed, the Court of Appeal affirmed and awarded costs on appeal to the defendants, the plaintiff moved to tax costs, the trial

court denied that motion, the plaintiff appealed from the denial, the Court of Appeal again affirmed and awarded costs on appeal to the defendants, the plaintiff moved to tax those costs and requested sanctions, and the trial court denied that motion. On the plaintiff's appeal from the last order insofar as it denied sanctions, the Court of Appeal had "serious doubt that the order is appealable" (*id. at p. 44*), stating without [*656] analysis that the order did not affect or relate to the judgment of dismissal. Because of the dissimilar procedural stance of that case, the court's equivocation as to the order's [****20] appealability, and the special appeal rules for sanction orders (see *Code Civ. Proc.*, § 904.1, *subd. (k)*), we find its reasoning unpersuasive in resolving the problem at hand.

Accordingly, we hold that [HN9](#) the order here in issue, denying an award of attorney fees requested pursuant to [Code of Civil Procedure section 2033, subdivision \(o\)](#), is a postjudgment order that affects the judgment or relates to its enforcement because it determines the rights and liabilities of the parties arising from the judgment, is not preliminary to later proceedings, and will not become subject to appeal after some future judgment. Therefore, it is appealable.⁶ On remand the Court of Appeal should address the merits of plaintiff's appeal from the portion of the order that denied attorney fees.

[****21] III. PREJUDGMENT INTEREST

[CA\(3\)](#) (3) Plaintiff next contends the Court of Appeal incorrectly affirmed the denial of her motion for prejudgment interest. She so moved pursuant to [Civil Code section 3291](#) (hereafter

[section 3291](#)), which provides in relevant part: [HN10](#) "In any action brought to recover damages for personal injury . . . it is lawful for the plaintiff in the complaint to claim interest on the damages alleged as provided in this section. [¶] If the plaintiff makes an offer pursuant to [Section 998 of the Code of Civil Procedure](#)⁷ which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to [Section 998 of the Code of Civil Procedure](#) which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment."

[****22] Plaintiff alleged causes of action sounding in negligence and intentional infliction of emotional distress. The threshold question is whether her action falls within the ambit of [section 3291](#). (See [Gourley v. State Farm Mut. Auto. Ins. Co. \(1991\) 53 Cal.3d 121, 126-127 \[3 Cal.Rptr.2d 666, 822 P.2d 374\]](#) [hereafter *Gourley*].) We are satisfied that it does. In *Gourley* we held that [section 3291](#) interest was not available in insurance bad faith [**187] actions because such actions [***117] seek damages for interference with a property right, not for personal injury. (*Id. at pp. 127-130.*) "The substance of a bad faith action . . . is the insurer's unreasonable refusal to pay benefits under the policy" (*id. at p. 127*), and in such an action "damages for emotional distress are compensable as *incidental damages* flowing from the initial breach, not as a separate cause of action" (*id. at p. 128*, italics in original).

Here, by contrast, plaintiff's claims of emotional distress were not incidental to " 'a substantial invasion of property interests' " ([Gourley, supra, 53](#)

⁶Given our holding that the order is appealable as an order made after a judgment, we need not consider the alternate ground suggested by the plaintiff: that the order is appealable as "an order which determines a matter collateral to the main action . . . [as well as] severable from the general objective of the litigation and . . . a decision thereon determines finally the rights of the parties in relation to the collateral matter, leaving no further judicial action to be taken in regard to that matter." ([Henneberque v. City of Culver City, supra, 172 Cal.App.3d 837, 841.](#))

⁷[Code of Civil Procedure section 998, subdivision \(b\)](#), provides in relevant part: [HN11](#) "Not less than 10 days prior to commencement of trial, any party may serve an offer in writing upon any other party to the action to allow judgment to be taken in accordance with the terms and conditions stated at that time."

[Cal.3d at p. 128](#)); rather, they were at the heart [****23] of her case.⁸ She presented evidence of emotional distress under both her theories: in the negligence cause of action, her emotional distress resulted from the accident itself, while in the cause of action for intentional infliction of emotional distress her emotional distress resulted from her dealings with defendants subsequent to the accident. Although the events that formed the basis for her lawsuit did cause some property damage, that fact alone does not defeat her claim for damages under a personal injury theory. Therefore, [section 3291](#) prejudgment interest is available because this suit is an "action brought to recover damages for personal injury" within the meaning of the section. (See also [Bihun v. AT&T Information Systems, Inc. \(1993\) 13 Cal.App.4th 976, 1005 \[16 Cal.Rptr.2d 787\]](#) [action for sexual harassment in the workplace under the Fair Employment and Housing Act is an action for personal injury within the meaning of [§ 3291](#)].)

[****24] A. BURDEN OF PROOF

[CA\(4a\)](#) (4a) We next determine where the burden of proof lies on the issue of entitlement to prejudgment interest under [section 3291](#). Plaintiff made a statutory pretrial offer to defendant trucking company to compromise for \$89,000; the company did not accept her offer. At trial she presented evidence of her emotional distress and of damage to her car. After trial she claimed prejudgment interest on the entire \$100,000 award against the company, which was comprised of punitive damages of \$80,000 against it [*658] and compensatory damages of \$20,000 jointly and severally against both it and the truck driver.⁹

[****25] The court denied plaintiff's motion for prejudgment interest on procedural grounds, not reaching its merits. On appeal, the Court of Appeal held there was no procedural barrier to an award of prejudgment interest but nevertheless denied relief, apparently on the ground that the award was not "damages for personal injury" within the meaning of the statute.

[Morin v. ABA Recovery Service, Inc., supra, 195 Cal.App.3d at page 208](#) (hereafter *Morin*), read [section 3291](#) as authorizing prejudgment interest only on damages attributable to personal injury. The *Morin* court reasoned from cases involving motions for attorney fees. For example, in [McKenzie v. Kaiser-Aetna \(1976\) 55 Cal.App.3d 84 \[127 Cal.Rptr. 275\]](#) (hereafter *McKenzie*), three legal theories--only one of which was contractual in nature--were argued to the jury. After a [**188] general verdict, [***118] the court denied attorney fees available in contract actions under [Civil Code section 1717](#) because it could not determine what part of the award related to the contractual theory, and "[a]ttorney fees are not allowed where it is [****26] impossible to determine what part of the jury award relates to contract." (*Morin, supra, 195 Cal.App.3d at p. 209*, citing *McKenzie, supra, 55 Cal.App.3d at pp. 88-89*.) The *Morin* court reasoned that [section 3291](#) similarly authorizes "prejudgment interest only for the personal injury portion of a more general total recovery." (*Morin, supra, 195 Cal.App.3d at p. 208*.)

[CA\(5\)](#) (5) We agree with this conclusion, although we do not adopt the reasoning. The statute in issue is not a model of clarity. Its second paragraph

⁸ Defendants do not dispute that emotional distress is personal injury for the purposes of [section 3291](#). (See Prosser & Keeton, Torts (5th ed. 1984) ch. 2, § 12, p. 56; 2 Harper et al., The Law of Torts (2d ed. 1986) § 9.1, p. 604; [Morin v. ABA Recovery Service, Inc. \(1987\) 195 Cal.App.3d 200, 208 \[240 Cal.Rptr. 509\]](#) [assuming emotional distress is personal injury for purposes of [§ 3291](#)].)

⁹ We perceive no significance in the fact that the compensatory damages claimed against defendant trucking company included

damages for the conduct of defendant truck driver. If plaintiff had made an undifferentiated settlement offer to both defendants and then had obtained a judgment for which defendants were not jointly liable, an issue of apportionment might arise. (See, e.g., [Taing v. Johnson Scaffolding Co. \(1992\) 9 Cal.App.4th 579 \[11 Cal.Rptr.2d 820\]](#).) The present situation, however, differs in two respects: plaintiff made her offer to only one defendant, and that defendant was either solely liable or jointly and severally liable for the entire judgment. (See [Bihun v. AT&T Information Systems, Inc., supra, 13 Cal.App.4th at pp. 1000-1001](#).)

provides that if the plaintiff makes a pretrial offer to compromise that is not accepted and then "obtains a more favorable judgment, the *judgment* shall bear interest . . ." (§ 3291, italics added). Taken literally, this language requires a court to assess prejudgment interest on an entire judgment regardless of how much or how little of the award consisted of personal injury damages.

Our inquiry, however, does not end here. We are not prohibited "from determining whether the literal meaning of a statute comports with its [*659] purpose or whether such a construction of one provision is consistent with other provisions of the statute. HN12 The meaning [****27] of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the [Citations.] An interpretation that renders related provisions nugatory must be avoided [citation]; each sentence must be read not in isolation but in the light of the statutory scheme [citation]" (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].)

The first paragraph of section 3291 permits the plaintiff in "any action brought to recover *damages for personal injury* . . . to claim interest on the damages alleged" (italics added). We understand the Legislature to have intended this narrower language, which confines the availability of prejudgment interest to "damages for personal injury," to limit the broader language of the second paragraph. To adopt the broader reading of the second paragraph would render the narrower language of the first paragraph nugatory.

By authorizing [****28] prejudgment interest only on personal injury damages, the narrower language also serves an important purpose of section 3291, i.e., "to provide a statutory incentive to settle personal injury litigation where plaintiff has been physically as well as economically impaired"

(*Gourley, supra*, 53 Cal.3d at p. 126.) The broader reading gives a windfall to plaintiffs who happen to attach claims for personal injury damages to claims for other kinds of damages. We conclude that section 3291 authorizes courts to award prejudgment interest only on damages attributable to personal injury.

CA(4b) (4b) We next consider how a court is to determine the nature of damages for purposes of section 3291. In *Morin, supra*, 195 Cal.App.3d 200, the first case to address this issue, the plaintiffs moved for section 3291 prejudgment interest on damages awarded in a general verdict under both personal injury and property damage theories. The Court of Appeal reversed the trial court's denial of the motion and remanded for further proceedings to establish what portion of the award was attributable to personal injury.

In the present case the Court of Appeal [****29] relied on *Morin, supra*, 195 Cal.App.3d 200, for the proposition that plaintiff has the burden of "establishing the threshold proposition that a certain award is in fact for personal injury" (*Id. at p. 208*.) According to the special verdict, the compensatory damages included \$5,000 as a result of the collision and \$15,000 as a result of the false identification and insurance information [**189] furnished by [*660] [***119] defendant truck driver. ¹⁰ [****30] Assuming that the compensatory damages of \$5,000 as a result of the

¹⁰The special verdict declared in relevant part: "1. Did defendant Gary Prince negligently operate a vehicle in such a manner as to damage plaintiff's [sic] vehicle?" Answer: "Yes." "2. Was such negligence a legal cause of damage to the plaintiff?" Answer: "Yes." "3. What is the total amount of damages suffered by the plaintiff as a legal result of the collision?" Answer: "\$5000.00." "4. Did defendant Gary Prince intentionally give plaintiff false information regarding his identity and insurance?" Answer: "Yes." "5. What is the total amount of damages suffered by the plaintiff as a legal result of the failure of defendant Gary Prince to inform plaintiff of his true identity and accurate insurance data?" Answer: "\$15,000." "6. Do you find that there was oppression, fraud or malice in the conduct of defendant Gary Prince?" Answer: "Yes." "7. Do you find that there was oppression, fraud or malice in the conduct of defendant Watkins Motor Lines, Inc.?" Answer: "Yes."

collision were attributable to property damage to plaintiff's car,¹¹ the Court of Appeal concluded that by requesting prejudgment interest on the entire award plaintiff failed to establish that the award was for personal injury.

Plaintiff concedes the initial burden of proof rested on her, but contends (1) that she carried her threshold burden to show that "any portion of the jury award reflects personal injury damages" (*Morin, supra*, 195 Cal.App.3d at p. 208) by establishing that the jury awarded damages on a personal injury theory, and (2) that the burden then shifted to defendant to claim and prove apportionment for any fraction of the award that might not be for personal injury.

We do not agree in full with either reading of *Morin*. Plaintiff's proposal to shift the burden of proving apportionment to defendant is contrary to [Evidence Code section 500](#), which provides: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." It is plaintiff who is claiming prejudgment interest; thus, under the general rule it is plaintiff who bears the burden of proving [****31] each fact essential to an award of such interest, including the amount or proportion of personal injury damages in the judgment.

It is true that [HN13](#) "[t]he general rule allocating the burden of proof applies 'except as otherwise provided by law.' The exception is included in recognition of the fact that the burden of proof is sometimes allocated in a manner that is at variance with the general rule. In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and

[*661] the probability of the existence or nonexistence of the fact." (Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1966 ed.) [§ 500](#), p. 431.)

Plaintiff offers no reason why we should make an exception to the general rule for [section 3291](#), and we cannot conceive of one. [HN14](#) Personal injury defendants possess no special knowledge of the basis of a jury's award of damages; the plaintiffs in such cases can request special verdicts or devise other [****32] means of identifying damages awarded for personal injury. Nor are we aware of any public policy that would justify creating a presumption that all damages in personal injury cases are eligible for prejudgment interest and then requiring defendants to rebut that presumption.

We therefore hold that, consistent with the general rule of [Evidence Code section 500](#), plaintiff has the burden of proving what portion of her award was "damages for personal injury" and thus was eligible for prejudgment interest under [section 3291](#).

We disagree, however, with the Court of Appeal's conclusion that plaintiff has tried but failed to carry that burden; in our view, she never had an opportunity to carry it. The trial court ruled that plaintiff's motion for prejudgment interest was [**190] barred on procedural [***120] grounds without reaching the question of what portion of the award represented damages for personal injury. Rather than remanding for such a determination, the Court of Appeal itself denied plaintiff's motion because the motion claimed interest on damages that were not for personal injury.

The Court of Appeal should instead have remanded the matter to the trial court to give plaintiff an opportunity--in [****33] effect, her first--to prove which damages were assessed for personal injury. As a general rule, this kind of factual determination lies in the province of the trial court. (See *Stallman v. Bell* (1991) 235 Cal.App.3d 740, 751 [286 Cal.Rptr. 755] [remanding "for the trial court to determine the amount of prejudgment interest due appellants"]; *Morin, supra*, 195 Cal.App.3d at p.

¹¹ At trial plaintiff presented evidence of \$4,808.50 in automobile repair and storage costs as a result of the accident.

[212](#) [remanding "to determine the portion, if any, of the verdict attributable to personal injury claims and [to] award prejudgment interest accordingly").) Such a determination requires an inquiry that the trial court, already familiar with the facts and issues of the case, is ordinarily better able to make.

This is especially true when, as here, the special verdict does not explicitly identify which damages are for personal injury. Although we encourage the use of special verdicts or jury findings as "the most direct and effective means of establishing the fact and amount of personal injury recovery" ([Morin, supra, 195 Cal.App.3d at p. 211](#)), special findings "are not necessarily the sole means to determine whether the jury awarded . . . damages [*662] [****34] for personal injuries and, if such damages were awarded, their amount. Facts and circumstances peculiar to [the] case, possibly including such considerations as the parties' theories of the case, uncontroverted evidence or jury instructions, may permit determination of the fact and amount of personal injury recovery." (*Ibid.*) In such a case, the trial court is usually better equipped than an appellate court to determine from the relevant facts and circumstances which portion of the judgment is eligible for prejudgment interest.

Here, the special verdict attributed \$5,000 in compensatory damages to the collision, \$15,000 in compensatory damages to the truck driver's failure to provide plaintiff with his true identity and accurate insurance information, and \$80,000 to punitive damages. As will appear, [section 3291](#) interest is available on compensatory, but not punitive, damages. On remand, plaintiff will be entitled to interest on the portion of the \$20,000 in compensatory damages that she proves was for personal injury.¹²

[****35] B. PUNITIVE DAMAGES

¹²We note that defendant mistakenly characterizes as "dictum" the Court of Appeal's holding that a prayer for prejudgment interest in the complaint is not a prerequisite to recovery of such interest under [section 3291](#). The Court of Appeal necessarily decided this issue before reaching the issue of the nature of the award.

[CA\(6a\) \(6a\)](#) Defendant contends for the first time that plaintiff should not receive prejudgment interest on the \$80,000 in punitive damages awarded to her under [Civil Code section 3294](#). Although no party raised this question at any previous stage of the proceedings, we deem its resolution appropriate because it is integrally related to the principal issues on review and will provide guidance on remand. (See [Code Civ. Proc., § 906](#).)

[CA\(7\) \(7\)](#) (See fn. 13.) We expressly reserved this question in [Gourley, supra, 53 Cal.3d at page 126](#), footnote 3. We now hold that [section 3291](#) does not authorize the award of prejudgment interest on punitive damages in personal injury cases.¹³

[****36] [**191] [***121] [CA\(6b\) \(6b\)](#) In arguing to the contrary, plaintiff cites [Greenfield v. Spectrum Investment Corp. \(1985\) 174 Cal.App.3d 111, 124-125 \[219 Cal.Rptr. 805\]](#) [*663] (hereafter *Greenfield*), and cases following it (e.g., [Morin, supra, 195 Cal.App.3d at p. 207](#); [Bihun v. AT&T Information Systems, Inc., supra, 13 Cal.App.4th at p. 1005](#)). The reasoning of *Greenfield* rests on the language of the second paragraph of [section 3291](#) providing that "the

¹³Defendant further argues that when the \$80,000 in punitive damages is subtracted from the total award of \$100,000, plaintiff's personal injury award totals at most \$20,000; that this was well below her offer to compromise for \$89,000 and so did not constitute a "more favorable judgment" in the meaning of [section 3291](#); and, therefore, that she cannot receive prejudgment interest even on the damages she proves are for personal injury.

We disagree. [HN15 Section 3291](#) provides for prejudgment interest when a personal injury plaintiff obtains a "more favorable judgment" than the plaintiff's offer to compromise under [Code of Civil Procedure section 998](#). Although the word "judgment" used later in [section 3291](#) must bear a narrower meaning to avoid conflict with legislative intent and the meaning of the statute as a whole (see *ante*, pp. 658-659), here there is no such conflict. The plain language of [section 3291](#) provides for a simple comparison in personal injury cases between the judgment and the offer to compromise; if the judgment is "more favorable," the plaintiff is eligible for prejudgment interest on the damages attributable to personal injury. We see no sign the Legislature intended the judgment and the offer to compromise to be apportioned between personal injury damages and other kinds of damages.

judgment shall bear interest" (italics added), and concludes that because "[t]here is only one judgment[,] . . . both compensatory and punitive damages are encompassed therein" (174 Cal.App.3d at p. 125.) As we have already seen, however, this language is not dispositive. The operative language of the first paragraph of [section 3291](#) restricts the availability of prejudgment interest to "damages for personal injury."

The question then becomes whether punitive damages are "damages for personal injury." (§ 3291.) The statute itself is silent on this point. During the enactment process, "the [****37] Legislature rejected several proposed amendments expressly providing that prejudgment interest would not accrue to that portion of the judgment representing punitive damages. [Citation.]" (*Gourley, supra, 53 Cal.3d at p. 126.*) The Legislature's rejection of the proposed amendments, however, is not conclusive of legislative intent regarding the availability of prejudgment interest on punitive damages. (See *id.*, fn. 3.)

We turn to the legislative intent of [section 3291](#) as a whole. As noted above, [section 3291](#) was intended to encourage settlements in personal injury cases. (*Gourley, supra, 53 Cal.3d at p. 126.*) Any connection there might be between the availability of prejudgment interest on punitive damages and the statutory purpose of providing an incentive to settle is too attenuated and speculative to be dispositive.

Prejudgment interest has an additional purpose, however. The basic provision governing prejudgment interest is [Civil Code section 3287, subdivision \(a\)](#) of which provides: [HN16](#) "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, [****38] is entitled also to recover interest thereon from that day" For more than a century it has been settled that one purpose of [section 3287](#), and of prejudgment

interest in general, is to provide just compensation to the injured party for loss of use of the award during the prejudgment period--in other words, to make the plaintiff whole as of the date of the injury. (See, e.g., *Cox v. McLaughlin (1888) 76 Cal. 60, 68-69 [18 P. 100]*; *Gourley, supra, 53 Cal.3d at p. 132* [*664] (dis. opn. of Broussard, J.)) In enacting [section 3291](#), the Legislature provided a means of compensating personal injury plaintiffs for loss of use of money during the prejudgment period.¹⁴

[****39] [**192] [***122] This end would not be served by awarding prejudgment interest on punitive damages. [HN17](#) Punitive damages are awarded "for the sake of example and by way of punishing the defendant." (*Civ. Code, § 3294, subd. (a).*) By definition they are not intended to make the plaintiff whole by compensating for a loss suffered. (See *Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1387 [241 Cal.Rptr. 67, 743 P.2d 1323]*.) To award prejudgment interest on punitive damages arising from personal injury actions would therefore give a windfall to the plaintiffs in those actions.

We are not persuaded that the Legislature intended such a result. Had the Legislature meant [section 3291](#) to authorize prejudgment interest on punitive damages, it could easily have used explicit language to that effect. Instead, it limited prejudgment interest to "damages for personal

¹⁴Other states that award prejudgment interest recognize its compensatory purpose. (See, e.g., *City and Borough of Juneau v. Comm'l U. Ins. Co. (Alaska 1979) 598 P.2d 957, 959* ["The purpose of prejudgment interest is to place an injured plaintiff in the same position as if he had been compensated immediately for his loss."]; *Heid v. Destefano (1978) 41 Colo.App. 436 [586 P.2d 246, 247]* [the purpose of prejudgment interest is "to compensate a successful plaintiff for the loss of the use of the money to which he has been entitled"]; *Old Orchard by the Bay v. Hamilton Mut. (1990) 434 Mich. 244 [454 N.W.2d 73, 76]* [the purpose of prejudgment interest is to compensate "the prevailing party for loss of the use of the funds awarded," as well as to offset any "costs of bringing a court action" and "to provide an incentive for prompt settlement"]; *Buckhannon-Upshur Cty. Airport v. R&R Coal (1991) 186 W.Va. 583 [413 S.E.2d 404, 408]* [prejudgment interest is "intended to make an injured plaintiff whole as far as loss of use of funds is concerned"].)

injury." (*Ibid.*) Punitive damages are not damages "for" personal injury in the sense of compensating plaintiffs for their injuries, even though they may arise from a personal injury cause of action.

We therefore conclude that [HN18 section 3291](#) does not authorize [****40] the award of prejudgment interest on punitive damages. We disapprove the contrary holding in [Greenfield v. Spectrum Investment Corp., supra, 174 Cal.App.3d at pages 124-125](#), as well as in [Bihun v. AT&T Information Systems, Inc., supra, 13 Cal.App.4th at pages 1005-1006](#), and in [Morin, supra, 195 Cal.App.3d at page 207](#), to the extent they conclude that prejudgment interest may be calculated on an award of punitive damages. Here, plaintiff may not recover prejudgment interest on her \$80,000 punitive damages award.

DISPOSITION

For the reasons stated the judgment of the Court of Appeal is reversed with directions to address the merits of the attorney fees issue and thereafter [**665] to reverse for further proceedings the order of the trial court on the prejudgment interest issue.

Lucas, C. J., Panelli, J., Kennard, J., Arabian, J., Baxter, J., and George, J., concurred.



Positive

As of: October 18, 2026 7:03 AM Z

[Lewis v. Superior Court](#)

Supreme Court of California

July 17, 2017, Filed

S219811

Reporter

3 Cal. 5th 561 *; 397 P.3d 1011 **; 220 Cal. Rptr. 3d 319 ***; 2017 Cal. LEXIS 5129 ****

ALWIN CARL LEWIS, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; MEDICAL BOARD OF CALIFORNIA, Real Party in Interest.

Subsequent History: Reported at [Lewis v. Superior Court, 2017 Cal. LEXIS 5847 \(Cal., July 17, 2017\)](#)

US Supreme Court certiorari denied by *Lewis v. Superior Court*, ___ U.S. ___, 199 L.Ed.2d 532, 138 S.Ct. 657 (U.S., Jan. 8, 2018)

Prior History: [****1] Superior Court of Los Angeles County, No. BS 139289, Joanne B. O'Donnell, Judge. Court of Appeal, Second Appellate District, Division Three, No. B252032.

[Lewis v. Superior Court, 226 Cal. App. 4th 933, 172 Cal. Rptr. 3d 491, 2014 Cal. App. LEXIS 471 \(Cal. App. 2d Dist., May 29, 2014\)](#)

Core Terms

patient, privacy, cure, privacy interest, prescribe, intrusion, controlled substance, right to privacy, countervailing interest, disclosure, invasion of privacy, medical record, monitor, prescription drug, good cause, prescribe, database, threshold, invasion, reasonable expectation of privacy, personal information, feasible, subpoena, the, balancing test, confidentiality, disciplinary, safeguards, diversion, incompetent

Case Summary

Overview

HOLDINGS: [1]-The Medical Board of California did not violate a physician's patients' right to privacy under [Cal. Const., art. I, § 1](#), by accessing the physician's prescribing history from the Controlled Substance Utilization Review and Evaluation System (CORES); [2]-Because the Board's actions did not intrude on a fundamental autonomy right, a general balancing test was applied to assess its actions; [3]-Even assuming the Board's actions constituted a serious intrusion on a legally protected privacy interest, its review of the CORES records was justified by the state's dual interest in protecting the public from the unlawful use and diversion of a particularly dangerous class of prescription drugs and protecting patients from negligent or incompetent physicians; [4]-Any potential invasion of privacy caused by the Board's actions was justified by countervailing interests.

Outcome

Judgment of court of appeal affirmed.

LexisNexis® Headnotes

Constitutional Law > Substantive Due Process > Privacy > Personal Information

[HN1](#) Privacy, Personal Information

[Cal. Const., art. I, § 1](#), guarantees certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy. [Art. I, § 1](#). The electorate added this protection for "privacy" to the California Constitution by a ballot initiative (the Privacy Initiative) in 1972. The Privacy Initiative addressed the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society. The principal mischiefs that the Privacy Initiative addressed were: (1) government snooping and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; and (4) the lack of a reasonable check on the accuracy of existing records.

Civil

Procedure > ... > Justiciability > Standing > Third Party Standing

Constitutional Law > Substantive Due Process > Privacy

[HN2](#) Standing, Third Party Standing

Although constitutional rights are generally personal, the United States Supreme Court has departed from this rule when the third-party right asserted by the litigant is inextricably bound up with the activity the litigant wishes to pursue and when some genuine obstacle prevents the absent party from asserting his or her own interest. Physicians have often been permitted to assert their patients' right to privacy under the California Constitution. Where the constitutionally protected privacy interests of absent patients are coincident with the interests of the doctor, the doctor must be permitted to speak for them.

Civil

Procedure > ... > Justiciability > Standing > Third Party Standing

[HN3](#) Standing, Third Party Standing

A physician has standing to assert his or her patient's rights where they may not otherwise be established.

Constitutional Law > Substantive Due Process > Privacy

[HN4](#) Substantive Due Process, Privacy

A two-part inquiry has been articulated for determining whether the right to privacy under [Cal. Const., art. I, § 1](#), has been violated. First, the complaining party must meet three threshold elements utilized to screen out claims that do not involve a significant intrusion on a privacy interest protected by the state constitutional privacy provision. The party must demonstrate (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy. This initial inquiry is necessary to permit courts to weed out claims that involve so insignificant or de minimis an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification by the defendant. Second, if a claimant satisfies the threshold inquiry, a defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. The plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests.

Constitutional Law > Substantive Due
Process > Privacy

HN5 Substantive Due Process, Privacy

The standard that a defendant's proffered countervailing interests must satisfy varies based on the privacy interest asserted. Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a compelling interest must be present to overcome the vital privacy interest. If in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed. The existence of a sufficient countervailing interest or an alternative course of conduct presents threshold questions of law for the court. The relative strength of countervailing interests and the feasibility of alternatives present mixed questions of law and fact. In cases where material facts are undisputed, adjudication as a matter of law may be appropriate.

Constitutional Law > Substantive Due
Process > Privacy

HN6 Substantive Due Process, Privacy

Under a general balancing test, the invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest. Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests.

Constitutional Law > Substantive Due
Process > Privacy

HN7 Substantive Due Process, Privacy

In the context of the right of privacy, the state has a vital interest in controlling the distribution of dangerous drugs.

Constitutional Law > Substantive Due
Process > Privacy

Evidence > Relevance

HN8 Substantive Due Process, Privacy

Evidence of less intrusive alternatives is relevant in balancing the government's interests against the privacy intrusion at issue.

Constitutional Law > Substantive Due
Process > Privacy > Personal Information

HN9 Privacy, Personal Information

Although patients retain a reasonable expectation of privacy in their prescription records, that privacy interest is less robust than the privacy interest associated with medical records.

Constitutional Law > Substantive Due
Process > Privacy

HN10 Substantive Due Process, Privacy

Protective measures, safeguards and other alternatives may minimize the privacy intrusion and thus should be considered when balancing a plaintiff's privacy interest against a defendant's countervailing interests. For example, if intrusion is limited and confidential information is carefully shielded from disclosure except to those who have a legitimate need to know, privacy concerns are assuaged.

Headnotes/Summary

Summary

[*561] CALIFORNIA OFFICIAL REPORTS SUMMARY

The Medical Board of California filed an accusation against a physician. Prior to the administrative hearing, the physician filed a motion to dismiss certain of the allegations against him. The physician argued that by obtaining reports from the Controlled Substance Utilization Review and Evaluation System (CURES) regarding his prescribing history without a warrant, subpoena, or good cause, the board violated his patients' privacy rights. The administrative law judge (ALJ) denied the motion to dismiss, concluding that the government's interest in obtaining the CURES reports in a highly regulated area outweighed the invasion of privacy. The ALJ concluded that the physician engaged in unprofessional conduct, engaged in negligent acts, and failed to maintain adequate records. The physician filed a petition for writ of mandate seeking to set aside the board's disciplinary decision, but the trial court denied the petition. (Superior Court of Los Angeles County, No. BS139289, Joanne B. O'Donnell, Judge.) The Court of Appeal, Second Dist., Div. Three, No. B252032, also denied the physician's petition for a writ of mandate.

The Supreme Court affirmed the judgment of the Court of Appeal. The court concluded the board did not violate the right to privacy under [Cal. Const., art. I, § 1](#), by accessing the CURES reports. Because the board's actions did not intrude on a fundamental autonomy right, the court applied a general balancing test to assess the board's actions. The state has a vital interest in controlling the distribution of dangerous drugs. Although patients retain a reasonable expectation of privacy in their prescription records, that privacy interest is less robust than the privacy interest associated with medical records. Even assuming the board's actions constituted a serious intrusion on a legally

protected privacy interest, its review of the CURES records was justified by the state's dual interest in protecting the public from the unlawful use and diversion of a particularly dangerous class of prescription drugs and protecting patients from negligent or incompetent physicians. Any potential invasion of privacy caused by the board's actions was justified by countervailing interests. The physician forfeited his claim that the board's [*562] access of the CURES records violated [U.S. Const., 4th Amend.](#), by failing to raise it at the administrative proceedings or before the superior court. (Opinion by Liu, J., with Cantil-Sakauye, C. J., Werdegar, Chin, Corrigan, Cuéllar, and Kruger, JJ., concurring. Concurring opinion by Liu, J., with Kruger, J., concurring (see p. 578).)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

[CA\(1\)](#) (1)

Privacy § 3—Nature and Extent of Right—Personal Information.

[Cal. Const., art. I, § 1](#), guarantees certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy. The electorate added this protection for "privacy" to the California Constitution by a ballot initiative (the Privacy Initiative) in 1972. The Privacy Initiative addressed the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society. The principal mischiefs that the Privacy Initiative addressed were (1) government snooping and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the

disclosure of it to some third party; and (4) the lack of a reasonable check on the accuracy of existing records.

CA(2) (2)

Parties § 1.2—Standing—Physicians—Patients' Rights—Privacy.

Although constitutional rights are generally personal, the United States Supreme Court has departed from this rule when the third party right asserted by the litigant is inextricably bound up with the activity the litigant wishes to pursue and when some genuine obstacle prevents the absent party from asserting his or her own interest. Physicians have often been permitted to assert their patients' right to privacy under the California Constitution. Where the constitutionally protected privacy interests of absent patients are coincident with the interests of the doctor, the doctor must be permitted to speak for them.

CA(3) (3)

Parties § 1.2—Standing—Physicians—Patients' Rights.

A physician has standing to assert his or her patient's rights where they may not otherwise be established.

CA(4) (4)

Privacy § 3—Nature and Extent of Right—Legally Protected Interest—Reasonable Expectation—Serious Invasion—Countervailing Interests—Feasible Alternatives.

A two-part inquiry has been articulated for determining [*563] whether the right to privacy under Cal. Const., art. I, § 1, has been violated. First, the complaining party must meet three threshold elements utilized to screen out claims that do not involve a significant intrusion on a privacy

interest protected by the state constitutional privacy provision. The party must demonstrate (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy. This initial inquiry is necessary to permit courts to weed out claims that involve so insignificant or de minimis an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification by the defendant. Second, if a claimant satisfies the threshold inquiry, a defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. The plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests.

CA(5) (5)

Privacy § 3—Nature and Extent of Right—Countervailing Interests—Feasible Alternatives.

The standard that a defendant's proffered countervailing interests must satisfy varies based on the privacy interest asserted. Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a compelling interest must be present to overcome the vital privacy interest. If, in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed. The existence of a sufficient countervailing interest or an alternative course of conduct presents threshold questions of law for the court. The relative strength of countervailing interests and the feasibility of alternatives present mixed questions of law and fact. In cases where material facts are undisputed,

adjudication as a matter of law may be appropriate. competing interests.

CA(6) (6)

Privacy § 3—Nature and Extent of Right— Accessing Physician's Prescribing History— Controlled Substance Utilization Review and Evaluation System.

The Medical Board of California did not violate a physician's patients' right to privacy under [Cal. Const., art. I, § 1](#), by accessing the physician's prescribing history from the Controlled Substance Utilization Review and Evaluation System. Even assuming the board's actions constituted a serious intrusion on a legally protected privacy interest, its review of these records was justified by the state's dual interest in [*564] protecting the public from the unlawful use and diversion of a particularly dangerous class of prescription drugs and protecting patients from negligent or incompetent physicians.

[[Cal. Forms of Pleading and Practice \(2017\) ch. 429, Privacy, § 429.60](#); 7 Witkin, Summary of Cal. Law (11th ed. 2017) Constitutional Law, § 648.]

CA(7) (7)

Privacy § 3—Nature and Extent of Right— Competing Interests—Socially Beneficial Activities.

Under a general balancing test, the invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest. Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important

CA(8) (8)

Privacy § 3—Nature and Extent of Right—State's Vital Interest—Controlling Distribution of Dangerous Drugs.

In the context of the right of privacy, the state has a vital interest in controlling the distribution of dangerous drugs.

CA(9) (9)

Privacy § 3—Nature and Extent of Right—Less Intrusive Alternative.

Evidence of less intrusive alternatives is relevant in balancing the government's interests against the privacy intrusion at issue.

CA(10) (10)

Privacy § 3—Nature and Extent of Right— Reasonable Expectation—Prescription Records.

Although patients retain a reasonable expectation of privacy in their prescription records, that privacy interest is less robust than the privacy interest associated with medical records.

CA(11) (11)

Privacy § 3—Nature and Extent of Right— Protective Measures.

Protective measures, safeguards and other alternatives may minimize the privacy intrusion and thus should be considered when balancing a plaintiff's privacy interest against a defendant's countervailing interests. For example, if intrusion is limited and confidential information is carefully shielded from disclosure except to those who have a legitimate need to know, privacy concerns are

assuaged.

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No appearance for Respondent.

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Judges: Opinion by Liu, J., with Cantil-Sakauye, C. J., Werdegarr, Chin, Corrigan, Cuéllar, and Kruger, JJ., concurring. Concurring opinion by Liu, J., with Kruger, J., concurring.

Opinion by: Liu

Opinion

[***322] [**1014] LIU, J.—The Controlled Substance Utilization Review and Evaluation System (CURES) [***323] is California's prescription drug monitoring program. By statute, every prescription of a Schedule II, III, or IV controlled substance must be logged in CURES, along with the patient's name, address, telephone number, gender, date of birth, drug name, quantity, number of refills, and information about the prescribing physician and pharmacy. (*Health & Saf. Code*, § 11165, *subd. (d)*; all undesignated statutory references are to this code.) The question in this case is whether the Medical Board of California (Board) violated patients' right to privacy under [article I, section 1 of the California Constitution](#) when it obtained data from CURES without a warrant or subpoena [****3] supported by good cause in the course of investigating the patients' physician, Dr. Alwin Carl Lewis. We hold that it did not because, even assuming that accessing prescription records without good cause constitutes a significant intrusion on a legally protected privacy interest, the Board's actions in this case were justified.

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I.

CURES was created in 1996 in an effort to move California's preexisting drug monitoring program online. (Sen. Com. on Crim. Proc., Analysis of Assem. Bill No. 3042 (1995–1996 Reg. Sess.) as amended Mar. 28, 1996.) CURES is maintained by the California Department of Justice (DOJ) and is designed to “assist health care practitioners in their efforts to ensure appropriate prescribing, ordering, administering, furnishing, and dispensing of controlled substances,” and to help “law enforcement and regulatory agencies in their efforts to control the diversion and resultant abuse of [Schedule II–IV] controlled substances.” (§ 11165, *subd. (a)*.)

CURES requires any pharmacy or dispenser that prescribes or dispenses controlled substances listed on Schedules II, III, or IV to keep a record of the prescription and to report specific information to the DOJ as soon as reasonably possible, subject [****4] to certain exceptions. (§§ 11165, *subd. (d)*, [11190](#).) This information includes the patient's full name, address, gender, date of birth, quantity of the drug dispensed, number of refills ordered, and date of the prescription. (§ 11165, *subd. (d)*.) Data obtained from CURES can be provided to “appropriate state, local, and federal public agencies for disciplinary, civil, or criminal purposes and to other agencies or entities, as determined by the Department of Justice, for the purpose of educating practitioners and others in lieu of disciplinary, civil, or criminal actions.” (§ 11165, *subd. (c)(2)(A)*.) At the time of these proceedings, the statute provided that “CURES shall operate under existing provisions of law to safeguard the privacy and confidentiality of patients.” (§ 11165, *former subd. (c)*.) Section 11165, *subdivision (c)* now states: “(1) The operation of CURES shall comply with all applicable federal and state privacy and security laws and regulations. [P] (2)(A) CURES shall operate under existing provisions of law to safeguard the privacy and confidentiality of patients. ...” Data obtained from CURES “shall not be disclosed, sold, or transferred to any third party.” (§ 11165, *subd. (c)(2)(A)*.)

In 2009, the Attorney General launched the prescription drug monitoring program (PDMP) system, which allows [****5] preregistered users, including licensed health care prescribers, pharmacists, law enforcement, and regulatory boards, to obtain from CURES real-time patient history information concerning controlled substances. (Attorney General, *Brown Unveils Real-Time Statewide Prescription Drug-Monitoring [**1015] System* (Sept. 15, 2009) <<https://oag.ca.gov/news/press-releases/brown-unveils-real-time-statewide-prescription-drug-monitoring-system>> [***324] [as of July 17, 2017].) Before the PDMP system, users had to

request information from CURES by fax, mail, or phone, and had to wait a few days to receive the information. (Sen. Health Com., Analysis of Sen. Bill No. 1071 (2009–2010 Reg. Sess.) as amended Apr. 28, 2010, p. 4.)

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The Board “has been charged with the duty to protect the public against incompetent, impaired, or negligent physicians.” (*Arnett v. Dal Cielo* (1996) [14 Cal.4th 4, 7](#) [[56 Cal. Rptr. 2d 706, 923 P.2d 11](#)] (*Arnett*).) It is responsible for enforcing disciplinary and criminal provisions of the Medical Practice Act, among other duties. (*Bus. & Prof. Code, § 2004*.) In particular, the Board may “[i]nvestigat[e] complaints from the public, from other licensees, from health care facilities, or from the board that a physician and surgeon may be guilty of unprofessional conduct.” (*Bus. & Prof. Code, § 2220, subd. (a)*.) The Board's investigators are peace officers. (*Pen. Code, § 830.3, subd. (a)*; *Bus. & Prof. Code, §§ 159.5, subd. (b)(1), 160, subd. (a)*.) The investigators may interview and take statements from witnesses, and they may issue subpoenas “for the attendance [****6] of witnesses and the production of papers, books, accounts, documents ... and testimony pertinent or material to any inquiry [or] investigation.” (*Gov. Code, § 11181, subd. (e)*; see also *id.*, [§ 11182](#); *Bus. & Prof. Code, § 101, subd. (b)*; *Arnett, at p. 8*.) The Board qualifies as one of the agencies authorized to access the CURES database.

The Board investigates physicians based on complaints or on its own initiative. (*Bus. & Prof. Code, § 2220, subd. (a)*.) If after an investigation the Board determines there is sufficient evidence to warrant a formal disciplinary action against a licensee, it refers the matter to the Attorney General. The action is then prosecuted by the Senior Assistant Attorney General of the Health Quality Enforcement Section, and the proceedings are conducted in accordance with the *Administrative Procedure Act*. (*Arnett, supra*, [14 Cal.4th at p. 9](#); see *Gov. Code, § 12529*.)

II.

In November 2008, the Board initiated an investigation of Dr. Alwin Carl Lewis as a result of a patient's complaint in August 2008 alleging that Lewis recommended she lose weight by engaging in a “five-bite” diet. A participant in this diet does not eat breakfast, has five bites of food for lunch, and five bites of food for dinner.

In the initial stages of the investigation, the Board investigator assigned to the case obtained a CURES prescriber activity [****7] report on Lewis. The report was 205 pages long and contained the prescription information of hundreds of patients. Before obtaining the CURES report, the Board investigator did not obtain patient authorization or issue any subpoenas. After reviewing the report, the Board asked five of Lewis's patients for release of their full medical records. Three patients gave their consent, and the Board obtained the other two patients' records via administrative subpoenas. The investigator also requested and obtained a copy of Lewis's prescribing history from CVS Pharmacy, Inc. (CVS), for the prior three years.

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As a result of this preliminary investigation, the Board filed an accusation against Lewis related to the original patient who complained, as well as the five additional patients. The charges included unprofessional conduct, prescribing dangerous drugs without an appropriate examination, excessive prescribing, and failure to maintain [***325] adequate and accurate medical records.

Prior to the administrative hearing, Lewis filed a motion to dismiss the allegations related to the five additional patients. Lewis argued that by obtaining the CURES reports without a warrant, subpoena, or good cause, the [****8] Board violated his patients' privacy rights. The administrative law judge (ALJ) denied Lewis's motion, stating that the government's interest in obtaining the reports in a highly regulated area outweighed the invasion of privacy.

Following the eight-day administrative hearing, the ALJ concluded that Lewis engaged [**1016] in unprofessional conduct, engaged in negligent acts, and failed to maintain adequate records. The ALJ recommended revoking Lewis's license but staying the revocation and placing Lewis on probation for three years. The Board adopted the ALJ's recommendation.

Lewis next filed a writ of administrative mandamus in the Los Angeles County Superior Court seeking to set aside the Board's decision, arguing that the Board violated “fundamental privacy protections guaranteed under state and federal law.” The superior court denied Lewis's petition, concluding that “[t]he public health and safety concern served by the monitoring and regulation of the prescription of controlled substances serves a compelling public interest that justifies disclosure of prescription records without notification or consent.”

Lewis then filed a petition for writ of mandate in the Court of Appeal, again seeking [****9] to set aside the Board's disciplinary decision because the Board's decision violated his patients' right to privacy. The court interpreted his challenge to be one based on the right to privacy under [article I, section 1 of the California Constitution](#), stating that “Lewis makes clear that he is asserting his patients' right to informational privacy in their controlled substances prescription records.”

Applying the framework set forth in [Hill v. National Collegiate Athletic Assn. \(1994\) 7 Cal.4th 1 \[26 Cal. Rptr. 2d 834, 865 P.2d 633\]](#) (Hill), the Court of Appeal determined that Lewis did not satisfy the threshold elements required to establish that the Board's actions involved a significant intrusion on a privacy interest protected by the state Constitution's privacy provision. Specifically, the court held that although there is a legally protected privacy right in medical records, the “well-known and long-established regulatory [*569] history significantly diminishes any reasonable expectation of privacy against the release of controlled substances prescription records to state, local, or

federal agencies for purposes of criminal, civil, or disciplinary investigations,” and “the release of CURES data to the Board during an investigation of a licensee-physician is not a serious invasion of privacy because sufficient safeguards are in place.” [****10]

The Court of Appeal went on to conclude that even if Lewis had satisfied the threshold elements to establish a right to privacy on behalf of his patients, the invasion of privacy was justified because it furthered two compelling government interests: “controlling the diversion and abuse of controlled substances” and “protect[ing] the public against incompetent, impaired, or negligent physicians.” “Balancing the state's substantial interest in preventing the abuse and diversion of controlled substances and protecting the public health against the minor intrusion upon a patient's informational privacy in his or her controlled substances prescription records stored in CURES,” the court concluded that “the Board's actions here in accessing and compiling data from CURES did [***326] not violate [article I, section 1 of the California Constitution](#).” We granted review.

III.

[HN1 CA\(1\)](#) (1) [Article I, section 1 of the California Constitution](#) guarantees certain inalienable rights. “Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.” ([Cal. Const., art. I, § 1](#).) The electorate added this protection for “privacy” to the California Constitution by a ballot initiative (the Privacy Initiative) in 1972. The Privacy Initiative addressed the “accelerating [****11] encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society.” ([White v. Davis \(1975\) 13 Cal.3d 757, 774 \[120 Cal. Rptr. 94, 533 P.2d 222\]](#).) The principal “‘mischiefs’” that the Privacy Initiative addressed were “(1) ‘government snooping’ and the secret gathering of

personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; and (4) the lack of a reasonable check on the accuracy of existing [**1017] records.” ([Id. at p. 775](#).)

A.

We first address the Board's contention that Lewis lacks standing to assert his patients' privacy rights under [article I, section 1 of the California Constitution](#).

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[HN2 CA\(2\)](#) (2) Although constitutional rights are “generally personal” ([People v. Hazelton \(1996\) 14 Cal.4th 101, 109 \[58 Cal. Rptr. 2d 443, 926 P.2d 423\]](#)), the United States Supreme Court has departed from this rule when the third party right asserted by the litigant is “inextricably bound up with the activity the litigant wishes to pursue” and when some “genuine obstacle” prevents the absent party from asserting his or her own interest. ([Singleton v. Wulff \(1976\) 428 U.S. 106, 114, 116 \[49 L. Ed. 2d 826, 96 S. Ct. 2868\]](#) (Singleton).) The Courts of Appeal have often permitted physicians to assert their [****12] patients' right to privacy under the California Constitution. (See [Medical Bd. of California v. Chiarottino \(2014\) 225 Cal.App.4th 623, 630–631, fn. 3 \[170 Cal. Rptr. 3d 540\]](#) (Chiarottino); [Whitney v. Montegut \(2014\) 222 Cal.App.4th 906, 918–921 \[166 Cal. Rptr. 3d 455\]](#) (Whitney); [Wood v. Superior Court \(1985\) 166 Cal.App.3d 1138, 1143–1145 \[212 Cal. Rptr. 811\]](#) (Wood); [Board of Medical Quality Assurance v. Gherardini \(1979\) 93 Cal.App.3d 669, 675 \[156 Cal. Rptr. 55\]](#) (Gherardini).) These cases stand for the principle that “[w]here the constitutionally protected privacy interests of absent patients are coincident with the interests of the doctor, the doctor must be permitted to speak for them.”

([Wood, at p. 1145.](#))

Although the Board recognizes that physicians may assert their patients' privacy interests in certain cases, it argues that those cases are limited to contexts where the physician is the custodian of the records or where his interests align with his patients' interests. The Board argues that because Lewis is not the custodian of the records in this case and his interests do not align with his patients' interests, he should not be permitted to assert his patients' rights.

CA(3) (3) We do not agree that Lewis's interests are at odds with his patients' interests. Because an individual's prescription records contain intimate details about his or her medical conditions, the government's ability to access these records may [***327] cause patients to hesitate to seek appropriate medical treatment. ([Whalen v. Roe \(1977\) 429 U.S. 589, 602 \[51 L. Ed. 2d 64, 97 S. Ct. 869\]](#) (*Whalen*) ["Unquestionably, some individuals' concern for their own privacy may lead them to [****13] avoid or to postpone needed medical attention."]; [Ferguson v. Charleston \(2001\) 532 U.S. 67, 78, fn. 14 \[149 L. Ed. 2d 205, 121 S. Ct. 1281\]](#) [an intrusion on privacy "may have adverse consequences because it may deter patients from receiving needed medical care"].) Because a physician has an interest in patients seeking appropriate treatment and using appropriate medication, the Board's actions are "inextricably bound up with the activity the litigant wishes to pursue" in this case. ([Singleton, supra, 428 U.S. at p. 114.](#)) Moreover, the patients' rights are "likely to be diluted or adversely affected" unless Lewis is permitted to assert their rights on their behalf. ([Griswold v. Connecticut \(1965\) 381 U.S. 479, 481 \[14 L. Ed. 2d 510, 85 S. Ct. 1678\]](#).) In this case, the patients are unable to assert their own rights because they were never given notice that their records were accessed. [*571] Without notice, there was no way for them to know of the potential constitutional violation. **HN3** "A physician has standing to assert his patient's rights where they may not otherwise be established." ([People v.](#)

[Barksdale \(1972\) 8 Cal.3d 320, 333 \[105 Cal. Rptr. 1, 503 P.2d 257\].](#))

The Board relies on [Pating v. Board of Medical Quality Assurance \(1982\) 130 Cal.App.3d 608 \[182 Cal. Rptr. 20\]](#), where the Court of Appeal held that the petitioner did not have standing to object to the introduction of third party medical records in part because a majority of the patients whose records were subpoenaed appeared at the administrative hearing and voluntarily consented to the introduction [****14] of their medical records. ([Id. at p. 621.](#)) The Board makes a similar argument here, contending that Lewis should not be permitted to assert his patients' privacy rights because [**1018] after the access of the CURES records, when five of the patients were informed that the Board sought their *complete* medical records, three gave consent and the other two did not object. We need not decide what effect, if any, the subsequent consent of the three patients has on Lewis's standing because Lewis would still be entitled to assert the rights of the nonconsenting patients. Finally, the Board relies on *Pating* for the suggestion that "having allegedly victimized his patients, [Lewis] should not be permitted standing to thus assert their privacy rights for his own protection." (*Ibid.*) Even assuming this rule applies in some contexts, this line of reasoning is inapplicable where, as here, Lewis is not alleged to have victimized all of the patients whose rights he seeks to assert.

B.

CA(4) (4) We now turn to the merits of Lewis's constitutional claim. In *Hill*, a case involving a challenge to the student-athlete drug testing policies of the National Collegiate Athletic Association (NCAA), **HN4** we articulated a two-part inquiry for determining [****15] whether the right to privacy under [article I, section 1](#) has been violated. ([Hill, supra, 7 Cal.4th at p. 26.](#))

First, the complaining party must meet three

“‘threshold elements’ ... utilized to screen out claims that do not involve a significant intrusion on a privacy interest protected by the state constitutional privacy provision.” (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 893 [59 Cal. Rptr. 2d 696, 927 P.2d 1200] (*Loder*).) The party must demonstrate “(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; [***328] and (3) conduct by defendant constituting a serious invasion of privacy.” (*Hill, supra*, 7 Cal.4th at pp. 39–40.) This initial inquiry is necessary to “permit courts to weed out claims that involve so insignificant or de minimis an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification by the defendant.” (*Loder, at p. 893*.)

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Second, if a claimant satisfies the threshold inquiry, “[a] defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests.” (*Hill, supra*, 7 Cal.4th at p. 40.) “The plaintiff, in turn, may rebut a defendant’s assertion of countervailing interests [****16] by showing there are feasible and effective alternatives to defendant’s conduct which have a lesser impact on privacy interests.” (*Ibid.*)

HN5 CA(5) (5) The standard that a defendant’s proffered countervailing interests must satisfy varies based on the privacy interest asserted: “Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a ‘compelling interest’ must be present to overcome the vital privacy interest. If, in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed.” (*Hill, supra*, 7 Cal.4th at p. 34.) “The existence of a sufficient countervailing interest or

an alternative course of conduct present[s] threshold questions of law for the court. The relative strength of countervailing interests and the feasibility of alternatives present mixed questions of law and fact. ... [I]n cases where material facts are undisputed, adjudication as a matter of law may be appropriate.” (*Id. at p. 40*.)

1.

CA(6) (6) Lewis claims that the Board violated [article I, section 1 of the California Constitution](#) by accessing his patients’ CURES records. We reject this claim because, even assuming the Board’s actions constituted a serious [****17] intrusion on a legally protected privacy interest, its review of these records was justified by the state’s dual interest in protecting the public from the unlawful use and diversion of a particularly dangerous class of [**1019] prescription drugs and protecting patients from negligent or incompetent physicians.

The Court of Appeal assumed without deciding that if Lewis were able to satisfy the three threshold elements, the Board would be required to establish a compelling interest. In *Hill*, we “decline[d] to hold that every assertion of a privacy interest under [article I, section 1](#) must be overcome by a ‘compelling interest.’” (*Hill, supra*, 7 Cal.4th at pp. 34–35.) Instead, we limited the application of the “compelling interest test” to those cases that implicate an “obvious invasion of an interest fundamental to personal autonomy.” (*Id. at p. 34*; see *Hernandez v. Hillside, Inc.* (2009) 47 Cal.4th 272, 288 [97 Cal. Rptr. 3d 274, 211 P.3d 1063] (*Hernandez*) [“except in the rare case in which a ‘fundamental’ right of personal autonomy is involved[,] the defendant need not present a “‘compelling’” countervailing interest”].)

[*573]

In all but one of our cases applying *Hill*, we have applied a general balancing test [***329] without requiring the asserted countervailing interest to be compelling. (See *Loder, supra*, 14 Cal.4th at p. 898 [applying a general balancing test to an employer’s

suspicionless drug testing [****18] of a job applicant]; *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 373 [53 Cal. Rptr. 3d 513, 150 P.3d 198] (*Pioneer Electronics*) [applying a general balancing test to plaintiff's request to obtain defendant's customer lists]; *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 339 [64 Cal. Rptr. 3d 693, 165 P.3d 488] [the public's "strong" interest in public employees' salaries outweighed any privacy invasion]; *Hernandez, supra*, 47 Cal.4th at p. 287 [because a fundamental autonomy right was not implicated, the defendant did not need to present a compelling countervailing interest].) The only case requiring a compelling interest involved a challenge to a statute requiring a pregnant minor to obtain parental consent or judicial authorization before having an abortion, an issue that "unquestionably impinges upon 'an interest fundamental to personal autonomy.'" (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 340 [66 Cal. Rptr. 2d 210, 940 P.2d 797].)

The Board's actions in this case do not implicate a fundamental autonomy right. It is true that the disclosure of information from the CURES database may chill patients' willingness to pursue treatment. But it cannot "be said that any individual has been deprived of the right to decide independently, with the advice of his physician, to acquire and to use needed medication. Although the State no doubt could prohibit entirely the use of particular [Schedule II, III, or IV] drugs, it has not done so. This case is therefore unlike those in [****19] which the Court has held that a total prohibition of certain conduct was an impermissible deprivation of liberty." (*Whalen, supra*, 429 U.S. at p. 603, fn. omitted.) The disclosure of information from CURES may be one consideration affecting a patient's choice to pursue treatment, but it does not significantly impair the patient's ultimate ability to make that choice on his or her own. Because the Board's actions do not intrude on a fundamental autonomy right, we apply a general balancing test

to assess the Board's actions in this case.

HN6 CA(7) (7) Under that test, the "[i]nvasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest. Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests." (*Hill, supra*, 7 Cal.4th at p. 38.)

[*574]

CA(8) (8) The Board asserts two countervailing interests to justify any potential invasion of privacy in this case: (1) protecting [****20] the public from unlawful use and diversion of a particularly dangerous class of prescription drugs and (2) protecting patients from negligent or incompetent physicians. There is no question that **HN7** the state has a "vital interest in [**1020] controlling the distribution of dangerous drugs" (*Whalen, supra*, 429 U.S. at p. 598), and Lewis does not contest that access to the CURES database furthers the state's interest in protecting patients and preventing the abuse of prescription medication. Lewis instead argues that the Board should be required to employ "less intrusive [***330] means" of monitoring controlled substance abuse by limiting searches of the CURES database to those involving good cause, as established by a warrant, subpoena, or similar legal mechanism.

The Board does not bear the burden of showing it adopted the least intrusive means of achieving its legitimate objectives. In *Hill*, we said that "[l]ike the 'compelling interest' standard, the argument that such a 'least restrictive alternative' burden must invariably be imposed on defendants in privacy cases derives from decisions that: (1) involve clear invasions of central, autonomy-based

privacy rights, particularly in the areas of free expression and association, procreation, [****21] or government-provided benefits in areas of basic human need; or (2) are directed against the invasive conduct of government agencies rather than private, voluntary organizations.” (*Hill, supra*, 7 Cal.4th at p. 49.) Seizing on the language directed at the “invasive conduct of government agencies” (*ibid.*), Lewis argues that any time we consider the impact of the government's actions on a privacy interest, the “least restrictive alternative” must be imposed. This interpretation ignores the footnote associated with this passage in *Hill* summarizing cases where the “least restrictive alternative” burden has been applied; that footnote says “at the roots of the ‘least restrictive alternative’ burden lie cases of government infringement of fundamental freedoms of expression and association.” (*Id.* at p. 49, fn. 16.) This case does not involve a government infringement of any fundamental freedom of expression and association.

CA(9) (9) Although the Board does not bear the burden of showing it has adopted the least intrusive means to monitor the flow of prescription drugs, **HN8** evidence of less intrusive alternatives is relevant in balancing the government's interests against the privacy intrusion at issue. (*Hill, supra*, 7 Cal.4th at p. 40 [“The plaintiff ... may rebut a defendant's [****22] assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests.”].) In *Hill*, despite finding that the NCAA's drug testing program was reasonably calculated to further its legitimate interests in maintaining the integrity of athletic competition and the health and safety of student athletes, we went on to consider the alternative methods proposed by the plaintiffs. (*Id.* at p. 50.) Ultimately, we determined that, “[b]ecause plaintiffs failed to demonstrate [*575] with substantial evidence the presence of fully viable alternatives to monitoring, they stopped short of proving their case.” (*Id.* at p. 51.) But our analysis demonstrates that a showing of viable less intrusive alternatives can carry weight in evaluating

the reasonableness of a challenged policy and balancing privacy against any countervailing interests.

CA(10) (10) Lewis asserts that a good cause requirement in this context is a feasible alternative, citing as examples several cases involving Board access to patients' medical records. (See *Gherardini, supra*, 93 Cal.App.3d at p. 680; *Wood, supra*, 166 Cal.App.3d at pp. 1148–1150; *Bearman v. Superior Court* (2004) 117 Cal.App.4th 463, 468–470 [11 Cal. Rptr. 3d 644].) But medical records contain far more sensitive information than do prescription records. A patient's complete medical file may [****23] include descriptions of symptoms, family history, diagnoses, test results, and other intimate details concerning treatment. Moreover, a reasonable patient would know or should know that the government monitors the [***331] sale and distribution of controlled substances, and that prescription records are routinely reviewed by pharmacists and insurance companies. The same cannot be said of a patient's comprehensive medical record. Patients are also on notice that under the *Information Practices Act of 1977*, personal information may be shared among government agencies “in a manner that would link the information disclosed to the individual” so long as “the [**1021] transfer is necessary for the transferee agency to perform its constitutional or statutory duties, and the use is compatible with a purpose for which the information was collected ...” (*Civ. Code*, § 1798.24, *subd. (e)*.) Therefore, **HN9** although patients retain a reasonable expectation of privacy in their prescription records, that privacy interest is less robust than the privacy interest associated with medical records, and the cases on which Lewis relies are inapposite.

The Board argues that real-time access to CURES is essential to closely monitoring the prescribing and dispensing [****24] of controlled substances because it gives the Board the ability to “spot-check prescribers for compliance with both the laws and standards of care governing controlled substance prescriptions, potentially preventing the Board from

detecting and addressing problems before they result in patient harm.” The Board further argues that if it “were required to provide notice to patients and develop good cause as understood by the Courts of Appeal in the medical records context before obtaining records of controlled substances prescriptions from the Department, it would delay the Board’s ability to identify and correct potentially dangerous practices.” We agree that a good cause requirement would compromise the Board’s ability to identify and address potentially dangerous prescribing practices. Requiring the Board to present evidence to a judicial officer establishing good cause as part of its preliminary investigations could result in protracted legal battles that effectively derail those investigations. Patients who objected to subpoenas to compel disclosure of their medical records on [*576] the ground that the Board lacked good cause have stalled investigations in the past. (See [Chiarottino, supra, 225 Cal.App.4th 623](#) [records requested [****25] in Feb. 2012; appeal resolved in Apr. 2014]; [Whitney, supra, 222 Cal.App.4th 906](#) [records requested in Jan. 2011; appeal resolved in Jan. 2014].) Such delay is tolerated in that context because of the heightened privacy interests implicated by government searches of medical records. For prescription records, however, delays of that magnitude would impede the Board’s ability to swiftly identify and stop dangerous prescribing practices.

Thus, although Lewis’s proposed alternative would reduce the impact on patients’ privacy interests, it is not an equally effective or feasible alternative to the Board’s current approach. It is possible there are ways to limit the privacy intrusion on patients without hampering the Board’s ability to investigate unsafe medical practices. For instance, the Board could take steps to anonymize patients’ prescription information prior to accessing the CURES database. But the parties do not propose this alternative or address its feasibility, and we do not consider the merits of such an approach here. Moreover, our rejection of an individualized good cause requirement should not be understood to

suggest that Board investigators may access the CURES database for any reason. Such access [****26] must be for the purpose of aiding “law enforcement and regulatory agencies in their efforts to control the diversion and resultant abuse of [Schedule II–IV] controlled substances” (§ 11165, *subd. (a)*) and pursuant to the Board’s duty “to protect the public against [***332] incompetent, impaired, or negligent physicians” ([Arnett, supra, 14 Cal.4th at p. 7](#)). The statutes governing the CURES database and the Board’s functions limit the reasons for which the Board may access the database.

[CA\(11\)](#) (11) The Board further argues that its review of the CURES data is not unconstitutional because there are sufficient protocols in place to prevent public disclosure. We have previously explained that [HN10](#) “[p]rotective measures, safeguards and other alternatives may minimize the privacy intrusion” and thus should be considered when balancing a plaintiff’s privacy interest against a defendant’s countervailing interests. ([Pioneer Electronics, supra, 40 Cal.4th at p. 371](#).) “For example, if intrusion is limited and confidential information is carefully shielded from disclosure except to those who have a legitimate need to know, privacy concerns are assuaged.” (*Ibid.*, quoting [Hill, supra, 7 Cal.4th at p. 38](#).)

Here, several provisions of law prohibit the wrongful public disclosure of personal [**1022] information obtained from CURES. CURES data may only be provided to “appropriate [****27] state, local, and federal public agencies for disciplinary, civil, or criminal purposes.” (§ 11165, *subd. (c)(2)(A)*.) The information reported to CURES is subject to “existing provisions of law to safeguard ... privacy and confidentiality” and “shall not be disclosed, sold, or transferred [*577] to any third party.” (*Ibid.*) During the course of investigations, the Board is required to “keep in confidence ... the names of any patients whose records are reviewed and shall not disclose or reveal those names, except as is necessary during the course of an investigation, unless and until

proceedings are instituted.” ([Bus. & Prof. Code, § 2225, subd. \(a\)](#).) Failure to abide by these limitations may trigger criminal and civil liability: The Information Practices Act of 1977 provides that “[e]xcept for disclosures which are otherwise required or permitted by law, the intentional disclosure of medical, psychiatric, or psychological information ... is punishable as a misdemeanor if the wrongful disclosure results in economic loss or personal injury to the individual to whom the information pertains.” ([Civ. Code, § 1798.57](#).) [Civil Code section 1798.45](#) further authorizes civil actions for the same unlawful conduct; in such an action, “the agency shall be liable to the individual in an amount equal to the sum of ... [****28] [¶] [a]ctual damages sustained by the individual, including damages for mental suffering” and “[t]he costs of the action together with reasonable attorney's fees.” ([Civ. Code, § 1798.48](#).)

We note that adequate protections against public disclosure do not obviate constitutional concerns as privacy interests are still implicated when the government accesses personal information without disseminating it. That said, we ultimately agree with the Board that the safeguards here limit the degree to which patients' privacy is invaded when the Board examines their prescription records.

In view of the considerations above, we find that the balance tips in favor of the Board's interests in protecting the public from unlawful use and diversion of a particularly dangerous class of prescription drugs and protecting patients from negligent or incompetent physicians. Because any potential invasion of privacy caused by the Board's actions was justified by countervailing interests, we conclude that the Board did not violate [article I, section 1 of the California Constitution](#) when it obtained patient prescription records from CURES.

2.

In addition to challenging the Board's review of the CURES records, [***333] Lewis asserts that the Board violated his patients' rights to privacy when,

after searching [****29] the CURES database, it obtained prescription records from CVS without good cause, a warrant, or notice to his patients. Lewis has forfeited this claim.

Lewis's challenge at the administrative hearing, as well as his petition for a writ of administrative mandate before the superior court, focused entirely on [**578] the CURES report, with no mention of the subsequent records obtained from CVS. It does appear, as Lewis asserts, that there was some confusion as to whether the prescription records obtained from CVS were from the CURES database or from CVS. Even after this confusion was clarified, however, Lewis did not assert an additional objection to the CVS records until his reply brief before the Court of Appeal. As a result, there are gaps in the record pertaining to these records and neither the ALJ, the superior court, nor the Court of Appeal addressed this issue. Finding this claim forfeited, we decline to reach the merits for the first time on appeal. ([Medical Bd. of California v. Superior Court \(1991\) 227 Cal.App.3d 1458, 1462 \[278 Cal. Rptr. 247\]](#).)

IV.

Lewis also asserts that the Board's access of the CURES records violates the [Fourth Amendment to the United States Constitution](#). We agree with the Board that Lewis has forfeited this claim on behalf of his patients by failing to raise it at the administrative proceedings or before [****30] the superior court. Lewis's fleeting references to “fundamental privacy protections guaranteed under state and federal law” were insufficient to preserve the issue. His claims before the [**1023] Board and the trial court were supported entirely on the basis of the California Constitution. Lewis's argument may be more convincing if he had presented arguments under [article I, section 13 of the California Constitution](#), the provision that explicitly protects against unreasonable searches and seizures. However, given that the thrust of his arguments before the Board and the trial court

asserted a general right to *informational* privacy, with no mention of search or seizure, at most he can be said to have asserted a federal right to informational privacy under the [*Fourteenth Amendment to the United States Constitution*](#), a claim that he does not pursue before this court.

CONCLUSION

For the reasons above, we affirm the judgment of the Court of Appeal.

Cantil-Sakauye, C. J., Werdegar, J., Chin, J., Corrigan, J., Cuéllar, J., and Kruger, J., concurred.

Concur by: Liu

Concur

LIU, J., Concurring.—In concluding that the government interests in protecting patients and the public justify the Medical Board of California's access to the prescription drug database here, our opinion today assumes without deciding that Dr. Alwin Carl Lewis has met the [****31] threshold elements of an [*579] invasion of privacy claim. (Maj. opn., *ante*, at p. 572.) I believe each of those elements is satisfied in this case.

Lewis contends that the Medical Board of California (Board) violated his patients' right to privacy under [*article I, section 1 of the California Constitution*](#) [***334] by examining, without good cause, their prescription records maintained in the Controlled Substance Utilization Review and Evaluation System (CURES) database. A party asserting such a claim must demonstrate “(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.” ([*Hill v. National Collegiate Athletic Assn.* \(1994\) 7 Cal.4th 1, 39–40 \[26 Cal. Rptr. 2d 834, 865 P.2d 633\]](#) (*Hill*).)

The Board concedes that the first element is

satisfied here because patients have a legally recognized privacy interest in their prescription records. The records stored in CURES contain “sensitive and confidential information” ([*Hill, supra, 7 Cal.4th at p. 35*](#)) that is protected by the right to privacy under the California Constitution, and the sensitivity of this information is reflected in the confidentiality provision of the CURES statute itself. (*Health & Saf. Code, § 11165, subd. (c)(2)*; all undesignated statutory references are to this code.)

As to the second element (reasonable expectation of privacy), it is relevant [****32] that “medical records contain far more sensitive information than do prescription records” and that patients “know or should know that the government monitors the sale and distribution of controlled substances, and that prescription records are routinely reviewed by pharmacists and insurance companies.” (Maj. opn., *ante*, at p. 575.) But these considerations do not mean that patients have no reasonable expectation of privacy with regard to their prescription records. Many of the drugs classified as Schedule II, Schedule III, and Schedule IV controlled substances are approved only for the treatment of specific and often sensitive medical conditions or symptoms. For example, testosterone, a Schedule III controlled substance, is used to treat hypogonadism, a condition in which the male's testicles do not produce enough testosterone. (§ [*11056, subd. \(f\)\(30\)*](#); see Mayo Clinic, Patient Care & Health Information <<http://www.mayoclinic.org/diseases-conditions/male-hypogonadism/basics/definition/con-20014235>> [as of July 17, 2017].) Alprazolam, a Schedule IV controlled substance (commonly found in anti-anxiety [**1024] drugs such as Xanax), is used to treat anxiety and panic disorders. (§ [*11057, subd. \(d\)\(1\)*](#); see Prescribers' Digital Reference, Alprazolam - Drug Summary (2017) <<http://www.pdr.net/drug-summary/Xanax-alprazolam-1873.31>> [as of July 17, 2017].) Patients retain a reasonable expectation [****33] of privacy in prescription drug records that can

reveal their medical conditions. (See [Douglas v. Dobbs \(10th Cir. 2005\) 419 F.3d 1097, 1102](#) [“we have no [*580] difficulty concluding that protection of a right to privacy in a person's prescription drug records, which contain intimate facts of a personal nature, is sufficiently similar to other areas already protected within the ambit of privacy”]; [Doe v. Southeastern Pa. Transportation Authority \(3d Cir. 1995\) 72 F.3d 1133, 1138](#) [“[M]edical science has improved and specialized its medications. It is now possible from looking at an individual's prescription records to determine that person's illnesses”].)

The fact that the government regulates controlled substances does not eliminate patients' reasonable expectation of privacy. A pervasive regulatory scheme has less significance when the area being regulated is particularly sensitive. (Cf. [Tucson Woman's Clinic v. Eden \(9th Cir. 2004\) 379 F.3d 531, 550](#) [closely regulated industry exception to the warrant requirement does not apply to abortion clinics, “where the expectation of privacy is heightened”].) Moreover, “it plainly would defeat the voters' [***335] fundamental purpose in establishing a constitutional right of privacy if a defendant could defeat a constitutional claim simply by maintaining that statutory provisions or past practices that are inconsistent with the constitutionally protected [****34] right eliminate any ‘reasonable expectation of privacy’ with regard to the constitutionally protected right.” ([American Academy of Pediatrics v. Lungren \(1997\) 16 Cal.4th 307, 339 \[66 Cal. Rptr. 2d 210, 940 P.2d 797\]](#); see [Delaware v. Prouse \(1979\) 440 U.S. 648, 662 \[59 L. Ed. 2d 660, 99 S. Ct. 1391\]](#) [“An individual ... does not lose all reasonable expectation of privacy simply because [an activity is] subject to government regulation.”].)

It is also relevant that patients do not choose to participate in the prescription drug monitoring program. Instead, patients typically take prescription drugs for nonvoluntary, legitimate medical purposes. (§ 11153 [“A prescription for a controlled substance shall only be issued for a

legitimate medical purpose by an individual practitioner acting in the usual course of his or her professional practice.”].) “[T]he presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant.” ([Hill, supra, 7 Cal.4th at p. 37.](#)) In *Hill*, we emphasized that the student athletes were choosing to participate in a voluntary extracurricular activity and that, “[a]s a result of its unique set of demands, athletic participation carries with it social norms that effectively diminish the athlete's reasonable expectation of personal privacy in his or her bodily condition, both internal and external.” (*Id. at p. 42.*) [****35] Here, by contrast, “[t]he only way to avoid submission of prescription information ... is to forgo medical treatment or to leave the state[;] [t]his is not a meaningful choice.” ([Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Administration \(D.Or. 2014\) 998 F.Supp.2d 957, 967, revd. on \[581\] other grounds \(9th Cir. 2017\) 860 F.3d 1228.](#)) Furthermore, unlike the athletes in *Hill*, the patients were not given an opportunity to consent or refuse before their information was shared with the Board. Given the mandatory nature of CURES data collection, it is difficult to conclude that the monitoring scheme entirely negates patients' expectation of privacy.

Finally, Lewis has demonstrated “a serious invasion of privacy.” ([Hill, supra, 7 Cal.4th at p. 40.](#)) “[T]his element is intended simply to screen out intrusions on privacy that are de minimis or insignificant.” ([American Academy of Pediatrics v. Lungren, supra, 16 Cal.4th at p. 339.](#)) The Board argues that any intrusion on patients' privacy is insignificant because there are sufficient protocols to prevent public disclosure. Although such protective measures may limit the extent of privacy invasion, they do not render an intrusion de minimis for purposes of this threshold inquiry. (See maj. opn., [**1025] ante, at p. 577 [“privacy interests are still implicated when the government accesses personal information without disseminating it”]; [Hill, at p. 27, fn. 7](#) [“Particularly

when professional [****36] or fiduciary relationships premised on confidentiality are at issue (such as doctor and patient or psychotherapist and client), the state constitutional right to privacy may be invaded by a less-than-public dissemination of information.”].)

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The electorate was concerned about more than public disclosure when it passed the privacy initiative in 1972, which amended the Constitution. The voters were concerned that their privacy was violated whenever their personal information [***336] was used or accessed without reason. (See [*White v. Davis* \(1975\) 13 Cal.3d 757, 775 \[120 Cal. Rptr. 94, 533 P.2d 222\]](#) [the initiative was intended to curtail “the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party”]; Ballot Pamp., Gen. Elec. (Nov. 7, 1972) arguments in favor of Prop. 11, p. 27 [“Fundamental to our privacy is the ability to control circulation of personal information. ... The proliferation of government and business records over which we have no control limits our ability to control our personal lives. Often we do not know that these records even exist and we are certainly unable to determine who has access to them.”].) This concern is even more pressing today [****37] because advances in data science have enabled sophisticated analyses of curated information as to a particular person. Where, as here, one government agency discloses patients' sensitive medical information to another, the privacy intrusion cannot be dismissed as trivial.

In sum, the disclosure of CURES data to the Board is not a de minimis intrusion on patients' reasonable and legally protected privacy interests. But, [*582] as today's opinion explains, the government interests behind the prescription drug monitoring program are sufficiently weighty to justify the privacy invasion here.

Kruger, J., concurred.



Caution

As of: October 18, 2026 7:03 AM Z

Loving v. Virginia

Supreme Court of the United States

April 10, 1967, Argued ; June 12, 1967, Decided

No. 395

Reporter

388 U.S. 1 *; 87 S. Ct. 1817 **; 18 L. Ed. 2d 1010 ***; 1967 U.S. LEXIS 1082 ****

LOVING ET UX. v. VIRGINIA

Prior History: [****1] APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

[Loving v. Commonwealth, 206 Va. 924, 147 S.E.2d 78, 1966 Va. LEXIS 171 \(1966\)](#)

Disposition: [206 Va. 924, 147 S. E. 2d 78](#), reversed.

Core Terms

marriage, love, racial classification, marry, equal protection clause, white person, racial discrimination, invidious, interracial marriage, colored person, classification, miscegenation, sentence, equal application

Case Summary

Procedural Posture

Appellants, a husband and his wife, sought review of a judgment from the Supreme Court of Appeals of Virginia which held that Va. Code Ann. §§ 20-58 and 20-59, which were adopted by to prevent marriages between persons solely on the basis of racial classifications, did not violate the Equal Protection and Due Process Clauses of [U.S. Const. amend. XIV](#).

Overview

Appellants were indicted on charges of violating the state's ban on interracial marriages. After their conviction, appellants took up residence out-of-state and instituted a class action requesting that Va. Code Ann. §§ 20-58 and 20-59, the state antiscegenation statutes, be declared unconstitutional. The Supreme Court reversed the judgment of the appellate court, which had affirmed appellants' convictions and had upheld the constitutionality of the statutes. The Court rejected the notion that the mere "equal application" of a statute containing racial classifications was enough to remove the classification from the [U.S. Const. amend. XIV](#)'s proscription of all invidious racial discriminations and held there was no legitimate overriding purpose which justified the classification. The Court found that restricting the freedom to marry solely because of racial classifications violated the central meaning of the [Equal Protection Clause](#) and deprived appellants of liberty without due process of law in violation of the Due Process Clause of [U.S. Const. amend. XIV](#).

Outcome

The Court reversed the judgment.

LexisNexis® Headnotes

Constitutional Law > Substantive Due Process > Citizenship

Constitutional Law > Substantive Due

Process > Scope

HN1 See [U.S. Const. amend. XIV](#).

Civil Rights Law > ... > Contractual Relations &
Housing > Fair Housing Rights > General Overview

Constitutional Law > Substantive Due
Process > Scope

Constitutional Law > Equal Protection > National
Origin & Race

Education Law > Discrimination in Schools > Racial
Discrimination > Equal Protection

HN2 The [Equal Protection Clause](#) requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the [Fourteenth Amendment](#) is to eliminate all official state sources of invidious racial discrimination in the states.

Constitutional Law > Equal Protection > National
Origin & Race

HN3 At the very least, the [equal protection clause](#) demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the [Fourteenth Amendment](#) to eliminate.

Constitutional Law > Equal Protection > National
Origin & Race

Constitutional Law > Equal Protection > Nature &
Scope of Protection

HN4 There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the

[Equal Protection Clause](#) of [U.S. Const. amend. XIV](#).

Constitutional Law > Substantive Due
Process > Scope

HN5 The freedom to marry is recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Constitutional Law > Substantive Due
Process > Scope

Family Law > Marriage > Validity > Interracial
Marriages

HN6 Marriage is one of the "basic civil rights of man," fundamental to existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in Va. Code Ann. §§ 20-58, 20-59, classifications so directly subversive of the principle of equality at the heart of the [Fourteenth Amendment](#), is to deprive all the state's citizens of liberty without due process of law. The [Fourteenth Amendment](#) requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under the United States Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the state.

Lawyers' Edition Display

Summary

The issue presented in the instant case concerned the validity of the Virginia antimiscegenation statutes, the central features of which are the absolute prohibition of a "white person" marrying any person other than a "white person."

A husband, a "white person," and his wife, a "colored person," within the meanings given those terms by a Virginia statute, both residents of Virginia, were married in the District of Columbia pursuant to its laws, and shortly thereafter returned to Virginia, where, upon their plea of guilty, they were sentenced, in a Virginia state court, to one year in jail for violating Virginia's ban on interracial marriages. Their motion to vacate the sentences on the ground of the unconstitutionality of these statutes was denied by the trial court. The Virginia Supreme Court of Appeals affirmed. (206 Va 924, 147 SE2d 78.)

On appeal, the Supreme Court of the United States reversed the conviction. In an opinion by Warren, Ch. J., expressing the view of eight members of the court, it was held that the Virginia statutes violated both the equal protection and the [due process clauses of the Fourteenth Amendment](#).

Stewart, J., concurred in the judgment on the ground that a state law making the criminality of an act depend upon the race of the actor is invalid.

Headnotes

RIGHTS §4.5 > LAW §528.5 > miscegenation statutes -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B]

A state statutory scheme to prevent marriages between persons solely on the basis of racial classification violates the [Fourteenth Amendment's equal protection clause](#) and its due process clause, which guarantees the freedom to marry.

MARRIAGE §2 > state regulation -- > Headnote:
[LEdHN\[2\]](#) [2]

While marriage is a social relation subject to the state's police power, such power is limited by the

commands of the [Fourteenth Amendment](#).

RIGHTS §4.5 > miscegenation statute -- analysis --
> Headnote:

[LEdHN\[3\]](#) [3]

The mere fact of equal application of a miscegenation statute to whites and Negroes does not mean that the Supreme Court's analysis of the statute should follow the approach the court has taken in cases involving no racial discrimination; the fact of equal application does not immunize a statute containing racial classifications from the very heavy burden of justification which the [Fourteenth Amendment](#) has traditionally required of state statutes drawn according to race.

LAW §17 > Fourteenth Amendment -- history --
> Headnote:

[LEdHN\[4\]](#) [4]

Although the legislative history as to the adoption of the [Fourteenth Amendment](#) casts some light on its construction, statements made by the framers of the amendment are not sufficient to resolve a problem of racial discrimination, and at best they are inconclusive.

LAW §317 > classification -- > Headnote:
[LEdHN\[5\]](#) [5]

The [equal protection clause](#) requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination.

RIGHTS §4.5 > Fourteenth Amendment -- purpose --
> Headnote:

[LEdHN\[6\]](#) [6]

The clear and central purpose of the [Fourteenth Amendment](#) is to eliminate all official state sources of invidious racial discrimination in the states.

RIGHTS §4.5 > distinctions because of ancestry --
> Headnote:

[LEdHN\[7\]](#) [7]

Distinctions between citizens solely because of their ancestry are odious to a free people whose institutions are founded upon the doctrine of equality.

RIGHTS §4.5 > equal protection -- racial
classifications -- > Headnote:

[LEdHN\[8\]](#) [8]

The [equal protection clause of the Fourteenth Amendment](#) demands that racial classifications, especially suspect in criminal statutes, be subjected to the most rigid scrutiny, and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the [Fourteenth Amendment](#) to eliminate.

RIGHTS §4.5 > racial discrimination -- > Headnote:
[LEdHN\[9\]](#) [9]

The Supreme Court has consistently denied the constitutionality of measures which restrict the rights of citizens on account of race; restricting the freedom to marry solely because of racial

classification violates the central meaning of the [equal protection clause](#).

LAW §525 > liberty to marry -- > Headnote:
[LEdHN\[10\]](#) [10]

The freedom to marry is one of the vital personal rights protected by the [due process clause of the Fourteenth Amendment](#) as essential to the orderly pursuit of happiness by free men.

MARRIAGE §1 > basic right -- > Headnote:
[LEdHN\[11\]](#) [11]

Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.

RIGHTS §4.5 > marriage -- freedom of choice --
> Headnote:

[LEdHN\[12\]](#) [12]

The [Fourteenth Amendment](#) requires that the freedom of choice to marry not be restricted by invidious racial discriminations; the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the state.

Syllabus

Virginia's statutory scheme to prevent marriages between persons solely on the basis of racial classifications *held* to violate the Equal Protection and [Due Process Clauses of the Fourteenth Amendment](#). Pp. 4-12.

Counsel: Bernard S. Cohen and Philip J. Hirschkop

argued the cause and filed a brief for appellants. Mr. Hirschkop argued pro hac vice, by special leave of Court.

R. D. McIlwaine III, Assistant Attorney General of Virginia, argued the cause for appellee. With him on the brief were Robert Y. Button, Attorney General, and Kenneth C. Patty, Assistant Attorney General.

William M. Marutani, by special leave of Court, argued the cause for the Japanese American Citizens League, as amicus curiae, urging reversal.

Briefs of amici curiae, urging reversal, were filed by William M. Lewers and William B. Ball for the National Catholic Conference for Interracial Justice et al.; by Robert L. [****2] Carter and Andrew D. Weinberger for the National Association for the Advancement of Colored People, and by Jack Greenberg, James M. Nabrit III and Michael Meltsner for the N. A. A. C. P. Legal Defense & Educational Fund, Inc.

T. W. Bruton, Attorney General, and Ralph Moody, Deputy Attorney General, filed a brief for the State of North Carolina, as amicus curiae, urging affirmance.

Judges: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Fortas

Opinion by: WARREN

Opinion

[*2] [***1012] [**1818] MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

[LEdHN/1A](#) [1A] This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and [Due Process](#)

[Clauses of the Fourteenth Amendment](#).¹ For reasons [**1819] which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the [Fourteenth Amendment](#).

[****3] In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white [***1013] man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court [*3] of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

"Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they [****4] filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the [Fourteenth Amendment](#). The motion not having

¹ Section 1 of the Fourteenth Amendment provides:

[HN1](#) "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

been decided by October 28, 1964, the Lovings instituted a class action in the United States District Court for the Eastern District of Virginia requesting that a three-judge court be convened to declare the Virginia antiscegenation statutes unconstitutional and to enjoin state officials from enforcing their convictions. On January 22, 1965, the state trial judge denied the motion to vacate the sentences, and the Lovings perfected an appeal to the Supreme Court of Appeals of Virginia. On February 11, 1965, the three-judge District Court continued the case to allow the Lovings to present their constitutional claims to the highest state court.

The Supreme Court of Appeals upheld the constitutionality of the antiscegenation statutes and, after [*4] modifying the sentence, affirmed the convictions.² The Lovings appealed this decision, and we noted probable jurisdiction on December 12, 1966, 385 U.S. 986.

[****5] The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating § 20-58 of the Virginia Code:

"Leaving State to evade law. -- If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

Section 20-59, which defines the penalty for miscegenation, provides:

"Punishment for marriage. -- If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be

guilty of a felony and shall be punished by confinement in the penitentiary [**1820] for not less than one nor more than [****6] five years."

[***1014] Other central provisions in the Virginia statutory scheme are § 20-57, which automatically voids all marriages between "a white person and a colored person" without any judicial proceeding,³ and §§ 20-54 and 1-14 which, [*5] respectively, define "white persons" and "colored persons and Indians" for purposes of the statutory prohibitions.⁴

³ Section 20-57 of the Virginia Code provides:

"Marriages void without decree. -- All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process." Va. Code Ann. § 20-57 (1960 Repl. Vol.).

⁴ Section 20-54 of the Virginia Code provides:

"Intermarriage prohibited; meaning of term 'white persons.' -- It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter." Va. Code Ann. § 20-54 (1960 Repl. Vol.).

The exception for persons with less than one-sixteenth "of the blood of the American Indian" is apparently accounted for, in the words of a tract issued by the Registrar of the State Bureau of Vital Statistics, by "the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas" Plecker, *The New Family and Race Improvement*, 17 Va. Health Bull., Extra No. 12, at 25-26 (New Family Series No. 5, 1925), cited in Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 Va. L. Rev. 1189, 1202, n. 93 (1966).

Section 1-14 of the Virginia Code provides:

"Colored persons and Indians defined. -- Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians." Va. Code Ann. § 1-14 (1960 Repl. Vol.).

² 206 Va. 924, 147 S. E. 2d 78 (1966).

The Lovings have never disputed in the course of this litigation that Mrs. Loving is a "colored person" or that Mr. Loving is a "white person" within the meanings given those terms by the Virginia statutes.

[**7] [*6]** Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications.⁵ **[****8]** Penalties **[**1821]** for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial **[***1015]** period.⁶ The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a "white person" marrying other than another "white person,"⁷ a prohibition against issuing marriage licenses until the issuing official is

satisfied that **[*7]** the applicants' statements as to their race are correct,⁸ certificates of "racial composition" to be kept by both local and state registrars,⁹ and the carrying forward of earlier prohibitions against racial intermarriage.¹⁰

I.

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in *Naim v. Naim*, 197 Va. 80, 87 S. E. 2d 749, as stating the reasons supporting the validity of these laws. In *Naim*, the state court concluded that the State's legitimate purposes were "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," obviously an endorsement of the doctrine of White Supremacy. *Id.*, at 90, 87 S. E. 2d, at 756. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage **[****9]** should be left to exclusive state control by the *Tenth Amendment*.

LEdHN[2] [2] While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, *Maynard v. Hill*, 125 U.S. 190 (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the *Fourteenth Amendment*. Nor could it do so in light of *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Skinner v. Oklahoma*, 316 U.S. 535 (1942). Instead, the State argues that the meaning of the *Equal Protection Clause*, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element **[*8]** as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are

⁵ After the initiation of this litigation, Maryland repealed its prohibitions against interracial marriage, Md. Laws 1967, c. 6, leaving Virginia and 15 other States with statutes outlawing interracial marriage: Alabama, *Ala. Const., Art. 4, § 102*, Ala. Code, Tit. 14, § 360 (1958); Arkansas, Ark. Stat. Ann. § 55-104 (1947); Delaware, *Del. Code Ann., Tit. 13, § 101* (1953); Florida, Fla. Const., Art. 16, § 24, Fla. Stat. § 741.11 (1965); Georgia, Ga. Code Ann. § 53-106 (1961); Kentucky, *Ky. Rev. Stat. Ann. § 402.020* (Supp. 1966); Louisiana, *La. Rev. Stat. § 14:79* (1950); Mississippi, *Miss. Const., Art. 14, § 263*, Miss. Code Ann. § 459 (1956); Missouri, *Mo. Rev. Stat. § 451.020* (Supp. 1966); North Carolina, N. C. Const., Art. XIV, § 8, *N. C. Gen. Stat. § 14-181* (1953); Oklahoma, Okla. Stat., Tit. 43, § 12 (Supp. 1965); South Carolina, *S. C. Const., Art. 3, § 33*, *S. C. Code Ann. § 20-7* (1962); Tennessee, *Tenn. Const., Art. 11, § 14*, Tenn. Code Ann. § 36-402 (1955); Texas, Tex. Pen. Code, Art. 492 (1952); West Virginia, W. Va. Code Ann. § 4697 (1961).

Over the past 15 years, 14 States have repealed laws outlawing interracial marriages: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming.

The first state court to recognize that miscegenation statutes violate the *Equal Protection Clause* was the Supreme Court of California. *Perez v. Sharp*, 32 Cal. 2d 711, 198 P. 2d 17 (1948).

⁶ For a historical discussion of Virginia's miscegenation statutes, see Wadlington, *supra*, n. 4.

⁷ Va. Code Ann. § 20-54 (1960 Repl. Vol.).

⁸ Va. Code Ann. § 20-53 (1960 Repl. Vol.).

⁹ Va. Code Ann. § 20-50 (1960 Repl. Vol.).

¹⁰ Va. Code Ann. § 20-54 (1960 Repl. Vol.).

punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their [****10] reliance on racial classifications, do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the [Equal Protection Clause](#) does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, [***1016] the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

[**1822] [LEdHN/3](#) [3] Because we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the [Fourteenth Amendment's](#) proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding [****11] that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination where the [Equal Protection Clause](#) has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in New York City, *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), or an exemption in Ohio's ad valorem tax for merchandise owned by a nonresident in a storage warehouse, *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959). In these cases, involving distinctions not drawn according to race,

the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the [Fourteenth Amendment](#) has traditionally required of state statutes drawn according to race.

[LEdHN/4](#) [4] [****12] The State argues that statements in the Thirty-ninth Congress about the time of the passage of the [Fourteenth Amendment](#) indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freedmen's Bureau Bill, which President Johnson vetoed, and the Civil Rights Act of 1866, 14 Stat. 27, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the [Fourteenth Amendment](#), it must be understood that they pertained to the passage of specific statutes and not to the broader, organic purpose of a constitutional amendment. As for the various statements directly concerning the [Fourteenth Amendment](#), we have said in connection with a related problem, that although these historical sources "cast some light" they are not sufficient to resolve the problem; "[at] best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the [****13] letter and the spirit of the Amendments and wished them to have the most limited effect." [Brown v. Board of Education](#), 347 U.S. 483, 489 (1954). See also [Strauder \[*10\] v. West Virginia](#), 100 U.S. 303, 310 (1880). We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the [Fourteenth Amendment](#) supported the theory advanced by the State, that the requirement of equal protection of the laws is

satisfied by penal laws defining offenses based on racial classifications [***1017] so long as white and Negro participants in the offense were similarly punished. McLaughlin v. Florida, 379 U.S. 184 (1964).

LEdHN[5] [5]LEdHN[6] [6]The State finds support for its "equal application" theory in the decision of the Court in Pace v. Alabama, 106 U.S. 583 (1883). In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed [****14] a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned [**1823] that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated "Pace represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." McLaughlin v. Florida, *supra*, at 188. As we there demonstrated, HN2 the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. Slaughter-House Cases, 16 Wall. 36, 71 (1873); Strauder v. West Virginia, 100 U.S. 303, 307-308 (1880); Ex parte Virginia, 100 U.S. 339, 344-345 (1880); [****15] Shelley v. Kraemer, 334 U.S. 1 (1948); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[*11] LEdHN[7] [7]LEdHN[8] [8]There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of

different races. Over the years, this Court has consistently repudiated "distinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." Hirabayashi v. United States, 320 U.S. 81, 100 (1943). HN3 At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," Korematsu v. United States, 323 U.S. 214, 216 (1944), and, if they are ever to be upheld, [****16] they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they "cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense." McLaughlin v. Florida, *supra*, at 198 (STEWART, J., joined by DOUGLAS, J., concurring).

LEdHN[9] [9]There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed [***1018] to maintain White Supremacy.¹¹ We have consistently denied [*12] the constitutionality of measures which restrict the rights of citizens on

¹¹ Appellants point out that the State's concern in these statutes, as expressed in the words of the 1924 Act's title, "An Act to Preserve Racial Integrity," extends only to the integrity of the white race. While Virginia prohibits whites from marrying any nonwhite (subject to the exception for the descendants of Pocahontas), Negroes, Orientals, and any other racial class may intermarry without statutory interference. Appellants contend that this distinction renders Virginia's miscegenation statutes arbitrary and unreasonable even assuming the constitutional validity of an official purpose to preserve "racial integrity." We need not reach this contention because we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the "integrity" of all races.

account of race. [HN4](#) There can be no doubt that restricting the freedom to marry solely because of racial classifications [****17] violates the central meaning of the [Equal Protection Clause](#).

II.

[**1824] [LEdHN\[10\]](#) [10]These statutes [****18] also deprive the Lovings of liberty without due process of law in violation of the [Due Process Clause of the Fourteenth Amendment](#). [HN5](#) The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

[LEdHN\[1B\]](#) [1B][LEdHN\[11\]](#) [11][LEdHN\[12\]](#) [12][HN6](#) Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. [Skinner v. Oklahoma, 316 U.S. 535, 541 \(1942\)](#). See also [Maynard v. Hill, 125 U.S. 190 \(1888\)](#). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the [Fourteenth Amendment](#), is surely to deprive all the State's citizens of liberty without due process of law. The [Fourteenth Amendment](#) requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our [****19] Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

These convictions must be reversed.

It is so ordered.

Concur by: STEWART

Concur

[*13] MR. JUSTICE STEWART, concurring.

I have previously expressed the belief that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." [McLaughlin v. Florida, 379 U.S. 184, 198](#) (concurring opinion). Because I adhere to that belief, I concur in the judgment of the Court.

References

Am Jur, Miscegenation (1st ed 3)

US Digest Anno, Civil Rights 4.5

ALR Digests, Marriage 29

L ed Index to Anno, Civil Rights

ALR Quick Index, Marriage

Annotation [****20] References:

Recognition of foreign marriage as affected by local miscegenation law. [3 ALR2d 240](#).

End of Document

Meyer v. Nebraska

Supreme Court of the United States

Argued February 23, 1923. ; June 4, 1923, Decided

No. 325.

Reporter

262 U.S. 390 *; 43 S. Ct. 625 **; 67 L. Ed. 1042 ***; 1923 U.S. LEXIS 2655 ****; 29 A.L.R. 1446

MEYER v. STATE OF NEBRASKA.

Prior History: [****1] ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

ERROR to a judgment of the Supreme Court of Nebraska affirming a conviction for infraction of a statute against teaching of foreign languages to young children in schools.

Disposition: The court reversed the state supreme court's judgment, holding that the Nebraska statute was arbitrary and infringed on the liberty guaranteed under the Fourteenth Amendment to the United States Constitution.

Core Terms

teach, teach, eighth grade, tongue

Case Summary

Procedural Posture

Plaintiff in error, a teacher, sought review of a judgment from the Nebraska Supreme Court, which affirmed a conviction for violating 1919 Neb. Laws ch. 249, a statute that prohibited teaching of languages other than English to children who had not passed the eighth grade.

Overview

The teacher, while working in a parochial school, was convicted for teaching the German language to a 10-year old child who had not successfully passed

the eighth grade. The state supreme court had held that the statute was a valid exercise of the State's police power. The court reversed, holding that the statute was arbitrary and without reasonable relation to any legitimate State goal. The court further held that the liberty guaranteed by [U.S. Const. amend. XIV](#) protected the teacher's right to teach and the right of parents to engage the teacher in educating their children. The court stated that education and acquisition of knowledge were matters of supreme importance that should be diligently promoted. The State could not, under the guise of exercising its police power, interfere with such guaranteed liberty interests. The court found that, by the statute, the legislature was attempting to materially interfere with the calling of modern language teachers, with the opportunities of students to acquire knowledge, and with the power of parents to control the education of their own children. Thus, the teacher's conviction was based on an unconstitutional statute.

Outcome

The court reversed the state supreme court's judgment, holding that the Nebraska statute was arbitrary and infringed on the liberty guaranteed under the [Fourteenth Amendment to the United States Constitution](#).

LexisNexis® Headnotes

Constitutional Law > Substantive Due
Process > General Overview

HN1 See [U.S. Const. amend. XIV](#).

Constitutional Law > Substantive Due
Process > General Overview

Constitutional Law > Substantive Due
Process > Privacy > General Overview

HN2 The liberty guaranteed under [U.S. Const. amend. XIV](#) denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Constitutional Law > Substantive Due
Process > Scope

Governments > Police Powers

HN3 The liberty guaranteed under [U.S. Const. amend. XIV](#) may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of a state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

HN4 A teacher's right to teach and the right of parents to engage a teacher to instruct their children are within the liberty guaranteed under [U.S. Const. amend. XIV](#).

Constitutional Law > Substantive Due
Process > Scope

Education Law > ... > Curriculum > Regulation &
Selection > Governmental Authority

HN5 1919 Neb. Laws ch. 249 as applied is arbitrary and without reasonable relation to any end within the competency of the State.

Lawyers' Edition Display

Headnotes

Constitutional law -- guaranty of liberty -- what included. --

Headnote:

The liberty guaranteed by the [14th Amendment to the Federal Constitution](#) denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

[For other cases, see Constitutional Law, IV. b, 3, in Digest Sup. Ct. 1908.]

Constitutional law -- interference with liberty -- protection of public interests. --

Headnote:

The liberty protected by the [14th Amendment to the Federal Constitution](#) may not be interfered with, under the guise of protecting the public interests, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.

[For other cases, see Constitutional Law, IV. b, 3, Digest Sup. Ct. 1908.]
in Digest Sup. Ct. 1908.]

Courts -- determination of police power. --

Headnote:

Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts.

[For other cases, see Courts, I. e, 3, b, in Digest Sup. Ct. 1908.]

Parent and child -- duty to educate child. --

Headnote:

It is the natural duty of a parent to give his children education suitable to their station in life.

[For other cases, see Parent and Child, in Digest Sup. Ct. 1908.]

Constitutional law -- forbidding teaching foreign language in school -- violation of liberty. --

Headnote:

Forbidding the teaching in school of any other than the English language until the pupil has passed the eighth grade violates the guaranty of liberty in the [14th Amendment to the Federal Constitution](#), in the absence of sudden emergency rendering knowledge of the foreign language clearly harmful.

[For other cases, see Constitutional Law, IV. b, 3, in Digest Sup. Ct. 1908.]

Constitutional law -- who protected by. --

Headnote:

The protection of the Federal Constitution extends to those who speak other languages as well as to those who speak English.

[For other cases, see Constitutional Law, II. a, in

Syllabus

A state law forbidding, under penalty, the teaching in any private, denominational, parochial or public school, of any modern language, other than English, to any child who has not attained and successfully passed the eighth grade, invades the liberty guaranteed by the [Fourteenth Amendment](#) and exceeds the power of the State. P. 399.

So held where the statute was applied in punishment of an instructor who taught reading in German, to a child of ten years, in a parochial school.

[107 Neb. 657](#), reversed.

Counsel: Mr. Charles E. Sandall, with whom Mr. I. L. Albert, Mr. Arthur G. Wray and Mr. August Wagner were on the briefs, for plaintiff in error.

The right to choose and pursue a given legitimate vocation is within the rights guaranteed by the [Fourteenth Amendment](#).

The vocation of the plaintiff is teaching -- a legitimate vocation -- and in teaching, as he did, a certain subject in a language other than English, he encroached upon the rights of no other [****2] person. [Ritchie v. People, 155 Ill. 98](#); [Ex parte Harrison, 212 Mo. 88](#); [Butchers' Union Co. v. Crescent City Co., 111 U.S. 746](#); [Hooper v. California, 155 U.S. 662](#); [Allgeyer v. Louisiana, 165 U.S. 589](#); [Cully v. Baltimore & Ohio R.R. Co., 1 Hughes, 539](#); [Adair v. United States, 208 U.S. 578](#); [Munn v. Illinois, 94 U.S. 113](#); [Taylor v. Beckham, 178 U.S. 548](#); [Powell v. Pennsylvania, 127 U.S. 678](#). [Berea College v. Kentucky, 211 U.S. 45](#), dissenting opinion, p. 67.

Imparting knowledge in a foreign language is not inherently immoral or inimical to the public welfare, and not a legitimate subject for prohibitory legislation. In fact, an examination of the statute

will show that the legislature did not regard the teaching of a pupil in some language other than English as vicious or inimical to the public welfare. It applies only to schools, leaving teachers and others at liberty to teach privately. [State v. Redmon, 134 Wis. 89](#); [People v. Weiner, 271 Ill. 74](#).

When the legislature by clear implication finds that the practice or pursuit against which the act is leveled does not of itself injuriously affect the public, a measure designed to prohibit it is unconstitutional. It being clear, therefore, [****3] both upon reason and legislative finding, that the prohibited acts are not harmful, this measure, insofar as it imposes upon teachers, both lay and clerical, penalties of fine and imprisonment for the giving of instruction in languages, is violative of their constitutional right to engage in the practice of their chosen profession or calling. [Coal Co. v. People, 17 Ill. 66](#); [Adams v. Tanner, 244 U.S. 590](#).

The statute, as construed by the Supreme Court of Nebraska, is prohibitive, not regulatory of a legitimate vocation.

The statute in question is not a legitimate exercise of the police power. The exercise of the police power can be justified only when it adds, in a substantial way, to the security of the fundamental rights.

The relation to the common good of a law fixing a minimum of education is readily perceived, but how one fixing a maximum -- limiting the field of human knowledge -- can serve the public welfare or add substantially to the security of life, liberty or the pursuit of happiness is inconceivable. [State v. Redmon, supra](#); [Mugler v. Kansas, 123 U.S. 623](#); [Wyeth v. Cambridge Board of Health, 200 Mass. 474](#); [State v. Sperry, 94 Neb. 785](#).

One claim put forward is, [****4] that the statute forwards the work of Americanization. But in our desire for the Americanization of our foreign born population we should not overlook the fact that the spirit of American is liberty and toleration -- the disposition to allow each person to live his own life in his own way, unhampered by unreasonable and

arbitrary restrictions.

The law, as construed by the Supreme Court of Nebraska, operates to deny the plaintiff in error the equal protection of the law.

The law is directed against the teaching in or of a foreign language in public, private, denominational and parochial schools. It leaves those engaged in giving private lessons in such languages free to pursue their vocations. [Nebraska District Evangelical Synod v. McKelvie, 104 Neb. 93](#); [Bailey v. People, 190 Ill. 28](#); [Dunahoo v. Huber, 185 Ia. 753](#); [State v. Sloane, 49 N.J.L. 356](#); [State v. Ramsey, 48 Minn. 236](#); [Lincoln v. Lincoln Gas Co., 182 Fed. 926](#); [Haynes v. Lapeer Circuit Judge, 201 Mich. 138](#); [Smith v. Board of Examiners, 85 N.J.L. 46](#).

Mr. Mason Wheeler and Mr. O. S. Spillman, with whom Mr. Clarence A. Davis, Attorney General of the State of Nebraska, and Mr. Hugh La Master were on the brief, for defendant [****5] in error.

The federal constitutional question was injected into the case as an afterthought and too late to permit its review by this Court.

The statute was a legitimate exercise of the police power of the State.

The statute forbids the teaching of foreign languages to children of tender years before such children are grounded in the English tongue. It does not forbid the use of foreign languages by persons of maturity or prevent the study of foreign languages by persons who have passed the eighth grade. It does not in any way interfere with bona fide religious instruction or with any legitimate religion.

The object of the legislation, as is pointed out in [Nebraska District of Evangelical Synod v. McKelvie, 104 Neb. 93](#), and in the second case, [187 N.W. 927](#), and in the decision below, and by the [Ohio Supreme Court in Pohl v. State, 102 Oh. St. 474](#), and by the [Iowa Supreme Court in Bartels v. State, 191 Ia. 1060](#), was to create an enlightened American citizenship in sympathy with the

principles and ideals of this country, and to prevent children reared in America from being trained and educated in foreign languages and foreign ideals before they have had an opportunity to learn [****6] the English language and observe American ideals. It is a well known fact that the language first learned by a child remains his mother tongue and the language of his heart. The purpose of the statute is to insure that the English language shall be the mother tongue and the language of the heart of the children reared in this country who will eventually become the citizens of this country.

These foreign language statutes are no more difficult to sustain under the police power of the State than the Bank Guarantee Act, the Workmen's Compensation Acts, the Female Labor Laws, and Tenement Housing legislation.

Taking the test laid down as to the legitimate exercise of the police power by Freund (§ 143): A danger exists; of sufficient magnitude; concerning the public; the proposed measure tends to remove it; the restraint is a requirement in proportion to the danger; it is possible to secure the object sought without impairing essential rights and principles. [Wilson v. New, 243 U.S. 332](#); [Muller v. Oregon, 208 U.S. 412](#); [Second Employers' Liability Cases, 223 U.S. 1](#); [Arizona Employers' Liability Cases, 250 U.S. 400](#); [Block v. Hirsh, 256 U.S. 135](#). If it is within the police power of [****7] the State to regulate wages, to legislate respecting housing conditions in crowded cities, to prohibit dark rooms in tenement houses, to compel landlords to place windows in their tenements which will enable their tenants to enjoy the sunshine, it is within the police power of the State to compel every resident of Nebraska so to educate his children that the sunshine of American ideals will permeate the life of the future citizens of this Republic.

The recognized general necessity for legislation similar to the Nebraska foreign language act is shown by the fact that twenty-one States besides Nebraska have enacted similar foreign language laws.

In no State has this foreign language legislation been successfully attacked. Three attempts only have been made, in Ohio, Iowa and Nebraska. In every adjudicated case the legislation has been upheld and sustained as against all constitutional objections.

The police power itself is an attribute of sovereignty. It exists without any reservation in the Constitution. It is founded on the right of the State to protect its citizens, to provide for their welfare and progress and to insure the good of society. It corresponds to the right of [****8] self preservation in the individual. Its application varies with the exigencies of the situation and with the progress of mankind. It is the foundation of our social system and upon it depends the security of social order, the life and health of the citizen, the comfort of existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. It extends to the protection of life, health, comfort and welfare of persons, protection of property, and to the welfare of the State itself. All natural persons within the jurisdiction hold their property and pursue their various callings subject to the police power. It is inherent in the various States of the Union, as well as in the Federal Government. To the extent that property or business is devoted to public use or is affected with a public interest it is subject to regulation by the police power. It extends to regulation of education as the very existence of our government, as well as its progress and development, depends upon the intelligence of our citizenry. [McLean v. Arkansas, 211 U.S. 539](#); [Muller v. Oregon, 208 U.S. 412](#); [Holden v. Hardy, 169 U.S. 366](#); [Jacobson v. Massachusetts, \[****9\] 197 U.S. 11](#); [Atkin v. Kansas, 191 U.S. 207](#); [Murphy v. California, 225 U.S. 623](#); [Booth v. Illinois, 184 U.S. 425](#); [Second Employers' Liability Cases, 223 U.S. 1](#); [Noble State Bank v. Haskell, 219 U.S. 104](#); s. c., [219 U.S. 575](#); [Arizona Employers' Liability Cases, 250 U.S. 400](#); [Gilbert v. Minnesota, 254 U.S. 325](#); [Wilson v. New, 243 U.S. 332](#); [Block v. Hirsh, 256 U.S. 135](#); [State v. Sperry, 94 Neb. 785](#); [Matter of Gregory, 219 U.S. 216](#); [Rast v. Van](#)

[Deman & Lewis Co., 240 U.S. 342](#); [Pitney v. Washington, 240 U.S. 387](#); [Tanner v. Little, 240 U.S. 369](#).

The statute does not unlawfully interfere with the defendant's occupation as a teacher. [Mugler v. Kansas, 123 U.S. 623](#); [Wenham v. State, 65 Neb. 395](#); [Muller v. Oregon, 208 U.S. 412](#); [Barbier v. Connolly, 113 U.S. 27](#); [Slaughter-House Cases, 16 Wall. 36](#); [Chicago, Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549](#).

The statute does not deny defendant the equal protection of the law. [Nebraska District of Evangelical Synod v. McKelvie, 187 N.W. 927](#); [Miller v. Wilson, 236 U.S. 373](#); [Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61](#); [Johnston v. Kennecott Copper Co., 248 Fed. 407](#); [Halter v. Nebraska, 205 U.S. 34](#); [Quong Wong v. Kirkendall, 223 U.S. \[****10\] 59](#); [Wilson v. New, 243 U.S. 332](#); [Pitney v. Washington, 240 U.S. 387](#); [Tanner v. Little, 240 U.S. 369](#); [McLean v. Arkansas, 211 U.S. 539](#); [Lower Vein Coal Co. v. Industrial Board, 255 U.S. 144](#).

Mr. William D. Guthrie and Mr. Bernard Hershkopf, by leave of court, filed a brief as amici curioe.

Opinion by: MCREYNOLDS

Opinion

[*396] [**626] [***1044] MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Plaintiff in error was tried and convicted in the District Court for Hamilton County, Nebraska, under an information which charged that on May 25, 1920, while an instructor in Zion Parochial School, he unlawfully taught the subject of reading in the German language to Raymond Parpart, a child of ten years, who had not attained [*397] and successfully passed the eighth grade. The information is based upon "An act relating to the

teaching of foreign languages in the State of Nebraska," approved April 9, 1919, which follows [Laws 1919, c. 249.]:

"Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language.

"Sec. 2. Languages, other [****11] than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.

"Sec. 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five dollars (\$25), nor more than one hundred dollars (\$100) or be confined in the county jail for any period not exceeding thirty days for each offense.

"Sec. 4. Whereas, an emergency exists, this act shall be in force from and after its passage and approval."

The Supreme Court of the State affirmed the judgment of conviction. [107 Neb. 657](#). It declared the offense charged and established was "the direct and intentional teaching of the German language as a distinct subject to a child who had not passed the eighth grade," in the parochial school maintained by Zion Evangelical Lutheran Congregation, a collection of Biblical stories being used therefor. And it held that the statute forbidding this did not conflict with the [Fourteenth Amendment](#), but [****12] was a valid exercise of the police power. The following excerpts from the opinion sufficiently indicate the reasons advanced to support the conclusion.

"The salutary purpose of the statute is clear. The legislature had seen the baneful effects of permitting foreigners, [*398] who had taken

residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the [****13] English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state. *Pohl v. State*, 132 N.E. (Ohio) 20; *State v. Bartels*, 181 N.W. (Ia.) 508.

[***1045] "It is suggested that the law is an unwarranted restriction, in that it applies to all citizens of the state and arbitrarily interferes with the rights of citizens who are not of foreign ancestry, and prevents them, without reason, from having their children taught foreign languages in school. That argument is not well taken, for it assumes that every citizen finds himself restrained by the statute. The hours which a child is able to devote to study in the confinement of school are limited. It must have ample time for exercise or play. Its daily capacity for learning is comparatively small. A selection of subjects for its education, therefore, from among the many that might be taught, is obviously necessary. The legislature no doubt had in mind the practical operation of the law. The law affects few citizens, except those of foreign lineage. [*399] Other citizens, in their selection of studies, except perhaps [****14] in rare instances, have never deemed it of importance to teach their children

foreign languages before such children have reached the eighth grade. In the legislative mind, the salutary effect of the statute no doubt outweighed the restriction upon the citizens generally, which, it appears, was a restriction of no real consequence."

The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the [HN1 Fourteenth Amendment](#). "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, [HN2](#) it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as [****15] essential to the orderly pursuit of happiness by free men. [Slaughter-House Cases](#), 16 *Wall.* 36; [Butchers' Union Co. v. Crescent City Co.](#), 111 U.S. 746; *Yick W v v. Hopkins*, 118 U.S. 356; [*627] [Minnesota v. Barber](#), 136 U.S. 313; [Allgeyer v. Louisiana](#), 165 U.S. 578; [Lochner v. New York](#), 198 U.S. 45; [Twining v. New Jersey](#), 211 U.S. 78; [Chicago, Burlington & Quincy R.R. Co. v. McGuire](#), 219 U.S. 549; [Truax v. Raich](#), 239 U.S. 33; [Adams v. Tanner](#), 244 U.S. 590; [New York Life Ins. Co. v. Dodge](#), 246 U.S. 357; [Truax v. Corrigan](#), 257 U.S. 312; [Adkins v. Children's Hospital](#), 216 U.S. 525; [Wyeth v. Cambridge Board of Health](#), 200 *Mass.* 474. The established doctrine is that [HN3](#) this liberty may not be interfered [*400] with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes

proper exercise of police power is not final or conclusive but is subject to supervision by the courts. [*Lawton v. Steele*, 152 U.S. 133, 137.](#)

The American people have always regarded education and acquisition of knowledge as matters of [****16] supreme importance which should be diligently promoted. The Ordinance of 1787 declares, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.

Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonable be regarded as harmful. Heretofore it has been commonly [***1046] looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His [HN4](#) right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.

The challenged statute forbids the teaching in school of any subject except in [****17] English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The Supreme Court of the State has held that "the so-called ancient or dead languages" are not "within the spirit or the purpose of [*401] the act." [*Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 187 N.W.927.](#) Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian and every other alien speech are within the ban. Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with

the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.

It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals; and "that the English language should be and become the mother tongue of all children reared in this State." It is also affirmed that the foreign born population is very large, that certain communities commonly [****18] use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution -- a desirable end cannot be promoted by prohibited means.

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, [*402] nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in [****19] a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be." In order to submerge the individual and develop ideal

citizens, Sparta assembled the **[**628]** males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the State and conflict **[****20]** with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown.

The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the Supreme Court. [Adams v. **\[*403\]** Tanner, supra, p. 594](#), pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long **[***1047]** freely enjoyed. We are constrained to conclude that [HN5](#) the statute as applied is arbitrary and without reasonable relation to any end within the

competency of the State.

As the statute undertakes **[****21]** to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

[See the separate opinion of MR. JUSTICE HOLMES, concurred in by MR. JUSTICE SUTHERLAND, in the next case, at p. 412, *infra*.]



Caution

As of: October 18, 2026 7:03 AM Z

Michael H. v. Gerald D.

Supreme Court of the United States

October 11, 1988, Argued ; June 15, 1989, Decided

No. 87-746

Reporter

491 U.S. 110 *; 109 S. Ct. 2333 **; 105 L. Ed. 2d 91 ***; 1989 U.S. LEXIS 2977 ****; 57 U.S.L.W. 4691

MICHAEL H. ET AL. v. GERALD D.

Prior History: [****1] APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

Disposition: [191 Cal. App. 3d 995, 236 Cal. Rptr. 810](#), affirmed.

Core Terms

plurality, paternity, natural father, visitation rights, liberty interest, conclusive presumption, marital, marriage, father's, due process, marry, parental rights, unitary, birth, rebut, constitutionally protected interest, best interests of the child, biological father, illegitimate, terminate, cohabit, conceive, deprive, unwed, putative father, blood test, biological, couple, illegitimacy, parent-child

Case Summary

Procedural Posture

Petitioners appealed from an order of the Court of Appeal of California, Second Appellate District, granting summary judgment in favor of respondent in petitioner father's filiation action and petitioner child's cross-complaint seeking to maintain her filial relationship with respondent and petitioner father.

Overview

Mother and respondent were married. Mother had an adulterous relationship with petitioner father. As a result petitioner child was born. Respondent was

listed as father on child's birth certificate and held child out to the world as his daughter. Blood tests showed a 98.07 percent probability that petitioner was child's father. For a time, mother resided with petitioner, who held child out as his daughter. Mother subsequently moved and rebuffed father's attempts to visit child. Petitioner filed a filiation action to establish his paternity and right to visitation. Child filed a cross-complaint asserting that if she had more than one de facto father, she was entitled to maintain her filial relationship with both. Mother and respondent reconciled. Respondent intervened, and the superior court granted his motion for summary judgment against petitioner and child. The California Court of Appeal affirmed. The California Supreme Court denied discretionary review. The Supreme Court affirmed.

Outcome

Summary judgment affirmed; petitioner father did not have a liberty interest traditionally protected by society that would give rise to substantive due process rights, and petitioner child's due process claim failed for the same reason; in addition, petitioner child's equal protection challenge did not survive rational relationship scrutiny.

LexisNexis® Headnotes

Family Law > Paternity & Surrogacy > General Overview

HN1 Family Law, Paternity & Surrogacy

See Cal. Civ. Proc. Code § 621.

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > Substantive Due Process > General Overview

HN2 Constitutional Law, Substantive Due Process

The term "liberty" in the Due Process Clause extends beyond freedom from physical restraint.

Constitutional Law > Substantive Due Process > General Overview

HN3 Constitutional Law, Substantive Due Process

Due Process Clause affords only those protections so rooted in the traditions and conscience of the American people as to be ranked as fundamental.

Constitutional Law > Equal Protection > Parentage

Family Law > Parental Duties & Rights > Nonmarital Children > General Overview

HN4 Equal Protection, Parentage

Illegitimacy is a legal construct, not a natural trait.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Family Law > Guardians > Appointment

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Family Law > Parental Duties & Rights > Nonmarital Children > General Overview

HN5 Case or Controversy, Constitutionality of Legislation

The court applies the ordinary "rational relationship" test to a child's equal protection challenge to [Cal. Evid. Code ann. § 621](#) (Supp. 1989). The primary rationale underlying [§ 621](#)'s limitation on those who may rebut the presumption of legitimacy is a concern that allowing persons other than the husband or wife to do so may undermine the integrity of the marital union. When the husband or wife contests the legitimacy of their child, the stability of the marriage has already been shaken. In contrast, allowing a claim of illegitimacy to be pressed by the child -- or, more accurately, by a court-appointed guardian ad litem -- may well disrupt an otherwise peaceful union. Since it pursues a legitimate end by rational means, California's decision to treat a child differently from her parents is not a denial of equal protection.

Lawyers' Edition Display**Decision**

California statute's presumption that husband of child's mother is child's father held not to violate unwed putative father's rights under [due process clause of Fourteenth Amendment](#).

Summary

In 1982, a child's unwed putative father filed a filiation action in the Superior Court of California to establish his paternity and right to visitation. The child's mother had been married to, and cohabiting with, a man other than the child's putative father at the time of the child's conception and birth. From

August 1983 to May 1984, the mother and child lived with the putative father. During this time, the putative father held the child out as his daughter, and he and the mother signed a stipulation that he was the child's natural father. However, the mother left the putative father in May 1984 and instructed her attorneys not to file the stipulation. In June 1984, the mother moved back in with her husband, and in October of that year the husband, who had intervened in the Superior Court action, moved for summary judgment on the ground that there were no triable issues of fact as to the child's paternity. This assertion was based on a California statute providing that (1) a child of a married woman cohabiting with her husband is presumed to be a child of the marriage where the husband is not impotent or sterile, and (2) the presumption may be rebutted by blood tests, but only if a motion for such tests is made, within 2 years from the date of the child's birth, by (a) the wife, if the natural father has filed an affidavit acknowledging paternity, or (b) the husband. A blood test conducted in 1981, the year of the child's birth, had shown the putative father's paternity by a probability of more than 98 percent, but the mother had never made a motion for this blood test in court. In 1985, having found sufficient evidence that the mother and her husband had been cohabiting at the child's conception and birth and that the husband was neither sterile nor impotent, the Superior Court granted the husband's motion for summary judgment and rejected challenges by the putative father and the child to the constitutionality of the statute. The Superior Court also denied motions by the putative father and the child for continued visitation pending an appeal, under a second California statute which provided that reasonable visitation rights may be granted to any person, other than a parent, having an interest in the child's welfare. The California Court of Appeal, Second District, affirming, held that (1) the conclusive presumption statute did not violate the rights of the putative father or the child under the due process clause of the [Federal Constitution's Fourteenth Amendment](#), (2) the statute did not violate the child's rights under the

[Fourteenth Amendment's equal protection clause](#), and (3) the Superior Court had impliedly determined not only that the husband was the child's presumed father, but that the putative father was not entitled to any visitation rights under the second statute ([191 Cal App 3d 995, 236 Cal Rptr 810](#)). The Court of Appeal denied petitions for rehearing by the putative father and the child, and the Supreme Court of California denied discretionary review.

On appeal, the United States Supreme Court affirmed. Although unable to agree on an opinion, five members of the court agreed that the conclusive presumption statute did not infringe on the due process rights of the putative father or the child, or on the child's equal protection rights.

Scalia, J., announced the judgment of the court and, in an opinion joined by Rehnquist, Ch. J., and joined in part (except for point (3) below) by O'Connor and Kennedy, JJ., expressed the view that (1) the putative father's procedural due process claim failed, because the statute, although phrased in terms of a presumption, was the implementation of a substantive rule of law; (2) the putative father's substantive due process claim failed, because the power of a natural father to claim paternity of a child born into a woman's existing marriage with another man, and to assert parental rights over such a child, is not so deeply embedded within society's traditions as to be a fundamental right qualifying as a liberty interest; (3) in determining whether a due process liberty interest exists with regard to an asserted right, the inquiry focuses on whether the most specific relevant societal tradition that can be identified protects such a right; (4) the child had no due process right to maintain filial relationships with both her putative father and her mother's husband, or with her putative father regardless of her relationship with her mother's husband, and (5) the statute did not violate the child's equal protection rights insofar as the statute denied the child, unlike her mother and her mother's husband, the opportunity to rebut the presumption of paternity, because under the "rational relationship"

test, which was the appropriate standard of scrutiny, the state's decision to treat the child differently from her mother and her mother's husband pursued a legitimate end by rational means.

O'Connor, J., joined by Kennedy, J., concurring in part, (1) expressed general agreement with the plurality opinion, but (2) expressed the view that no single mode of historical analysis, such as that adopted by the plurality (point (3) above), should be imposed when identifying due process liberty interests.

Stevens, J., concurring in the judgment, expressed the view that (1) the statute did not violate due process insofar as it prevented the putative father and the child from obtaining a judicial determination, without legal consequences, of the putative father's paternity, (2) the possibility should not be foreclosed that a constitutionally protected relationship between a natural father and his child might exist in some cases, and (3) assuming that the putative father's relationship with the child was strong enough to give him a constitutional right to seek visitation rights, the California statutory scheme was consistent with due process, because (a) it allowed reasonable visitation rights to be granted to any person, other than a parent, having an interest in the child's welfare, (b) it gave a trial court the authority both to hear a plea for visitation rights by a natural father, as a person having such an interest, and to grant him such rights if the child's best interests so warrant, (c) a trial court found not only that the conclusive presumption was applicable in the case at hand but also that it was not in the best interests of the child that the putative father have visitation rights, and (d) therefore, under the circumstances, the putative father was given a fair opportunity to show that he was the child's natural father and that the child's interests would be served by granting him visitation rights.

Brennan, J., joined by Marshall and Blackmun, JJ., dissenting, expressed the view that (1) a natural father's biological link to his child, combined with a

substantial parent-child relationship maintained between them, guarantees the natural father a liberty interest in his relationship with the child, (2) the presumption statute, as interpreted by the California courts, not only prevented the putative father from establishing his paternity but also prevented him from obtaining visitation rights as a nonparent, (3) the flaw in the statute was the kind that procedural due process was designed to correct, and (4) the presumption statute violated the putative father's procedural due process rights, because California's purported interest in protecting matrimonial privacy did not measure up to the interest of the putative father and the child in maintaining their relationship with each other and thus did not justify denying the putative father a hearing before terminating his rights.

White, J., dissenting, expressed the view that (1) 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, (2) the putative father in this case established such a liberty interest, (3) the presumption statute was not justified by California's purported interests in protecting a child from the social stigma of illegitimacy or preserving the sanctity of the marital unit, and (4) the statute, as applied, violated the putative father's procedural due process rights, because it denied him any meaningful opportunity to be heard in order to establish his paternity and develop a relationship with the child.

Headnotes

CONSTITUTIONAL LAW §528.5 > due process -- deprivation of liberty -- statutory presumption -- determination of paternity -- putative father's visitation rights -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D] [LEdHN\[1E\]](#) [1E] [LEdHN\[1F\]](#) [1F] [LEdHN\[1G\]](#) [1G] [LEdHN\[1H\]](#) [1H]

A state statute providing that (1) a child of a married woman cohabiting with her husband is presumed to be a child of the marriage where the husband is not impotent or sterile, and (2) the presumption may be rebutted by blood tests, but only if a motion for such tests is made, within 2 years from the date of the child's birth, by (a) the wife, if the natural father has filed an affidavit acknowledging paternity, or (b) the husband, will be held by the United States Supreme Court not to violate the due process clause of the [Federal Constitution's Fourteenth Amendment](#) insofar as the statute is applied to deny a man the opportunity to obtain--absent a timely motion for blood tests--a judicial determination that he is a child's biological father and to obtain visitation rights, where (1) four Justices of the Supreme Court are of the view that the statute does not infringe on any protected liberty interest of the putative father, because the power of a natural father to assert parental rights over a child born into a woman's existing marriage with another man is not so deeply embedded within society's traditions as to be a fundamental right qualifying as a liberty interest, and (2) a fifth Justice is of the view that the state's statutory scheme, as applied in the case at hand, is consistent with due process, because (a) it provides that reasonable visitation rights may be granted to any person, other than a parent, having an interest in the child's welfare, (b) it gives a trial court the authority both to hear a plea for visitation rights by a natural father, as a person having such an interest, and to grant him such rights if the child's best interests so warrant, (c) a trial court found not only that the conclusive presumption was applicable in the case at hand but also that it was not in the best interests of the child in question that the putative father have visitation rights, and (d) therefore, under the circumstances, the putative father in question was given a fair opportunity to show that he was the child's natural father and that the child's interests would be served by granting him visitation rights. [Per Scalia, J., Rehnquist, Ch. J., and O'Connor, Kennedy, and Stevens, JJ. Dissenting: Brennan, Marshall, Blackmun, and White, JJ.]

APPEAL §1673 > CONSTITUTIONAL LAW
 §528.5 > affirmance -- due process -- deprivation of liberty -- statutory presumption -- determination of paternity -- child's relationship with putative father --
 > Headnote:
[LEdHN\[2A\]](#) [2A][LEdHN\[2B\]](#) [2B][LEdHN\[2C\]](#) [2C]

The United States Supreme Court will affirm a state appellate court judgment which held that a state statute providing that (1) a child of a married woman cohabiting with her husband is presumed to be a child of the marriage where the husband is not impotent or sterile, and (2) the presumption may be rebutted by blood tests, but only if a motion for such tests is made, within 2 years from the date of the child's birth, by (a) the wife, if the natural father has filed an affidavit acknowledging paternity, or (b) the husband, does not violate the due process clause of the [Federal Constitution's Fourteenth Amendment](#) insofar as the statute is applied to prevent a child whose mother was married to, and cohabiting with, a man other than the child's putative father at the time of the child's conception and birth from obtaining a legal determination of who the child's biological father is, where (1) four Justices of the Supreme Court are of the view that the statute does not infringe on any protected liberty interest of the child, because the child has no liberty interest in maintaining filial relationships with both her putative father and her mother's husband, or with her putative father regardless of her relationship with her mother's husband, and (2) a fifth Justice is of the view that the state's statutory scheme, as applied, is consistent with due process, because the putative father, when applying for visitation rights as a nonparent, was given a fair opportunity to show that he was the child's natural father. [Per Scalia, J., Rehnquist, Ch. J., and O'Connor, Kennedy, and Stevens, JJ. Dissenting: Brennan, Marshall, and Blackmun, JJ.]

Kennedy, Brennan, Marshall, and Blackmun, JJ.]

APPEAL §1673 > CONSTITUTIONAL LAW

§490 > affirmance -- equal protection -- presumption of paternity -- child's right to rebut -- > Headnote:

[LEdHN\[3A\]](#) [3A][LEdHN\[3B\]](#) [3B]

The United States Supreme Court will affirm a state appellate court judgment which held that a state statute providing that (1) a child of a married woman cohabiting with her husband is presumed to be a child of the marriage where the husband is not impotent or sterile, and (2) the presumption may be rebutted by blood tests, but only if a motion for such tests is made, within 2 years from the date of the child's birth, by (a) the wife, if the natural father has filed an affidavit acknowledging paternity, or (b) the husband, does not violate the [equal protection clause](#) of the [Federal Constitution's Fourteenth Amendment](#) insofar as the statute is applied to deny a child whose mother was married to, and cohabiting with, a man other than the child's putative father at the time of the child's conception and birth the opportunity to rebut the presumption, where (1) four Justices of the Supreme Court are of the view that (a) the child's claim is to be assessed under the "rational relationship" test, and (b) the state's decision to treat the child differently from her mother and her mother's husband pursues a legitimate end by rational means, and (2) a fifth Justice concurs in the Supreme Court's judgment, but does not discuss the issue of equal protection. [Per Scalia, J., Rehnquist, Ch. J., and O'Connor, Kennedy, and Stevens, JJ.]

CONSTITUTIONAL LAW §525 > due process -- liberty -- > Headnote:

[LEdHN\[4A\]](#) [4A][LEdHN\[4B\]](#) [4B]

The term "liberty" in the due process clause of the [Federal Constitution's Fourteenth Amendment](#) extends beyond freedom from physical restraint. [Per Scalia, J., Rehnquist, Ch. J., and O'Connor,

CONSTITUTIONAL LAW §830.7 > due process -- statutory presumption -- determination of paternity -- > Headnote:

[LEdHN\[5A\]](#) [5A][LEdHN\[5B\]](#) [5B][LEdHN\[5C\]](#) [5C][LEdHN\[5D\]](#) [5D]

A state statute providing that (1) a child of a married woman cohabiting with her husband is presumed to be a child of the marriage where the husband is not impotent or sterile, and (2) the presumption may be rebutted by blood tests, but only if a motion for such tests is made, within 2 years from the date of the child's birth, by (a) the wife, if the natural father has filed an affidavit acknowledging paternity, or (b) the husband, does not violate the due process clause of the [Federal Constitution's Fourteenth Amendment](#) insofar as the statute is applied to prevent a putative father and a child from obtaining a judicial determination that the man is the child's biological father where (1) no timely motion for blood tests has been made, and (2) no legal rights would be affected by such a determination. [Per Scalia, J., Rehnquist, Ch. J., and O'Connor, Kennedy, and Stevens, JJ.]

CONSTITUTIONAL LAW §101 > right to declaration of facts -- > Headnote:

[LEdHN\[6A\]](#) [6A][LEdHN\[6B\]](#) [6B]

It is no denial of federal constitutional right for a state to decline to declare facts unless some legal consequence hinges upon the requested declaration. [Per Scalia, J., Rehnquist, Ch. J., and O'Connor, Kennedy, and Stevens, JJ.]

CONSTITUTIONAL LAW §101 > PARENT AND

CHILD §1 > unwed natural father's rights --

> Headnote:

[LEdHN\[7A\]](#) [7A][LEdHN\[7B\]](#) [7B][LEdHN\[7C\]](#) [7C]

The United States Supreme Court will not foreclose the possibility that a natural father might ever have an interest protected by the Federal Constitution 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. [Per Stevens, Brennan, Marshall, Blackmun, and White, JJ. Contra: Scalia, J., Rehnquist, Ch. J., and O'Connor and Kennedy, JJ.]

Syllabus

In May 1981, appellant Victoria D. was born to Carole D., who was married to, and resided with, appellee Gerald D. in California. Although Gerald was listed as father on the birth certificate and has always claimed Victoria as his daughter, blood tests showed a 98.07% probability that appellant Michael H., with whom Carole had had an adulterous affair, was Victoria's father. During Victoria's first three years, she and her mother resided at times with Michael, who held her out as his own, at times with another man, and at times with Gerald, with whom they have lived since June 1984. In November 1982, Michael filed a filiation action in California Superior Court to establish his paternity and right to visitation. Victoria, through her court-appointed guardian ad litem, filed a cross-complaint asserting that she was entitled to maintain filial relationships with both Michael and Gerald. The court ultimately granted Gerald summary judgment on the ground that there were no triable issues of fact as to paternity under [****2] [Cal. Evid. Code § 621](#), which provides that a child born to a married woman living with her husband, who is neither impotent nor sterile, is presumed to be a child of the marriage, and that this presumption may be rebutted only by the husband or wife, and then only in limited circumstances. Moreover, the court

denied Michael's and Victoria's motions for visitation pending appeal under [Cal. Civ. Code § 4601](#), which provides that a court may, in its discretion, grant "reasonable visitation rights . . . to any . . . person having an interest in the [child's] welfare." The California Court of Appeal affirmed, rejecting Michael's procedural and substantive due process challenges to [§ 621](#) as well as Victoria's due process and equal protection claims. The court also rejected Victoria's assertion of a right to continued visitation with Michael under [§ 4601](#), on the ground that California law denies visitation against the wishes of the mother to a putative father who has been prevented by [§ 621](#) from establishing his paternity.

Held: The judgment is affirmed.

Counsel: Robert A. W. Boraks argued the cause for appellants. With him on the briefs for appellant Michael H. were George Kaufmann, [****3] Ronald K. Henry, Paul R. Taskier, and Joel S. Aaronson. Leslie Ellen Shear filed briefs for appellant Victoria D.

Larry M. Hoffman argued the cause for appellee. With him on the brief was Glen H. Schwartz. *

Judges: Scalia, J., announced the judgment of the Court and delivered an opinion, in which Rehnquist, C. J., joined, and in all but n. 6 of which O'Connor and Kennedy, JJ., joined. O'Connor, J., filed an opinion concurring in part, in which Kennedy, J., joined, post, p. 132. Stevens, J., filed an opinion concurring in the judgment, post, p. 132. Brennan, J., filed a dissenting opinion, in which Marshall and Blackmun, JJ., joined, post, p. 136. White, J., filed a dissenting opinion, in which Brennan, J., joined, post, p. 157.

Opinion by: SCALIA

*Michael L. Oddenino filed a brief for the National Council for Children's Rights as *amicus curiae* urging reversal.

Paul Hoffman, Joan Howarth, John A. Powell, Helen Hershkoff, Steven R. Shapiro, and Isabelle Katz Pinzler filed a brief for the American Civil Liberties Union Foundation et al. as *amici curiae*.

Opinion

[*113] [***99] [**2337] JUSTICE SCALIA announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE [****4] joins, and in all but footnote 6 of which JUSTICE O'CONNOR and JUSTICE KENNEDY join.

[LEdHN\[1A\]](#) [1A] [LEdHN\[2A\]](#) [2A] [LEdHN\[3A\]](#) [3A] Under California law, a child born to a married woman living with her husband is presumed to be a child of the marriage. [Cal. Evid. Code Ann. § 621](#) (West Supp. 1989). The presumption of legitimacy may be rebutted only by the husband or wife, and then only in limited circumstances. *Ibid.* The instant appeal presents the claim that this presumption infringes upon the due process rights of a man who wishes to establish his paternity of a child born to the wife of another man, and the claim that it infringes upon the constitutional right of the child to maintain a relationship with her natural father.

I

The facts of this case are, we must hope, extraordinary. On May 9, 1976, in Las Vegas, Nevada, Carole D., an international model, and Gerald D., a top executive in a French oil company, were married. The couple established a home in Playa del Rey, California, in which they resided as husband and wife when one [***100] or the other was not out of the country on business. In the summer of 1978, Carole became involved in an adulterous affair with a neighbor, Michael H. In September 1980, she conceived [****5] a child, Victoria D., who was born on May 11, 1981. Gerald was listed as father on the birth certificate and has always held Victoria out to the world as his [*114] daughter. Soon after delivery of the child, however, Carole informed Michael that she believed he might be the father.

In the first three years of her life, Victoria remained always with Carole, but found herself within a

variety of quasifamily units. In October 1981, Gerald moved to New York City to pursue his business interests, but Carole chose to remain in California. At the end of that month, Carole and Michael had blood tests of themselves and Victoria, which showed a 98.07% probability that Michael was Victoria's father. In January 1982, Carole visited Michael in St. Thomas, where his primary business interests were based. There Michael held Victoria out as his child. In March, however, Carole left Michael and returned to California, where she took up residence with yet another man, Scott K. Later that spring, and again in the summer, Carole and Victoria spent time with Gerald in New York City, as well as on vacation in Europe. In the fall, they returned to Scott in California.

In November 1982, rebuffed [****6] in his attempts to visit Victoria, Michael filed a filiation action in California Superior Court to establish his paternity and right to visitation. In March 1983, the court appointed an attorney and guardian ad litem to represent Victoria's interests. Victoria then filed a cross-complaint asserting that if she had more than one psychological or *de facto* father, she was entitled to maintain her filial relationship, with all of the attendant rights, duties, and obligations, with both. In May 1983, Carole filed a motion for summary judgment. During this period, from March through July 1983, Carole was again living with Gerald in New York. In August, however, she returned to California, became involved once again with Michael, and instructed her attorneys to remove the summary judgment motion from the calendar.

For the ensuing eight months, when Michael was not in St. Thomas he lived with Carole and Victoria in Carole's apartment in Los Angeles and held Victoria out as his daughter. In April 1984, Carole and Michael [**2338] signed a stipulation that [*115] Michael was Victoria's natural father. Carole left Michael the next month, however, and instructed her attorneys not to file [****7] the stipulation. In June 1984, Carole reconciled with Gerald and joined him in New York, where they

now live with Victoria and two other children since born into the marriage.

In May 1984, Michael and Victoria, through her guardian ad litem, sought visitation rights for Michael *pendente lite*. To assist in determining whether visitation would be in Victoria's best interests, the Superior Court appointed a psychologist to evaluate Victoria, Gerald, Michael, and Carole. The psychologist recommended that Carole retain sole custody, but that Michael be allowed continued contact with Victoria pursuant to a restricted visitation schedule. The court concurred and ordered *****101** that Michael be provided with limited visitation privileges *pendente lite*.

On October 19, 1984, Gerald, who had intervened in the action, moved for summary judgment on the ground that under [Cal. Evid. Code § 621](#) there were no triable issues of fact as to Victoria's paternity. This law 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." [Cal. Evid. Code Ann. § 621\(a\)](#) (West Supp. 1989). The presumption ******8** may be rebutted by blood tests, but only if a motion for such tests is made, within two years from the date of the child's birth, either by the husband or, if the natural father has filed an affidavit acknowledging paternity, by the wife. [§§ 621\(c\)](#) and [\(d\)](#).

On January 28, 1985, having found that affidavits submitted by Carole and Gerald sufficed to demonstrate that the two were cohabiting at conception and birth and that Gerald was neither sterile nor impotent, the Superior Court granted Gerald's motion for summary judgment, rejecting Michael's and Victoria's challenges to the constitutionality of [§ 621](#). The court also denied their motions for continued visitation pending the appeal under [Cal. Civ. Code § 4601](#), which provides that a court may, in its discretion, grant "reasonable ***116** visitation rights . . . to any . . . person having an interest in the welfare of the child." [Cal. Civ. Code Ann. § 4601](#) (West Supp.

1989). It found that allowing such visitation would "violat[e] the intention of the Legislature by impugning the integrity of the family unit." Supp. App. to Juris. Statement A-91.

On appeal, Michael asserted, *inter alia*, that the Superior Court's application ******9** of [§ 621](#) had violated his procedural and substantive due process rights. Victoria also raised a due process challenge to the statute, seeking to preserve her *de facto* relationship with Michael as well as with Gerald. She contended, in addition, that as [§ 621](#) allows the husband and, at least to a limited extent, the mother, but not the child, to rebut the presumption of legitimacy, it violates the child's right to equal protection. Finally, she asserted a right to continued visitation with Michael under [§ 4601](#). After submission of briefs and a hearing, the California Court of Appeal affirmed the judgment of the Superior Court and upheld the constitutionality of the statute. [191 Cal. App. 3d 995, 236 Cal. Rptr. 810 \(1987\)](#). It interpreted that judgment, moreover, as having denied permanent visitation rights under [§ 4601](#), regarding that as the implication of the Superior Court's reliance upon [§ 621](#) and upon an earlier California case, [Vincent B. v. Joan R., 126 Cal. App. 3d 619, 179 Cal. Rptr. 9 \(1981\)](#), appeal dism'd, 459 U.S. 807 (1982), which had held ******10** that once an assertion of biological paternity is "determined to be legally impossible" under [§ 621](#), visitation against the wishes of the mother should be denied under [§ 4601](#). [126 Cal. App. 3d, at 627-628, 179 Cal. Rptr., at 13](#).

The Court of Appeal denied Michael's and Victoria's petitions for rehearing, and, on July 30, 1987, the California Supreme Court denied discretionary review. On February 29, 1988, we noted probable jurisdiction of the present appeal. 485 U.S. 903. Before us, ****2339** Michael and Victoria both raise equal protection and due process *****102** challenges. We do not reach Michael's equal protection claim, however, as it ***117** was neither raised nor passed upon below. See [Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71](#)

[\(1988\)](#).

II

The California statute that is the subject of this litigation is, in substance, more than a century old. California Code of Civ. Proc. § 1962(5), enacted in 1872, provided that "[t]he issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." In 1955, the legislature amended [****11] the statute by adding the preface: "Notwithstanding any other provision of law." 1955 Cal. Stats., ch. 948, p. 1835, § 3. In 1965, when California's Evidence Code was adopted, the statute was codified as [§ 621](#), with no substantive change except replacement of the word "indisputably" with "conclusively," 1965 Cal. Stats., ch. 299, § 2, pp. 1297, 1308. When California adopted the Uniform Parentage Act, 1975 Cal. Stats., ch. 1244, § 11, pp. 3196-3201, codified at [Cal. Civ. Code Ann. § 7000 et seq.](#) (West 1983), it amended [§ 621](#) by replacing the word "legitimate" with the phrase "a child of the marriage" and by adding nonsterility to nonimpotence and cohabitation as a predicate for the presumption. 1975 Cal. Stats., ch. 1244, § 13, p. 3202. In 1980, the legislature again amended the statute to provide the husband an opportunity to introduce blood-test evidence in rebuttal of the presumption, 1980 Cal. Stats., ch. 1310, p. 4433; and in 1981 amended it to provide the mother such an opportunity, 1981 Cal. Stats., ch. 1180, p. 4761. In their present form, the substantive provisions of the statute are as follows:

[HN1](#) "[§ 621](#). Child of the marriage; notice of motion for blood [****12] tests

"(a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.

[*118] "(b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed

pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

"(c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.

"(d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

"(e) The provisions of subdivision (b) shall not apply to any case coming within the provisions of Section 7005 of the Civil Code [dealing with artificial insemination] or to any case in which the wife, with the consent [****13] of the husband, conceived by means of a surgical procedure."

III

We address first the claims of Michael. [***103] At the outset, it is necessary to clarify what he sought and what he was denied. California law, like nature itself, makes no provision for dual fatherhood. Michael was seeking to be declared *the* father of Victoria. The immediate benefit he evidently sought to obtain from that status was visitation rights. See [Cal. Civ. Code Ann. § 4601](#) (West 1983) (parent has statutory right to visitation "unless it is shown that such visitation would be detrimental to the best interests of the child"). But if Michael were successful in being declared the father, other rights would follow -- most importantly, the right to be considered as the parent who should have custody, [Cal. Civ. Code Ann. § 4600](#) (West 1983), a status which "embrace[s] the sum of parental rights with respect to the rearing of a [**2340] child, including the child's care; the right to the child's services and [*119] earnings;

the right to direct the child's activities; the right to make decisions regarding the control, education, and health of the child; and the right, as well as the duty, to prepare the child [****14] for additional obligations, which includes the teaching of moral standards, religious beliefs, and elements of good citizenship." 4 California Family Law § 60.02[1][b] (C. Markey ed. 1987) (footnotes omitted). All parental rights, including visitation, were automatically denied by denying Michael status as the father. While [Cal. Civ. Code Ann. § 4601](#) places it within the discretionary power of a court to award visitation rights to a nonparent, the Superior Court here, affirmed by the Court of Appeal, held that California law denies visitation, against the wishes of the mother, to a putative father who has been prevented by [§ 621](#) from establishing his paternity. See [191 Cal. App. 3d, at 1013, 236 Cal. Rptr., at 821](#), citing [Vincent B. v. Joan R., 126 Cal. App. 3d, at 627-628 179 Cal. Rptr., at 13](#).

Michael raises two related challenges to the constitutionality of [§ 621](#). 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 [****15] 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 [*120] the integrity of the family unit should not be impugned." [191 Cal. App. 3d, at 1005, 236 Cal. Rptr., at 816](#), quoting [Vincent B. v. Joan R., supra, at 623, 179 Cal. Rptr., at 10](#).

Of course the conclusive presumption not only expresses the State's substantive policy [****16] but also furthers it, excluding inquiries into the child's paternity that would be destructive [***104] of family integrity and privacy.¹

This Court has struck down as illegitimate certain "irrebuttable presumptions." See, e. g., [Stanley v. Illinois, 405 U.S. 645 \(1972\)](#); [Vlandis v. Kline, 412 U.S. 441 \(1973\)](#); [Cleveland Board of Education v. LaFleur, 414 U.S. 632 \(1974\)](#). Those holdings did not, however, rest upon *procedural* due process. A conclusive presumption [****17] does, of course, foreclose the person against whom it is invoked from demonstrating, in a particularized proceeding, that applying the presumption to him will in fact not further the lawful governmental policy the presumption is designed to effectuate. But the same can be said of any legal rule that establishes general classifications, whether framed in terms of a presumption or not. In this respect there is no difference between a rule which says that the marital husband shall be irrebuttably presumed to be the father, and a rule which says that the adulterous natural father shall not be recognized as the legal father. *Both* rules deny someone in Michael's situation a hearing on whether, in the particular circumstances of his case, California's policies would best be served by giving him parental [**2341] rights. Thus, as many commentators have observed, see, e. g., Bezanson, *Some Thoughts on the Emerging Irrebuttable*

¹ In those circumstances in which California allows a natural father to rebut the presumption of legitimacy of a child born to a married woman, e. g., where the husband is impotent or sterile, or where the husband and wife have not been cohabiting, it is more likely that the husband already knows the child is not his, and thus less likely that the paternity hearing will disrupt an otherwise harmonious and apparently exclusive marital relationship.

Presumption Doctrine, 7 Ind. L. Rev. 644 (1974); Nowak, Realigning [*121] the Standards of Review Under the Equal Protection Guarantee -- Prohibited, Neutral, and Permissive Classifications, 62 Geo. L. J. 1071, 1102-1106 (1974); [****18] Note, Irrebuttable Presumptions: An Illusory Analysis, 27 Stan. L. Rev. 449 (1975); Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974), our "irrebuttable presumption" cases must ultimately be analyzed as calling into question not the adequacy of procedures but -- like our cases involving classifications framed in other terms, see, e. g., [Craig v. Boren, 429 U.S. 190 \(1976\)](#); [Carrington v. Rash, 380 U.S. 89 \(1965\)](#) -- the adequacy of the "fit" between the classification and the policy that the classification serves. See [LaFleur, supra, at 652](#) (Powell, J., concurring in result); [Vlandis, supra, at 456-459](#) (White, J., concurring), 466-469 (Rehnquist, J., dissenting); [Weinberger v. Salfi, 422 U.S. 749 \(1975\)](#). We therefore reject Michael's procedural due process challenge and proceed to his substantive claim.

[LEdHN\[1B\]](#) [1B]Michael contends as a matter of substantive due process that, because he has established a parental relationship with [****19] Victoria, protection of Gerald's and Carole's marital union is an insufficient state interest to support termination of that relationship. This argument is, of course, [***105] predicated on the assertion that Michael has a constitutionally protected liberty interest in his relationship with Victoria.

[LEdHN\[4A\]](#) [4A]It is an established part of our constitutional jurisprudence that [HN2](#) the term "liberty" in the Due Process Clause extends beyond freedom from physical restraint. See, e. g., [Pierce v. Society of Sisters, 268 U.S. 510 \(1925\)](#); [Meyer v. Nebraska, 262 U.S. 390 \(1923\)](#). 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." [Moore v. East Cleveland, 431 U.S. 494, 502 \(1977\)](#). The need for restraint has been cogently expressed by Justice White:

[*122] "That the Court has ample precedent for the creation of new constitutional [****20] rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers . . . , the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority." [Moore, supra, at 544](#) (dissenting opinion).

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.² As we have put it, the [****21] [***2342] [HN3](#) Due Process Clause affords only those protections "so rooted in the traditions and conscience of our people as to be ranked as

² We do not understand what Justice Brennan has in mind by an interest "that society traditionally has thought important . . . without protecting it." *Post*, at 140. The protection need not take the form of an explicit constitutional provision or statutory guarantee, but it must at least exclude (all that is necessary to decide the present case) a societal tradition of enacting laws *denying* the interest. Nor do we understand why our practice of limiting the Due Process Clause to traditionally protected interests turns the Clause "into a redundancy," *post*, at 141. Its purpose is to prevent future generations from lightly casting aside important traditional values -- not to enable this Court to invent new ones.

fundamental." [*Snyder v. Massachusetts*, 291 U.S. 97, 105 \(1934\)](#) (Cardozo, J.). Our cases reflect "continual insistence upon respect for the teachings of history [and] solid recognition [*123] of the basic values that underlie our society" [*Griswold v. Connecticut*, 381 U.S. 479, 501 \(1965\)](#) (Harlan, J., concurring in judgment).

[****22] [***106] This insistence that the asserted liberty interest be rooted in history and tradition is evident, as elsewhere, in our cases according constitutional protection to certain parental rights. Michael reads the landmark case of [*Stanley v. Illinois*, 405 U.S. 645 \(1972\)](#), and the subsequent cases of [*Quilloin v. Walcott*, 434 U.S. 246 \(1978\)](#), [*Caban v. Mohammed*, 441 U.S. 380 \(1979\)](#), and [*Lehr v. Robertson*, 463 U.S. 248 \(1983\)](#), as establishing that a liberty interest is created by biological fatherhood plus an established parental relationship -- factors that exist in the present case as well. We think that distorts the rationale of those cases. As we view them, they rest not upon such isolated factors but upon the historic respect -- indeed, sanctity would not be too strong a term -- traditionally accorded to the relationships that develop within the unitary family.

³ See [*Stanley*, supra, at 651](#); [*Quilloin*, supra, at 254-255](#); [*Caban*, supra, at 389](#); [*Lehr*, supra, at 261](#).

[****23] In *Stanley*, for example, we forbade the destruction of such a family when, upon the death of the mother, the State had sought to remove children from the custody of a father who had lived with and supported them and their mother for 18 years. As Justice Powell stated for the plurality in

[*Moore v. East Cleveland*, supra, at 503](#): "Our [*124] decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."

[****24] [*LEdHN\[1C\]*](#) [1C] 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.⁴

[****25] [***107] [**2343] The presumption of legitimacy was a fundamental principle of the common law. H. Nicholas, *Adulterine Bastardy* 1 (1836). 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. [*Id.*, at 9-10](#) (citing Bracton, *De Legibus et Consuetudinibus Angliae*, bk. i, ch. 9, p. 6; bk. ii, ch. 29, p. 63, ch. 32, p. 70 (1569)). As explained by Blackstone, nonaccess could only be proved "if the husband be out of the kingdom of England (or, as the law somewhat loosely phrases it, *extra quatuor maria* [beyond the four seas]) for above nine months" 1

³ Justice Brennan asserts that only a "pinched conception of 'the family'" would exclude Michael, Carole, and Victoria from protection. *Post*, at 145. We disagree. The family unit accorded traditional respect in our society, which we have referred to as the "unitary family," is typified, of course, by the marital family, but also includes the household of unmarried parents and their children. Perhaps the concept can be expanded even beyond this, but it will bear no resemblance to traditionally respected relationships -- and will thus cease to have any constitutional significance -- if it is stretched so far as to include the relationship established between a married woman, her lover, and their child, during a 3-month sojourn in St. Thomas, or during a subsequent 8-month period when, if he happened to be in Los Angeles, he stayed with her and the child.

⁴ Justice Brennan insists that in determining whether a liberty interest exists we must look at Michael's relationship with Victoria in isolation, without reference to the circumstance that Victoria's mother was married to someone else when the child was conceived, and that that woman and her husband wish to raise the child as their own. See *post*, at 145-146. We cannot imagine what compels this strange procedure of looking at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people -- rather like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body. The logic of Justice Brennan's position leads to the conclusion that if Michael had begotten Victoria by rape, that fact would in no way affect his possession of a liberty interest in his relationship with her.

Blackstone's Commentaries 456 (J. Chitty ed. 1826). And, under the common law both in England and here, "neither [*125] husband nor wife [could] be a witness to prove access or nonaccess." J. Schouler, *Law of the Domestic Relations* § 225, p. 306 (3d ed. 1882); R. Graveson & F. Crane, *A Century of Family Law: 1857-1957*, p. 158 (1957). The primary policy rationale underlying the common law's severe restrictions on rebuttal of the presumption appears to have been an aversion to declaring children illegitimate, see [****26] Schouler, *supra*, § 225, at 306-307; M. Grossberg, *Governing the Hearth* 201 (1985), thereby depriving them of rights of inheritance and succession, 2 J. Kent, *Commentaries on American Law* *175, and likely making them wards of the state. A secondary policy concern was the interest in promoting the "peace and tranquillity of States and families," Schouler, *supra*, § 225, at 304, quoting Boullenois, *Traite des Status*, bk. 1, p. 62, a goal that is obviously impaired by facilitating suits against husband and wife asserting that their children are illegitimate. 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." Grossberg, *supra*, at 202.

[LEdHN\[1D\]](#) [1D][LEdHN\[5A\]](#) [5A]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 [****27] 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. For example, a 1957 annotation on the subject: "Who may dispute presumption of legitimacy of [*126] child conceived or born during wedlock," [53 A. L. R. 2d 572](#), shows three States (including California) with statutes limiting standing to the husband or wife and their descendants, one State (Louisiana) with a [***108] statute limiting it to the husband, two States (Florida and Texas) with judicial decisions limiting standing to the husband, and two States (Illinois and New York) with judicial decisions denying standing even to the mother. Not a single decision is set forth specifically according standing to the natural father, and "express indications of the nonexistence of any . [****28] . . limitation" upon standing were found only "in a few jurisdictions." [Id.](#), at 579.

[LEdHN\[1E\]](#) [1E][LEdHN\[5B\]](#) [5B][LEdHN\[6A\]](#) [6A]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. As noted earlier, what is at [**2344] issue here is not entitlement to a state pronouncement that Victoria was begotten by Michael. It is no conceivable denial of constitutional right for a State to decline to declare facts unless some legal consequence hinges upon the requested declaration. What Michael asserts here is a right to have himself declared the natural father *and thereby to obtain parental prerogatives*.⁵ [****30] What he must establish, therefore, is

⁵ According to Justice Brennan, Michael does not claim -- and in order to prevail here need not claim -- a substantive right to maintain a parental relationship with Victoria, but merely the right to "a hearing on the issue" of his paternity. *Post*, at 156, n. 12. "Michael's challenge . . . does not depend," we are told, "on his ability ultimately to obtain visitation rights." *Post*, at 147. To be sure it does not depend upon his ability ultimately to *obtain* those rights, but it surely depends upon his *asserting a claim* to those rights, which is precisely what Justice Brennan denies. We cannot grasp the concept of a "right to a hearing" on the part of a person who claims no substantive entitlement that the hearing will assertedly vindicate.

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. Even if the law in all States had always been that the entire world could challenge [*127] the marital presumption and obtain a declaration as to who was the natural father, [****29] that would not advance Michael's claim. Thus, it is ultimately irrelevant, even for purposes of determining *current* social attitudes towards the alleged substantive right Michael asserts, that the present law in a number of States appears to allow the natural father -- including the natural father who has not established a relationship with the child -- the theoretical power to rebut the marital presumption, see Note, *Rebutting the Marital Presumption: A Developed Relationship Test*, [88 Colum. L. Rev. 369, 373 \(1988\)](#). 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.⁶

⁶Justice Brennan criticizes our methodology in using historical traditions specifically relating to the rights of an adulterous natural father, rather than inquiring more generally "whether parenthood is an interest that historically has received our attention and protection." *Post*, at 139. There seems to us no basis for the contention that this methodology is "nove[!]," *post*, at 140. For example, in [Bowers v. Hardwick, 478 U.S. 186 \(1986\)](#), we noted that at the time the [Fourteenth Amendment](#) was ratified all but 5 of the 37 States had criminal sodomy laws, that all 50 of the States had such laws prior to 1961, and that 24 States and the District of Columbia continued to have them; and we concluded from that record, regarding that very specific aspect of sexual conduct, that "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." *Id.*, at 194. In [Roe v. Wade, 410 U.S. 113 \(1973\)](#), we spent about a fifth of our opinion negating the proposition that there was a longstanding tradition of laws proscribing abortion. *Id.*, at 129-141.

We do not understand why, having rejected our focus upon the societal tradition regarding the natural father's rights vis-a-vis a child whose mother is married to another man, Justice Brennan would choose to focus instead upon "parenthood." Why should the relevant

[****31] [*128] [***109] [**2345] In *Lehr v. Robertson*, a case involving a natural father's attempt to block his child's adoption by the unwed mother's new husband, we observed that "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship [*129] with his offspring," [463 U.S., at 262](#), and we assumed that the Constitution might require some

category not be even more general -- perhaps "family relationships"; or "personal relationships"; or even "emotional attachments in general"? Though the 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.

One would think that Justice Brennan would appreciate the value of consulting the most specific tradition available, since he acknowledges that "[e]ven 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 and destructive to pretend that we do." *Post*, at 141. Because such general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views. The need, if arbitrary decisionmaking is to be avoided, to adopt the most specific tradition as the point of reference -- or at least to announce, as Justice Brennan declines to do, some other criterion for selecting among the innumerable relevant traditions that could be consulted -- is well enough exemplified by the fact that in the present case Justice Brennan's opinion and Justice O'Connor's opinion, *post*, p. 132, which disapproves this footnote, *both* appeal to tradition, but on the basis of the tradition they select reach opposite results. Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.

Finally, we may note that this analysis is not inconsistent with the result in cases such as [Griswold v. Connecticut, 381 U.S. 479 \(1965\)](#), or [Eisenstadt v. Baird, 405 U.S. 438 \(1972\)](#). None of those cases acknowledged a longstanding and still extant societal tradition withholding the very right pronounced to be the subject of a liberty interest and then rejected it. Justice Brennan must do so here. In this case, the existence of such a tradition, continuing to the present day, refutes any possible contention that the alleged right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental," [Snyder v. Massachusetts, 291 U.S. 97, 105 \(1934\)](#), or "implicit in the concept of ordered liberty," [Palko v. Connecticut, 302 U.S. 319, 325 \(1937\)](#).

protection of that opportunity, *id.*, at 262-265. Where, however, the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter. In *****110** *Lehr* we quoted approvingly from Justice Stewart's dissent in *Caban v. Mohammed*, 441 U.S., at 397, to the effect that although "[i]n some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father," "the absence of a ******32** legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist." 463 U.S., at 260, n. 16. In accord with our traditions, a limit is also imposed by the circumstance that the mother is, at the time of the child's conception and birth, married to, and cohabitating with, another man, both of whom wish to raise the child as the offspring of their union.⁷ It is a question of legislative policy and not constitutional law whether ***130** California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted.

⁷Justice Brennan chides us for thus limiting our holding to situations in which, as here, the husband and wife wish to raise her child jointly. The dissent believes that without this limitation we would be unable to "rely on the State's asserted interest in protecting the 'unitary family' in denying that Michael and Victoria have been deprived of liberty." *Post*, at 147. As we have sought to make clear, however, and as the dissent elsewhere seems to understand, see *post*, at 139, 140-141, 145, 147, we rest our decision not upon our independent "balancing" of such interests, but upon the absence of any constitutionally protected right to legal parentage on the part of an adulterous natural father in Michael's situation, as evidenced by long tradition. That tradition reflects a "balancing" that has already been made by society itself. We limit our pronouncement to the relevant facts of this case because it is at least possible that our traditions lead to a different conclusion with regard to adulterous fathering of a child whom the marital parents do not wish to raise as their own. It seems unfair for those who disagree with our holding to include among their criticisms that we have not extended the holding more broadly.

******33** We do not accept Justice Brennan's criticism that this result "squashes" the liberty that consists of "the freedom not to conform." *Post*, at 141. It seems to us that 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 "****2346** 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. If Michael has a "freedom not to conform" (whatever that means), Gerald must equivalently have a "freedom to conform." One of them will pay a price for asserting that "freedom" -- Michael by being unable to act as father of the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the traditional family unit he and Victoria have established. Our disposition does not choose between these two "freedoms," but leaves that to the people of California. Justice Brennan's approach chooses one of them as the constitutional imperative, on no apparent basis except that the unconventional is to be preferred.

IV

LEdHN[2B] [2B]We have never had ******34** occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her *****111** 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 ***131** 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-a-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.

[****35] [LEdHN\[3B\]](#) [3B]Victoria claims in addition that her equal protection rights have been violated because, unlike her mother and presumed father, she had no opportunity to rebut the presumption of her legitimacy. We find this argument wholly without merit. We reject, at the outset, Victoria's suggestion that her equal protection challenge must be assessed under a standard of strict scrutiny because, in denying her the right to maintain a filial relationship with Michael, the State is discriminating against her on the basis of her illegitimacy. See [HN4 Gomez v. Perez, 409 U.S. 535, 538 \(1973\)](#). Illegitimacy is a legal construct, not a natural trait. Under California law, Victoria is not illegitimate, and she is treated in the same manner as all other legitimate children: she is entitled to maintain a filial relationship with her legal parents.

[HN5](#) We apply, therefore, the ordinary "rational relationship" test to Victoria's equal protection challenge. The primary rationale underlying [§ 621](#)'s limitation on those who may rebut the presumption of legitimacy is a concern that allowing persons other than the husband or wife to do so may undermine the integrity of the marital [****36] union. When the husband or wife contests the legitimacy of their child, the stability of the marriage has already been shaken. In contrast, allowing a claim of illegitimacy to be pressed by the child -- or, more accurately, by a court-appointed guardian ad litem -- may well disrupt an otherwise peaceful union. Since it pursues a legitimate end by rational means, California's decision [*132] to treat Victoria differently from her parents is not a denial of equal protection.

The judgment of the California Court of Appeal is *Affirmed*.

Concur by: O'CONNOR (In Part); STEVENS

Concur

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 [**2347] 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, 381 U.S. 479 \(1965\)](#); [Eisenstadt v. Baird, 405 U.S. 438 \(1972\)](#). On [***112] occasion the Court has characterized relevant traditions protecting asserted rights [****37] at levels of generality that might not be "the most specific level" available. *Ante*, at 127-128, n. 6. See [Loving v. Virginia, 388 U.S. 1, 12 \(1967\)](#); [Turner v. Safley, 482 U.S. 78, 94 \(1987\)](#); cf. [United States v. Stanley, 483 U.S. 669, 709 \(1987\)](#) (O'Connor, J., concurring in part and dissenting in part). I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis. [Poe v. Ullman, 367 U.S. 497, 542, 544 \(1961\)](#) (Harlan, J., dissenting).

JUSTICE STEVENS, concurring in the judgment.

[LEdHN\[1F\]](#) [1F] [LEdHN\[5C\]](#) [5C]As I understand this case, it raises two different questions about the validity of California's statutory scheme. First, is [Cal. Evid. Code Ann. § 621](#) (West Supp. 1989) unconstitutional because it prevents Michael and Victoria from obtaining a judicial determination that he is her biological father -- even if no legal rights would be affected by that determination? Second, does the California statute deny appellants a fair opportunity to prove that Victoria's best interests would be served by granting Michael visitation [****38] rights?

[LEdHN\[5D\]](#) [5D][LEdHN\[6B\]](#) [6B]On the first issue I agree with Justice Scalia that the Federal Constitution imposes no obligation upon a State to [*133] "declare facts unless some legal consequence hinges upon the requested declaration." *Ante*, at 126. "The actions of judges neither create nor sever genetic bonds." [Lehr v. Robertson](#), 463 U.S. 248, 261 (1983).

[LEdHN\[1G\]](#) [1G][LEdHN\[7A\]](#) [7A]On the second issue I do not agree with Justice Scalia's analysis. He seems to reject the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child's conception and birth. I think cases like [Stanley v. Illinois](#), 405 U.S. 645 (1972), and [Caban v. Mohammed](#), 441 U.S. 380 (1979), demonstrate that enduring "family" relationships may develop in unconventional settings. I therefore 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 [****39] 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.

[LEdHN\[1H\]](#) [1H] [LEdHN\[2C\]](#) [2C][Section 4601 of the California Civil Code Annotated](#) (West Supp. 1989) provides:

"[R]easonable visitation rights [shall be awarded] to a parent unless it is shown that the visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child." (Emphasis added.)

The presumption established by [§ 621](#) denied Michael the benefit of [****113] the first sentence of [§ 4601](#) because, as a matter of law, he is not a "parent." It does not, however, prevent him from proving that he is an "other person having an interest in the welfare of the child." On its face, therefore, the statute [*134] plainly gave the trial judge the authority to grant Michael "reasonable visitation rights."

I recognize that my colleagues have interpreted [****40] [§ 621](#) as creating an absolute bar that would prevent a California trial judge from regarding the natural father as either [**2348] a "parent" within the meaning of the first sentence of [§ 4601](#) or as "any other person" within the meaning of the second sentence. See *ante*, at 116, 119; *post*, at 148-151 (BRENNAN, J., dissenting). That is not only an unnatural reading of the statute's plain language, but it is also not consistent with the California courts' reading of the statute. Thus, in [Vincent B. v. Joan R.](#), 126 Cal. App. 3d 619, 179 Cal. Rptr. 9 (1981), appeal dism'd, 459 U.S. 807 (1982), the California Court of Appeal, after deciding that the [§ 621](#) presumption barred a natural father from proving paternity, went on to consider the separate question whether it would be proper to allow visitation pursuant to the second sentence of [§ 4601](#):

"Finally, appellant contends that even if Frank is conclusively presumed to be Z.'s father, appellant should be allowed visitation rights, since Civil Code [section 4601](#) gives discretion to grant visitation rights to 'any other person having an interest in the [****41] welfare of the child.' We think it obvious that *in the circumstances of this case* such court-ordered visitation would be detrimental to the best interest of the child. Appellant's interest in visiting the child is based on his claim that appellant is Z.'s father. Such claim is now determined to be legally impossible. The mother does not wish the child to be visited by appellant. Confusion, uncertainty, and embarrassment to the child would likely result

from a court order that appellant, who claims to be Z.'s biological father, is entitled to visitation against the wishes of the mother. (*Petitioner F. v. Respondent R.*, *supra*, 430 A. 2d 1075, 1080.)" [126 Cal. App. 3d, at 627-628, 179 Cal. Rptr., at 13](#) (emphasis added).

[*135] Supporting the court's decision that granting visitation rights to Vincent would be contrary to the child's best interests was the fact that "unlike the putative fathers in *Stanley* [*v. Illinois*, 405 U.S. 645 (1972),] and [*In re*] *Lisa R.* [, *13 Cal. 3d* 636, 532 P. 2d 123 (1975)], appellant has [****42] never lived with the mother and child, nor has he ever supported the child." [126 Cal. App. 3d, at 626, 179 Cal. Rptr., at 12](#).

Similarly, in this case, the trial judge not only found the conclusive presumption applicable, but also separately considered the effect of [§ 4601](#) and expressly found "that, at the present time, it is not in the best interests of the child that the Plaintiff have visitation. The Court believes that the existence of two (2) 'fathers' as male authority figures will confuse the child and be counter-productive to her best interests." Supp. App. to Juris. Statement A-90 -- A-91. In its opinion, the Court [***114] of Appeal also concluded that Michael "is not entitled to rights of visitation under [section 4601](#)," see [191 Cal. App. 3d 995, 1013, 236 Cal. Rptr. 810, 821 \(1987\)](#), and then quoted the above excerpt from the opinion in *Vincent B. v. Joan R.* As I read that opinion, it does not support the view that a natural father *cannot* be an "other person" within the meaning of [§ 4601](#); rather, it indicates that the outcome depends largely on "the circumstances of th[e] [****43] case." *

Under the circumstances of the case before us, Michael was given a fair opportunity to show that he is Victoria's natural father, that he had developed

a relationship with her, and that her interests would be served by granting him visitation rights. On the other hand, the record also shows that after its rather shaky start, the marriage between Carole and Gerald developed a stability that now provides Victoria with [*136] a loving and harmonious family home. In the circumstances of this case, I find nothing fundamentally unfair about [****44] the exercise of a judge's discretion that, in the end, allows the mother to decide whether [**2349] her child's best interests would be served by allowing the natural father visitation privileges. Because I am convinced that the trial judge had the authority under state law both to hear Michael's plea for visitation rights and to grant him such rights if Victoria's best interests so warranted, I am satisfied that the California statutory scheme is consistent with the [Due Process Clause of the Fourteenth Amendment](#).

I therefore concur in the Court's judgment of affirmance.

Dissent by: BRENNAN; WHITE

Dissent

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

[LEdHN\[7B\]](#) [7B]In a case that has yielded so many opinions as has this one, it is fruitful to begin by emphasizing the common ground shared by a majority of this Court. Five Members of the Court refuse to foreclose "the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child's conception and birth." *Ante*, at 133 (Stevens, J., concurring in judgment); see *infra*, at 141-147; *post*, [****45] at 157 (White, J., dissenting). Five Justices agree that the flaw inhering in a conclusive presumption that terminates a constitutionally protected interest

* For cases showing the California courts' willingness to decide [§ 621](#) cases on a case-by-case basis, see, e. g., *Michelle W. v. Ronald W.*, [39 Cal. 3d 354, 703 P. 2d 88 \(1985\)](#), app. dism'd, [474 U.S. 1043 \(1986\)](#); *In re Lisa R.*, [13 Cal. 3d 636, 532 P. 2d 123](#), cert. denied *sub nom. Porzuczek v. Towner*, [421 U.S. 1014 \(1975\)](#).

without any hearing whatsoever is a *procedural* one. See *infra*, at 153; *post*, at 163 (White, J., dissenting); *ante*, at 132 (Stevens, J., concurring in judgment). Four Members of the Court agree that Michael H. has a liberty interest in his relationship with Victoria, see *infra*, at 143; *post*, at 157 (White, J., dissenting), and one assumes for purposes of this case that he does, see *ante*, at 133 (Stevens, J., concurring in judgment).

In contrast, only one other Member of the Court fully endorses Justice Scalia's view of the proper *****115** method of analyzing questions arising under the Due Process Clause. **[*137]** See *ante*, at 113; *ante*, at 132 (O'Connor, J., concurring in part). Nevertheless, because the plurality opinion's exclusively historical analysis portends a significant and unfortunate departure from our prior cases and from sound constitutional decisionmaking, I devote a substantial portion of my discussion to it.

I

Once we recognized that the "liberty" protected by the *Due Process* ******46** Clause of the Fourteenth Amendment encompasses more than freedom from bodily restraint, today's plurality opinion emphasizes, the concept was cut loose from one natural limitation on its meaning. This innovation paved the way, so the plurality hints, for judges to substitute their own preferences for those of elected officials. Dissatisfied with this supposedly unbridled and uncertain state of affairs, the plurality casts about for another limitation on the concept of liberty.

It finds this limitation in "tradition." 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 in his dissent in *Moore v. East*

Cleveland, 431 U.S. 494, 549 (1977): "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 ******47** country's traditions," one thing is 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.

[*138] Even if we could agree, moreover, on the content and significance of particular traditions, we still would be forced to identify ****2350** the point at which a tradition becomes firm enough to be relevant to our definition of liberty and the moment at which it becomes too obsolete to be relevant any longer. The plurality supplies no objective means by which we might make these determinations. Indeed, as soon as the plurality sees signs that the tradition upon which it bases its decision (the laws denying putative fathers like Michael standing to assert paternity) is crumbling, it shifts ground and says that the case has nothing to do with that tradition, after all. "[W]hat is at issue here," the plurality asserts after canvassing the law on paternity suits, ******48** "is not entitlement to a state pronouncement that Victoria was begotten by Michael." *Ante*, at 126. But that is precisely what is at issue here, and the plurality's last-minute denial of this fact dramatically illustrates the subjectivity of its own analysis.

It is ironic that an approach so ******116** 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. Just as common-law notions no longer define the

"property" that the Constitution protects, see [Goldberg v. Kelly](#), 397 U.S. 254 (1970), neither do they circumscribe the "liberty" that it guarantees. 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 [****49] fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.'" [Board of Regents of State Colleges v. Roth](#), 408 U.S. 564, 571 (1972), quoting [National \[*139\] Ins. Co. v. Tidewater Co.](#), 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

[LEdHN\[4B\]](#) [4B]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 [****50] 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](#), 405 U.S. 438 (1972), or even by married couples, [Griswold v. Connecticut](#), 381 U.S. 479 (1965); the freedom from corporal punishment in schools, [Ingraham v. Wright](#), 430 U.S. 651 (1977); the freedom from an arbitrary transfer from a prison to a psychiatric institution, [Vitek v. Jones](#), 445 U.S. 480 (1980); and even the right to raise one's natural but illegitimate children, [Stanley v. Illinois](#), 405 U.S. 645 (1972), were not "interest[s] [**2351] traditionally protected by our society," ante, at 122, at [****51] the time of their consideration by this Court. If we had asked, therefore, in *Eisenstadt*, *Griswold*, *Ingraham*, *Vitek*, or *Stanley* itself [***117] whether [*140] the specific interest under consideration had been traditionally protected, the answer would have been a resounding "no." That we did not ask this question in those cases highlights the novelty of the interpretive method that the plurality opinion employs today.

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, as has the rationale [****52] for [Cal. Evid. Code Ann. § 621](#) (West Supp. 1989); ¹ instead, our task is simply to identify a rule denying the asserted interest and not

¹ See [In re Marriage of Sharyne and Stephen B.](#), 124 Cal. App. 3d 524, 528-531, 177 Cal. Rptr. 429, 431-433 (1981) (noting that California courts initially justified conclusive presumption of paternity on the ground that biological paternity was impossible to prove, but that the preservation of family integrity became the rule's paramount justification when paternity tests became reliable).

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," *ante*, at 122 (emphasis added), 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," *ante*, at 128, n. 6 (emphasis added), the plurality acts as if the only purpose [*141] 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](#).

[****53] 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.

[***118] 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 [****54] 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.

[**2352] II

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 [*142] 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](#), 262 U.S. 390, 399 (1923); [Skinner v. Oklahoma](#), 316 U.S. 535, 541 (1942); [Prince v. Massachusetts](#), 321 U.S. 158, 166 (1944), and I think I am safe in saying that no one doubts the wisdom or validity of those decisions. Where the interest under consideration is a parent-child relationship, we need not ask, over and over again, whether that interest is one that [****55] society traditionally protects.

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," *ante*, at 124, 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, see *ante*, at 127, n. 6, 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. See [*Stanley v. Illinois*, 405 U.S. 645 \(1972\)](#); [*Quilloin v. Walcott*, 434 U.S. 246 \(1978\)](#); [****56] [*Caban v. Mohammed*, 441 U.S. 380 \(1979\)](#); and [*Lehr v. Robertson*, 463 U.S. 248 \(1983\)](#). 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 [***119] relationship will do [*143] so.² "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. At that point it may be said that he 'act[s] as a father toward his children.'" [*Lehr v. Robertson*, supra, at 261](#), quoting [*Caban v. Mohammed*, supra, at 392, 389, n. 7](#). This commitment is why Mr. Stanley and Mr. Caban won; why Mr. Quilloin and Mr. Lehr lost; and why Michael H. should prevail today. Michael H. is almost certainly Victoria D.'s [****57] natural father, has lived with her as her father, has contributed to her support, and has from the beginning sought to strengthen and maintain his relationship with her.

Claiming that the intent of these cases was to protect the "unitary family," *ante*, at 123, the plurality waves *Stanley*, *Quilloin*, *Caban*, and *Lehr* aside. In evaluating the plurality's dismissal of these precedents, it is essential to identify its conception [**2353] of the "unitary family." If, by acknowledging that *Stanley* et al. sought to protect "the relationships that develop within the unitary

family," *ibid.*, the plurality meant only to describe the [****58] kinds of relationships that develop when parents and children live together (formally or informally) as a family, then the plurality's vision of these cases would be correct. But that is not the plurality's message. Though it pays lipservice to the idea that marriage is not the crucial fact in denying constitutional protection to the relationship between Michael and Victoria, *ante*, at 123, n. 3, the plurality cannot mean what it says.

The evidence is undisputed that Michael, Victoria, and Carole did live together as a family; that is, they shared the [*144] same household, Victoria called Michael "Daddy," Michael contributed to Victoria's support, and he is eager to continue his relationship with her. Yet they are not, in the plurality's view, a "unitary family," whereas Gerald, Carole, and Victoria do compose such a family. The only difference between these two sets of relationships, however, is the fact of marriage. The plurality, indeed, expressly recognizes that marriage is the critical fact in denying Michael a constitutionally protected stake in his relationship with Victoria: no fewer than six times, the plurality refers to Michael as the "adulterous natural [****59] father" (emphasis added) or the like. *Ante*, at 120; 127, n. 6; 128, n. 6; 129, n. 7; 130. See also *ante*, at 124 (referring to the "marital family" of Gerald, Carole, and Victoria) (emphasis added); *ante*, at 129 (plurality's holding limited to those situations in which there is "an extant [***120] marital family").³ However, the very premise of *Stanley* and the cases following it is that marriage is not decisive in answering the question whether the Constitution protects the parental relationship under consideration. These cases are, after all, important precisely because they involve the rights of *unwed* fathers. It is important to

² The plurality's claim that "[t]he logic of [my] position leads to the conclusion that if Michael had begotten Victoria by rape, that fact would in no way affect his possession of a liberty interest in his relationship with her," *ante*, at 124, n. 4, ignores my observation that a mere biological connection is insufficient to establish a liberty interest on the part of an unwed father.

³ In one place, the plurality opinion appears to suggest that the length of time that Michael and Victoria lived together is relevant to the question whether they have a liberty interest in their relationship with each other. See *ante*, at 123, n. 3. The point is not pursued, however, and in any event I am unable to find in the traditions on which the plurality otherwise exclusively relies any emphasis on the duration of the relationship between the putative father and child.

remember, moreover, that in *Quilloin*, *Caban*, and *Lehr*, the putative father's demands would have disrupted a "unitary family" as the plurality defines it; in each case, the husband of the child's mother sought to adopt the child over the objections of the natural father. Significantly, our decisions in those cases in no way relied on the need to protect the marital family. Hence the plurality's claim that *Stanley*, *Quilloin*, *Caban*, and *Lehr* [*145] were about the "unitary family," as that family is defined [****60] by today's plurality, is surprising indeed.

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*, 388 U.S. 1 (1967), [****61] to *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Glonn v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968), and from *Gomez v. Perez*, 409 U.S. 535 (1973), to *Moore v. East Cleveland*, 431 U.S. 494 (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.

The plurality's focus on the "unitary family" is misdirected for another reason. It conflates the question whether a liberty interest exists with the question what procedures may be used to terminate or curtail [**2354] it. It is no coincidence that we never before have looked at the relationship that the unwed father seeks to disrupt, rather than the one he seeks to preserve, in determining whether he has a liberty interest in his relationship with his child. To do otherwise is to allow the State's interest in terminating the relationship to play a role in defining the "liberty" that is protected by the Constitution. According to our [****62] established framework under the Due Process

Clause, however, we first ask whether the person claiming constitutional protection has an interest that the Constitution recognizes; if we find that he or she does, we next consider the State's interest in limiting the extent of the procedures that will attend the deprivation of that interest. See, e. g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 [***121] (1982). By stressing the need to preserve the "unitary [*146] family" and by focusing not just on the relationship between Michael and Victoria but on their "situation" as well, *ante*, at 124, today's plurality opinion takes both of these steps at once.

The plurality's premature consideration of California's interests is evident from its careful limitation of its holding to those cases in which "the mother is, at the time of the child's conception and birth, married to, and cohabitating with, another man, *both of whom wish to raise the child as the offspring of their union.*" *Ante*, at 129 (emphasis added). See also *ante*, at 127 (describing Michael's liberty interest as the "substantive parental rights [of] the natural father of [****63] a child conceived within, and born into, an extant marital union that wishes to embrace the child"). The highlighted language 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.⁴ But that would be to say that whether Michael and Victoria have a liberty interest varies with the

⁴ Note that the plurality presumably would disapprove the California courts' holdings in *Vincent B. v. Joan R.*, 126 Cal. App. 3d 619, 179 Cal. Rptr. 9 (1981) (§ 621 defeated putative father's interest even where husband and wife divorced at the time of the paternity action), and *Michelle W. v. Ronald W.*, 39 Cal. 3d 354, 703 P. 2d 88 (1985) (§ 621 defeated putative father's interest even where mother had married putative father and divorced man to whom she had been married at time of conception and birth). To suggest, moreover, that "it is at least possible that our traditions lead to a different conclusion" in cases such as *Vincent B.* and *Michelle W.*, *ante*, at 129, n. 7, is to express an optimism about our ability to identify "traditions" with microscopic precision that I do not share, and a willingness to slice society up into minuscule pieces, based only on tradition, that I cannot endorse.

State's interest in recognizing that interest, for it is 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. It is a bad day for due process when [*147] the State's interest in terminating a parent-child relationship is reason to conclude that that relationship is not part of the "liberty" protected by the [Fourteenth Amendment](#).

[****64] The plurality has wedged itself between a rock and a hard place. If it limits its holding to those situations in which a wife and husband wish to raise the child together, then it necessarily takes the State's interest into account in defining "liberty"; yet if it extends that approach to circumstances in which the marital union already has been dissolved, then it may no longer rely on the State's asserted interest in protecting the "unitary family" in denying that Michael and Victoria have been deprived of liberty.

The plurality's confusion about the proper analysis of claims involving procedural due process also becomes obvious when one examines the plurality's shift in emphasis from the putative father's standing to his ability to obtain parental prerogatives. See *ante*, at 126. In announcing that what matters is not the father's ability to claim paternity, but his ability to obtain "substantive parental rights, [***122] " *ante*, at 127, the plurality turns procedural due [**2355] process upside down. Michael's challenge in this Court does not depend on his ability ultimately to obtain visitation rights; it would be strange indeed if, before one could be granted a hearing, one [****65] were required to prove that one would prevail on the merits. The point of procedural due process is to give the litigant a fair chance at prevailing, not to ensure a particular substantive outcome. Nor does Michael's challenge depend on the success of fathers like him in obtaining parental rights in past cases; procedural due process is, by and large, an individual guarantee, not one that should depend on the success or failure of prior cases having little or

nothing to do with the claimant's own suit.⁵

[*148] III

Because the plurality decides that Michael and Victoria have no liberty interest in their relationship [****66] with each other, it need consider neither the effect of [§ 621](#) on their relationship nor the State's interest in bringing about that effect. It is obvious, however, that the effect of [§ 621](#) is to terminate the relationship between Michael and Victoria before affording any hearing whatsoever on the issue whether Michael is Victoria's father. This refusal to hold a hearing is properly analyzed under our procedural due process cases, which instruct us to consider the State's interest in curtailing the procedures accompanying the termination of a constitutionally protected interest. California's interest, minute in comparison with a father's interest in his relationship with his child, cannot justify its refusal to hear Michael out on his claim that he is Victoria's father.

A

We must first understand the nature of the challenged statute: it is a law that stubbornly insists that Gerald is Victoria's father, in the face of evidence showing a 98 percent probability that her father is Michael.⁶ 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 [****67] in [§ 4601 of California's Civil Code](#), which directs that *parents* be given visitation rights unless "the visitation

⁵ One need only look as far as [Quilloin v. Walcott](#), 434 U.S. 246, 255 (1978), to understand why an unwed father might lose for reasons having nothing to do with his own relationship with the child: there, we approved the use of a "best interest" standard, rather than an "unfitness" standard, for an unwed father who objected to the adoption of his child by another man.

⁶ Justice Steven' claim that "Michael was given a fair opportunity to show that he is Victoria's natural father," *ante*, at 135, ignores the fact that this case is before us precisely because California law refuses to allow men like Michael such an opportunity.

would be detrimental to the best interests of the child." [Cal. Civ. Code Ann. § 4601](#) (West Supp. 1989).⁷

[**68] [*149] [***123]** As interpreted by the California courts, however, [§ 621](#) not only deprives Michael of the benefits of the best-interest standard; it also deprives him of any **[**2356]** chance of maintaining his relationship with the child he claims to be his own. When, as a result of [§ 621](#), a putative father may not establish his paternity, neither may he obtain discretionary visitation rights as a "nonparent" under [§ 4601](#). See [Vincent B. v. Joan R.](#), 126 Cal. App. 3d 619, 627-628, 179 Cal. Rptr. 9, 13 (1981), appeal dismissed, 459 U.S. 807 (1982); see also *ante*, at 116. Justice Stevens' assertion to the contrary, *ante*, at 134-135, is mere wishful thinking. In concluding that the California courts afford putative fathers like Michael a meaningful opportunity to show that visitation rights would be in the best interests of their children, he fastens upon the words "in the circumstances of this case" in [Vincent B. v. Joan R.](#), *supra*, at 627, 179 Cal. Rptr., at 13. *Ante*, at 134-135. His suggestion is that the court in that case conducted an individualized **[****69]** assessment

of the effect on the child of granting visitation rights to Vincent B.

[*150] The California appellate court's decision will not support Justice Stevens' reading, as the court's reasoning applies to *all* putative fathers whom [§ 621](#) has denied the opportunity to show paternity. The court in *Vincent B.* began by stressing the fact that the child's mother objected to visits from Vincent. This circumstance is present in every single case falling under the conclusive presumption of [§ 621](#). Granting visitation rights to a person who claimed to be the child's father, the court went on, also would cause "confusion, uncertainty, and embarrassment." 126 Cal. App. 3d, at 628, 179 Cal. Rptr., at 13. Again, the notion that unacceptable confusion would result from awarding visitation to a person who claims to be the child's father is equally applicable to any case in which the "nonparent" under [§ 4601](#) has lost under [§ 621](#). Finally, the court in *Vincent B.* approvingly cited [Petitioner F. v. Respondent R.](#), 430 A. 2d 1075, 1080 (1981), in which the Supreme Court of Delaware rejected a putative **[****70]** father's argument that Delaware's conclusive presumption of paternity violated the [Equal Protection Clause of the Federal Constitution](#). 126 Cal. App. 3d, at 627, 179 Cal. Rptr., at 13. Emphasizing the "permanent stigma and distress" that would result from granting parental rights to a putative father whose child was born to the wife of another man, the Delaware court decided that, given the State's interest in "guard[ing] against assaults upon the family unit[,] . . . [t]he application of the presumption of legitimacy of a child born to a married **[***124]** woman would be in the child's interest in *practically all cases*." 430 A. 2d, at 1080 (emphasis added). *Vincent B.*'s reliance on *Petitioner F.* sends a clear signal that the California court was issuing a ruling applicable to any case that fit into [§ 621](#)'s conclusive presumption, and that the "rough justice" that prevailed under [§ 621](#) also would suffice under [§ 4601](#). This kind of determination is a far cry from the individualized assessment that Justice Stevens would seem to demand. *Ante*, at

⁷ Showing a startling misunderstanding of the stakes in this case, the plurality characterizes the issue at the hearing that Michael seeks as "whether, in the particular circumstances of his case, California's policies would best be served by giving him parental rights." *Ante*, at 120. The hearing that the plurality describes is merely one that the California courts hold in response to constitutional challenges such as those lodged here, see, e. g., [Michelle W. v. Ronald W.](#), 39 Cal. 3d, at 363, 703 P. 2d, at 93; it is not the hearing that Michael seeks as the end result of this lawsuit. The plurality's confusion is further evident in its announcement that "what is at issue here is *not* entitlement to a state pronouncement that Victoria was begotten by Michael." *Ante*, at 126 (emphasis added). That is precisely what is at issue in the hearing that Michael seeks.

Justice Stevens exhibits the same misunderstanding in pointing to *Michelle W.* and [In re Lisa R.](#), 13 Cal. 3d 636, 532 P. 2d 123 (1975), as evidence of "the California courts' willingness to decide [§ 621](#) cases on a case-by-case basis." *Ante*, at 135, n. This "case-by-case" analysis is not the result of a flexible interpretation of [§ 621](#), but is the courts' response to the many constitutional challenges brought against [§ 621](#). Similarly, Michael was given an opportunity to show that "he had developed a relationship with [Victoria]," *ante*, at 135, only because he launched this constitutional attack on [§ 621](#).

135.⁸

[****71] [*151] Likewise, in the case before us, the court's finding that "the existence of two (2) 'fathers' as male authority figures will confuse the child and be counter-productive to her best interests," Supp. App. to Juris. Statement A-90 -- A-91, is not an evaluation of the relationship between Michael and Victoria, but a restatement of the policies underlying [§ 621](#) itself. It may well be that the California courts' interpretation of [§ 4601](#) as precluding visitation rights for a putative father is "an unnatural reading" of that provision, *ante*, at 134, but it is not for us to decide what California's statute means.

[Section 621](#) as construed by the California courts thus cuts off the relationship between Michael and Victoria -- a liberty interest [**2357] 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. See, e. g., [Vlandis v. Kline, 412 U.S. 441 \(1973\)](#); [Cleveland Board of Education v. LaFleur, 414 U.S. 632 \(1974\)](#); [****72] [Weinberger v. Salfi, 422 U.S. 749, 770-772 \(1975\)](#).

Gerald D. and the plurality turn a blind eye to the true nature of [§ 621](#) by protesting that, instead of being a conclusive presumption, it is a "substantive rule of law." *Ante*, at 119. This facile observation cannot save [§ 621](#). It may be that all conclusive presumptions are, in a sense, substantive rules of law; but [§ 621](#) then belongs in that special category of substantive rules that presumes a fact relevant to a certain class of litigation, and it is that feature that renders [§ 621](#) suspect under our prior cases. To put

the point differently, a conclusive presumption takes the form of "no X's are Y's," and is typically accompanied by a rule such as, ". . . and only Y's may obtain a driver's license." (There would be no need for the presumption unless something hinged on the fact presumed.) [*152] Ignoring the fact that [§ 621](#) takes the form of "no X's are Y's," Gerald D. and the plurality fix upon the rule following [§ 621](#) -- only Y's may assert parental rights -- and call [§ 621](#) a substantive rule of law. This strategy ignores both the form and the effect of [§ 621](#).

In a further [****73] effort to show that [***125] [§ 621](#) is not a conclusive presumption, Gerald D. claims -- and the plurality agrees, see *ante*, at 119 -- that whether a man is the biological father of a child whose family situation places the putative father within [§ 621](#) is simply irrelevant to the State. Brief for Appellee 14. This is, I surmise, an attempt to avoid the implications of our cases condemning the presumption of a fact that a State has made relevant or decisive to a particular decision. See, e. g., [Bell v. Burson, 402 U.S. 535 \(1971\)](#). Yet the claim that California does not care about factual paternity is patently false. California cares very much about factual paternity when the husband is impotent or sterile, see [Cal. Evid. Code Ann. § 621\(a\)](#) (West Supp. 1989); it cares very much about it when the wife and husband do not share the same home, see [Vincent B. v. Joan R., 126 Cal. App. 3d, at 623-624, 179 Cal. Rptr., at 11](#); and it cares very much about it when the husband himself declares that he is not the father, see [Cal. Evid. Code Ann. § 621\(c\)](#) (West Supp. 1989). Indeed, under California [****74] law as currently structured, paternity is decisive in choosing the standard that will be used in granting or denying custody or visitation. The State, though selective in its concern for factual paternity, certainly is not *indifferent* to it.⁹ More

⁸Justice Stevens incorrectly suggests that the court in *Vincent B.* based its denial of visitation rights under [§ 4601](#) partly on the lack of an established relationship between Vincent B. and the child. *Ante*, at 135. In fact, the court did not even mention the specific relationship between these two people in coming to its decision under [§ 4601](#). See [126 Cal. App. 3d, at 628, 179 Cal. Rptr., at 13](#).

⁹In this respect, the plurality is mistaken in suggesting that "there is no difference between a rule which says that the marital husband shall be irrebuttably presumed to be the father, and a rule which says that the adulterous natural father shall not be recognized as the legal

fundamentally, California's purported indifference to factual paternity does not show that [§ 621](#) is not a conclusive [*153] presumption. To say that California does not care about factual paternity in the limited circumstances of this case -- where the husband is neither impotent nor sterile nor living apart from his wife -- is simply another way of describing its conclusive presumption.

[****75] Not content to rest on its assertion that [§ 621](#) does not, in fact, establish a conclusive presumption, the plurality goes on to argue that a challenge to a conclusive presumption must rest on substantive rather than procedural due process. See *ante*, at 120-121. This is simply not so. In [Weinberger v. Salfi, supra](#), the Court identified two lines of cases involving challenges to social-welfare legislation: those [**2358] in which a legislative classification was challenged as arbitrary and those in which a conclusive presumption was attacked. The Court fit the complaint in *Salfi* into the former category on the ground that the challenged law did not deprive anyone of a constitutionally protected interest. [422 U.S., at 772](#). Today's plurality, in contrast, classifies this case as one invoking substantive due process *before* it considers the nature of the interest at stake. Its support for this innovation includes several law-review commentaries, two concurrences in the judgment, a dissent, and *Salfi* itself. *Ante*, at 120-121. Even more disturbing than the plurality's reliance on these infirm foundations is [****76] its failure to recognize that the defect from which conclusive presumptions suffer is a *procedural* one: the State has declared a certain fact relevant, [***126] indeed controlling, yet has denied a particular class of litigants a hearing to establish that fact. This is precisely the kind of flaw that procedural due process is designed to correct.¹⁰

father." *Ante*, at 120. In the latter case, the State has not made paternity the predominant concern in child-custody disputes and then told some putative fathers that they may not prove their paternity.

¹⁰ We recognized as much in [Caban v. Mohammed, 441 U.S. 380, 385, n. 3 \(1979\)](#), in which we explicitly described [Stanley v. Illinois, 405 U.S. 645 \(1972\)](#), as a case involving *procedural* due process. The plurality's bald statement that the holding in *Stanley* did not rely

[*154] B

The question before us, therefore, is whether California has an interest so powerful that it justifies granting Michael *no* hearing before terminating his parental rights.

"Many controversies have raged about the cryptic and abstract [****77] words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." [Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 \(1950\)](#). When a State seeks to limit the procedures that will attend the deprivation of a constitutionally protected interest, it is only the State's interest in streamlining procedures that is relevant. See, e. g., [Mathews v. Eldridge, 424 U.S. 319, 335 \(1976\)](#). A State may not, in other words, justify abbreviated procedures on the ground that it wishes to pay welfare benefits to fewer people or wants to reduce the number of tenured professors on its payroll. It would be strange indeed if a State could curtail procedures with the explanation that it was hostile to the underlying, constitutionally protected interest.

The purported state interests here, however, stem primarily from the State's antagonism to Michael's and Victoria's constitutionally protected interest in their relationship with each other and not from [****78] any desire to streamline procedures. Gerald D. explains that [§ 621](#) promotes marriage, maintains the relationship between the child and presumed father, and protects the integrity and privacy of the matrimonial family. Brief for Appellee 24. It is not, however, [§ 621](#), but the best-interest principle, that protects a stable marital relationship and maintains the relationship between the child and presumed father. These interests are implicated by the determination of who gets parental rights, *not* by the determination of who is the father; in the hearing that Michael seeks, parental rights are not the issue. Of the objectives

on procedural due process is therefore incorrect. See *ante*, at 120.

that Gerald stresses, therefore, only the preservation of family [*155] privacy is promoted by the refusal to hold a hearing itself. Yet § 621 furthers even this objective only partially.

Gerald D. gives generous proportions to the privacy protected by § 621, asserting that this provision protects a couple like Gerald and Carole from answering questions on such matters as "their sexual habits and practices with each other and outside their marriage, their finances, and their thoughts, beliefs, and opinions concerning their relationship with each [****79] other and with Victoria." *Id.*, at 25. Yet invalidation of § 621 would not, as Gerald suggests, [**2359] subject Gerald and Carole to [***127] public scrutiny of all of these private matters. Family finances and family dynamics are relevant, not to paternity, but to the best interests of the child -- and the child's best interests are not, as I have stressed, in issue at the hearing that Michael seeks. The only private matter touching on the paternity presumed by § 621 is the married couple's sex life. Even there, § 621 as interpreted by California's intermediate appellate courts pre-empts inquiry into a couple's sexual relations, since "cohabitation" consists simply of living under the same roof together; the wife and husband need not even share the same bed. See, e.g., *Vincent B. v. Joan R.*, 126 Cal. App. 3d 619, 179 Cal. Rptr. 9 (1981). Admittedly, § 621 does not foreclose inquiry into the husband's fertility or virility -- matters that are ordinarily thought of as the couple's private business. In this day and age, however, proving paternity by asking intimate and detailed questions about a couple's relationship would be [****80] decidedly anachronistic. Who on earth would choose this method of establishing fatherhood when blood tests prove it with far more certainty and far less fuss? The State's purported interest in protecting matrimonial privacy thus does not measure up to Michael's and Victoria's interest in maintaining their relationship with each other.¹¹

¹¹ Thus, in concluding that § 621 "exclud[es] inquiries into the child's paternity that would be destructive of family integrity and privacy," *ante*, at 120, the plurality exaggerates the extent to which these

[****81] [*156] Make no mistake: to say that the State must provide Michael with a hearing to prove his paternity is not to express any opinion of the ultimate state of affairs between Michael and Victoria and Carole and Gerald. In order to change the current situation among these people, Michael first must convince a court that he is Victoria's father, and even if he is able to do this, he will be denied visitation rights if that would be in Victoria's best interests. See *Cal. Civ. Code Ann. § 4601* (West Supp. 1989). It is elementary that a determination that a State must afford procedures before it terminates a given right is not a prediction about the end result of those procedures.¹²

[****82] [***128] IV

The atmosphere surrounding today's decision is one of make-believe. Beginning with the suggestion that the situation [*157] confronting us here does not repeat itself every day in every corner of the country, *ante*, at 113, moving on to the claim that it

interests would be threatened by the elimination of § 621's presumption. On the other hand, if the State's foremost interest is in protecting the husband from discovering that he may not be the father of his wife's children, as the plurality suggests, see *ante*, at 120, n. 1, then § 621 is unhelpful indeed. Since "cohabitation" under California law includes sharing the same roof but not the same bed and since a person need only make a phone call in order to unsettle a husband's certainty in the paternity of his wife's children, § 621 will do little to prevent such discoveries. See also *post*, at 162 (White, J., dissenting).

¹² The plurality's failure to see this point causes it to misstate Michael's claim in the following way: "Michael contends as a matter of substantive due process that, because he has established a parental relationship with Victoria, protection of Gerald's and Carole's marital union is an insufficient state interest to support termination of that relationship." *Ante*, at 121. Michael does not claim that the State may not, under any circumstance, terminate his relationship with Victoria; instead, he simply claims that the State may not do so without affording him a hearing on the issue -- paternity -- that it deems vital to the question whether their relationship may be discontinued. The plurality makes Michael's claim easier to knock down by turning it into such a big target.

The plurality's misunderstanding of Michael's claim also leads to its assertion that "to provide protection to an adulterous natural father is to deny protection to a marital father." *Ante*, at 130. To allow Michael a chance to prove his paternity, however, in no way guarantees that Gerald's relationship with Victoria will be changed.

is tradition alone that supplies the details of the liberty that the Constitution protects, and passing finally to the notion that the Court always has recognized a cramped vision of "the family," today's decision lets stand California's pronouncement that Michael -- whom blood tests show to a 98 percent probability to be Victoria's father -- is not Victoria's father. When and if the **[**2360]** Court awakes to reality, it will find a world very different from the one it expects.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

California law, as the plurality describes it, *ante*, at 119, tells us that, except in limited circumstances, California declares it to be "irrelevant for paternity purposes whether a child conceived during, and born into, an existing marriage was begotten by someone other than the husband" (emphasis in original). This I do not accept, for the fact that Michael H. is the biological **[*****83]** father of Victoria is to me highly relevant to whether he has rights, as a father or otherwise, with respect to the child. Because I believe that Michael H. has a liberty interest that cannot be denied without due process of the law, I must dissent.

I

[LEdHN[7C] [7C] 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." *Ante*, at 133 (Stevens, J., concurring in judgment). 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 **[*158]** 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.¹

[**84] [***129]** We have not before faced the question of a biological father's relationship with his child when the child was born while the mother was married to another man. On several occasions however, we have considered whether a biological father has a constitutionally cognizable interest in an opportunity to establish paternity. *Stanley v. Illinois*, 405 U.S. 645 (1972), recognized the biological father's right to a legal relationship with his illegitimate child, holding that the *Due Process Clause of the Fourteenth Amendment* entitled the biological father to a hearing on his fitness before his illegitimate children could be removed from his custody. We rejected the State's treatment of Stanley "not as a parent but as a stranger to his children." *Id.*, at 648.

Quilloin v. Walcott, 434 U.S. 246, 255 (1978), also expressly recognized due process rights in the biological father, even while holding that those rights were not impermissibly burdened by the State's application of a "best interests of the child" standard. *Caban v. Mohammed*, 441 U.S. 380 **[*159]** (1979), **[*****85]** invalidated on equal protection grounds a statute under which a man's children could be adopted by their natural mother and her husband without the natural father's consent.

In *Lehr v. Robertson*, 463 U.S. 248, 261-262

¹ *Lehr v. Robertson*, 463 U.S. 248, 259-260 (1983), emphasized the distinction between "a mere biological relationship and an actual relationship of parental responsibility." In the dissent to *Lehr*, I said: "As Jessica's biological father, Lehr either had an interest protected by the Constitution or he did not. If the entry of the adoption order in this case deprived Lehr of a constitutionally protected interest, he is entitled to notice and an opportunity to be heard before the order can be accorded finality." *Id.*, at 268 (footnote omitted). I rejected the majority's approach which purported to analyze the particular facts of the case in order to determine whether Mr. Lehr had a constitutionally protected liberty interest. I stressed the interest that a natural parent has in his child, "one that has long been recognized and accorded constitutional protection." *Id.*, at 270. Whether or not the majority in *Lehr* was in error, on the facts of the instant case, even *Lehr*'s more demanding standard is clearly satisfied.

(1983), though holding against the father in that case, the Court said clearly [****2361**] that fathers who have participated in raising their illegitimate children and have developed a relationship with them have constitutionally protected parental rights. Indeed, the Court in *Lehr* suggested that States must provide a biological father of an illegitimate child the means by which he may establish his paternity so that he may have the opportunity to develop a relationship with his child. The Court upheld a stepparent adoption over the natural father's objections, but acknowledged that "the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child." *Id.*, at 266-267. There, however, the father had never established a custodial, personal, or financial relationship with his child. *Lehr* [******86**] had never lived with the child or the child's mother after the birth of the child and had never provided any financial support.

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. In contrast to the father in *Lehr*, 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. (Even appellee concedes that Michael has "made greater efforts and had more success in establishing a [***160**] father-child [*****130**] relationship" than did Mr. *Lehr*. Brief for Appellee 13, n. 6.) The mother has never denied, and indeed has admitted, that Michael is Victoria's father.² *Lehr* was

predicated on the absence of [******87**] a substantial relationship between the man and the child and emphasized the "difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and [*Lehr*]." *Lehr*, *supra*, at 261. "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' *Caban*, *supra*, at 392, his interest in personal contact with his child acquires substantial protection under the Due Process Clause." *Lehr*, *supra*, at 261. The facts in this case satisfy the *Lehr* criteria, which focused on the relationship between father and child, not on the relationship between father and mother. Under *Lehr* a "mere biological relationship" is not enough, but in light of Carole's vicissitudes, what more could Michael have done? It is clear enough that Michael more than meets the mark in establishing the constitutionally protected liberty interest discussed in *Lehr* and recognized in *Stanley v. Illinois*, *supra*, [******88**] and *Caban v. Mohammed*, *supra*. He therefore has a liberty interest entitled to protection under the *Due Process Clause of the Fourteenth Amendment*.

II

California plainly denies Michael this protection, by refusing him the opportunity to rebut the State's presumption that the mother's husband is the father of the child. California law not only deprives Michael of a legal parent-child relationship with his daughter Victoria but even denies him the opportunity to introduce blood-test evidence to rebut the demonstrable [***161**] fiction that Gerald is Victoria's father.³ Unlike [****2362**] *Lehr*,

² As the plurality concedes, Carole signed a stipulation in April 1984 acknowledging that Michael was Victoria's father. *Ante*, at 114-115.

³ While the ultimate resolution of Michael's case, were he permitted to introduce such evidence, might well be visitation rights or even custody of the child, it is important to keep in mind that the question at issue here is not whether he should be granted visitation or custody but simply whether he can take the first step in any such proceeding. Whatever the end result, Michael is simply asking that he be permitted to offer proof that he is Victoria's father. In the instant case, that is likely to mean that he would introduce the blood tests that he and Carole took and which show that Michael is

Michael has not been denied notice. He has, most definitely, however, been denied any real opportunity to be heard. The grant of summary judgment against Michael was based on the conclusive presumption of [Cal. Evid. Code Ann. § 621](#) (West Supp. 1989), which [****89] denied him the opportunity to prove that he is Victoria's biological father. The Court gives its blessing to § 621 by relying on the State's asserted interests in the integrity of the family (defined as Carole and Gerald) and in protecting Victoria from the stigma of illegitimacy and by balancing away Michael's interest in establishing that he is the father of the child.

[***130A] The interest in [****90] protecting a child from the social stigma of illegitimacy lacks any real connection to the facts of a case where a father is seeking to establish, rather than repudiate, paternity. The "stigma of illegitimacy" argument harks back to ancient common law when there were no blood tests to ascertain that the husband could not "by the laws of nature" be the child's father. Judicial process refused to declare that a child born in wedlock was illegitimate unless the proof was positive. The only such proof was physical absence or impotency. But we have now clearly recognized the use of blood tests as an authoritative means of evaluating allegations of paternity. See, e. g., [Little v. Streater, 452 U.S. 1, 6-7 \(1981\)](#). I see no reason to debate the plurality's multilingual explorations into "spousal nonaccess" and ancient policy concerns behind bastardy laws. It may be true that a child conceived in an extramarital relationship would [*162] be considered a "bastard" in the literal sense of the word, but whatever stigma remains in today's society is far less compelling in the context of a child of a married mother, especially when there is a father [****91] asserting paternity and seeking a relationship with his child. It is hardly rare in this world of divorce and remarriage for a child to live with the "father" to whom her mother is married, and still have a relationship with her biological father.

Victoria's father.

The State's professed interest in the preservation of the existing marital unit is a more significant concern. To be sure, the intrusion of an outsider asserting that he is the father of a child whom the husband believes to be his own would be disruptive to say the least. On the facts of this case, however, Gerald was well aware of the liaison between Carole and Michael. The conclusive presumption of evidentiary rule § 621 virtually eliminates the putative father's chances of succeeding in his effort to establish paternity, but it by no means prevents him from asserting the claim. It may serve as a deterrent to such claims but does not eliminate the threat. Further, the argument that the conclusive presumption preserved the sanctity of the marital unit had more sway in a time when the husband was similarly prevented from challenging paternity.

4

[****92] [*163] "The [***130B] emphasis of the Due Process Clause is on 'process.'" [Moore v. East Cleveland, 431 U.S. 494, 542 \(1977\)](#) (White, J., dissenting). I fail to see the fairness in the process established by the State of California [**2363] 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.'" [Grannis v. Ordean, 234](#)

⁴Even in the last quarter century, under California law, a husband whose blood test definitively showed he could not be the father of the child born to his wife was nonetheless not permitted to present this evidence to a court in order to refute the conclusive presumption of paternity. In 1967, however, the California courts began to erode the presumption as it applied to the husband, providing the husband with at least some opportunity to demonstrate that he was not the child's father. [Jackson v. Jackson, 67 Cal. 2d 245, 430 P. 2d 289 \(1967\)](#). In 1980, the California Legislature amended § 621 of its Evidence Code in order to permit the husband an opportunity to overcome the presumption that he is the father of his wife's child if he raises the notice of motion for blood tests not later than two years from the birth of the child. (So much for the State's interest in protecting the child from the stigma of illegitimacy!)

[U.S. 385, 394](#). It is an opportunity which must be granted at a meaningful time and in a meaningful manner." [Armstrong v. Manzo, 380 U.S. 545, 552 \(1965\)](#). 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 [****93] in any meaningful manner.

As the Court has said: "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." [Lehr, 463 U.S., at 262](#). It is as if this passage was addressed to Michael. Yet the plurality today recants. Michael eagerly grasped the opportunity to have a relationship with his daughter (he lived with her; he declared her to be his child; he provided financial support for her) and still, with today's opinion, his opportunity has vanished. He has been rendered a stranger to his child.

[***131] Because [Cal. Evid. Code Ann. § 621](#), as applied, should be held unconstitutional under the [Due Process Clause of the Fourteenth Amendment](#), I respectfully dissent.

References

10 Am Jur 2d, Bastards 11, 12, 18-20, 22-24, 62.5;
59 Am Jur 2d, Parent and Child 36

5 Am Jur Pl & Pr Forms (Rev), Bastards,
[****94] Forms 97, 121

2 Am Jur Proof of Facts 445, Bastards; 14 Am Jur
Proof of Facts 2d 409, Husband's Sterility as
Rebutting Presumption of Legitimacy

10 Am Jur Trials 653, Disputed Paternity Cases

USCS, [Constitution, Amendment 14](#)

US L Ed Digest, Appeal 1673; Constitutional Law
490, 528.5, 830.7

Index to Annotations, Cohabitation; Due Process;
Legitimacy of Children; Visits and Visitation

Annotation References:

Supreme Court's views as to concept of "liberty"
under [due process clauses of Fifth](#) and [Fourteenth Amendments](#). 47 L Ed 2d 975.

Right of illegitimate child to maintain action to
determine paternity. [19 ALR4th 1082](#).

Who may dispute presumption of legitimacy of
child conceived or born during wedlock. 90 ALR3d
1032.

Proof of husband 's impotency or sterility as
rebutting presumption of legitimacy. [84 ALR3d 495](#).

Binding effect upon state courts of opinion of
United States Supreme Court supported by less
than a majority of all its members. [65 ALR3d 504](#).

Right of putative father to visit illegitimate child.
[15 ALR3d 887](#).



Caution

As of: October 18, 2026 7:03 AM Z

[Mirabelli v. Bonta](#)

Supreme Court of the United States

March 2, 2026, Decided

No. 25A810.

Reporter

607 U.S. 492 *; 146 S. Ct. 797 **; 224 L. Ed. 2d 310 ***; 2026 U.S. LEXIS 1192 ****; 2026 LX 50034; 31 Fla. L. Weekly Fed. S 563

Elizabeth Mirabelli, et al., Applicants v. Rob Bonta, Attorney General of California, et al.

Notice: The pagination of this document is subject to change pending release of the final published version.

Prior History: [****1] ON APPLICATION TO VACATE INTERLOCUTORY STAY ORDER

[Mirabelli v. Bonta, 2026 U.S. App. LEXIS 403, 2026 WL 44874 \(Jan. 5, 2026\)](#)

Core Terms

injunction, gender, children's, religious, child's, substantive due process, transit, district court, daughter, teacher, free exercise, mental health, parents, pronoun, slip opinion, per curiam, interim, subclass, succeed, exempt, vacate, male

Case Summary

Overview

HOLDINGS: [1]-The stay of a permanent injunction with respect to the parents was not justified under the governing four-factor test because the parents who sought religious exemptions from California policies concerning gender transitioning and use of students' preferred names and pronouns were likely to succeed on the merits of their [Free Exercise Clause of the First](#)

[Amendment](#) claim as California's policies violated the parents' sincere religious beliefs about sex and gender, the denial of plaintiffs' constitutional rights during the potentially protracted appellate process constituted irreparable harm, and the equities did not justify depriving the parents of the district court's judgment in their favor. The injunction promoted child safety by guaranteeing fit parents a role in some of the most consequential decisions in their children's lives.

Outcome

Application to vacate Ninth Circuit's stay granted as to parents, but otherwise denied. Per curiam decision; 1 concurrence, 1 dissent.

LexisNexis® Headnotes

Family Law > Parental Duties & Rights > Consent > Education

Family Law > Family Protection & Welfare > Children > Proceedings

[HN1](#) Consent, Education

Under long-established precedent, parents—not the State—have primary authority with respect to the upbringing and education of children. The right protected by these precedents includes the right not to be shut out of participation in decisions regarding their children's mental health.

Judges: Roberts, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson.

Opinion

[**800] [***311] [*492] PER CURIAM.

Before us is an application to vacate a Court of Appeals order staying a permanent injunction entered by a District Court on behalf of parents and teachers who claim that certain California policies violate their rights under the [Free Exercise Clause of the First Amendment](#) and the [Due Process Clause of the Fourteenth Amendment](#). [*493] The parents object that these policies prevent schools from telling them about their children's efforts to engage in gender transitioning at school unless the children consent to parental notification. The parents also take issue with California's requirement that schools use children's preferred names and pronouns regardless of their parents' wishes. The teachers object to their compelled participation in the implementation of the State's policies.

I

This case began in the United States District Court for the Southern District of California in 2023 when two teachers sued seeking an exemption from their school district's policies regarding students' gender. During litigation, the school district claimed that state law, as interpreted by the California attorney general and Department of Education, required it to [****2] adopt these policies. So the teachers added state officials as defendants, and parents of California schoolchildren joined the lawsuit as plaintiffs. Relying on their own experiences and guidance documents issued by state officials, plaintiffs alleged that California's [**801] policies permitted disclosure of a student's gender transitioning at school only if the student consented. Plaintiffs claimed that these policies violated their rights under the [Free Exercise Clause of the First Amendment](#) [***312] and the [Due](#)

[Process Clause of the Fourteenth Amendment](#).

Two of the parent plaintiffs, John and Jane Poe, have religious objections to gender transitioning but were not told by their daughter's school when she began to present as a boy and use a male name and male pronouns during her seventh-grade year. In parent-teacher meetings, no one told the Poes about their daughter's transitioning or referred to her using the male name and pronouns that were used at school. At the beginning of their daughter's eighth-grade year, she attempted suicide and was hospitalized. Only then did her parents learn from a doctor that she had gender dysphoria [*494] and had been presenting as a boy at school. Just months after being discharged, the Poes' daughter was rehospitlized and held there involuntarily because she was at risk for self-harm. At a new school in ninth grade, she once again began identifying as a boy. Contrary to the Poes' instructions, teachers and school officials continued to use a male name and pronouns for their daughter, citing their obligations under California state law. [****3] The Poes have placed their daughter in therapy and obtained psychiatric care for her.

Like the Poes, plaintiffs John and Jane Doe object to gender transitioning, but since fifth grade, their daughter has sometimes identified as a boy. When their daughter was in seventh grade, the Does confronted the school principal about their daughter's transitioning. They believed the school was using a male name and pronouns for their daughter behind their backs. The principal explained that state law prohibited the school from sharing information about a child's transitioning with the child's parents without the child's consent. The Does believed that the risk of leaving their daughter in that school was too great, so they transferred their daughter to a new public school because sending her to a private school was financially and logistically infeasible. The Does have also placed their daughter in therapy.

In 2025, defendants asserted that the guidance documents on which plaintiffs had relied were no

longer operative and that the claims against certain state defendants should be dismissed as moot. But the State had promulgated a new required training curriculum that similarly directed teachers not to tell parents about their children's gender identity without the children's consent. Defendants then withdrew their mootness argument, and the District Court declined to impose sanctions.

Later, plaintiffs sought classwide relief, and the District Court certified a class with separate subclasses for parents [****4] and teachers. One subclass of parents comprises all those [*495] who object to the challenged policies, while a separate subclass is limited to those who seek a religious exemption. App. to Emergency Application 90a (App.). Two similar subclasses of teachers were also certified. *Id.*, at 89a-90a.

After discovery, the court granted summary judgment for all plaintiffs and entered a permanent injunction in their favor. The injunction prevents the schools from “misleading” parents about their children's gender presentation at school and their social transitioning efforts. *Id.*, at 24a. It also requires the schools to follow parents' directions regarding their children's names and pronouns. And it compels [***313] defendants to include in state-created or approved instructional materials a notice of the rights protected by the injunction.

[**802] The Ninth Circuit granted defendants' motion to stay the injunction pending appeal. It began by raising procedural objections to the District Court's injunction. It claimed that the District Court had granted class certification without undertaking the “‘rigorous analysis’” required by [Federal Rule of Civil Procedure 23](#). App. 7a (quoting [Wal-Mart Stores, Inc. v. Dukes](#), 564 U. S. 338, 351, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)). And it stated that the injunction appeared to be overly broad because it “covers every parent of California's millions of public school students and every public school employee in the state.” App. 6a. As a result, it opined, the injunction seemed to grant relief to uninjured class

members who lacked Article III standing.

The Ninth Circuit also expressed doubts about the District Court's decision on the merits. On the free exercise issue, it relied on a not-precedential [****5] Sixth Circuit decision and brushed aside [Mahmoud v. Taylor](#), 606 U. S. 522, 145 S. Ct. 2332, 222 L. Ed. 2d 695 (2025), as “a narrow decision focused on uniquely coercive ‘curricular requirements.’” App. 10a-11a (citing [Doe No. 1 v. Bethel Local Sch. Dist. Bd. of Educ.](#), 2025 U.S. App. LEXIS 22140, 2025 WL 2453836, *7 (CA6, Aug. 26, 2025)). The Ninth Circuit expressed skepticism [*496] about the parents' and teachers' [Fourteenth Amendment](#) due process claim because it viewed those claims as seeking to expand the protection afforded by established precedent.

When the Ninth Circuit stayed the injunction, the parents and teachers filed this application seeking vacatur of the Ninth Circuit's stay pending appeal.

II

We grant the application and vacate the stay with respect to the parents because this aspect of the stay is not “justified under the governing four-factor test.” [Alabama Assn. of Realtors v. Department of Health and Human Servs.](#), 594 U. S. 758, 763, 141 S. Ct. 2485, 210 L. Ed. 2d 856 (2021) (*per curiam*) (citing [Nken v. Holder](#), 556 U. S. 418, 434, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)).

Likelihood of success on the merits. We conclude that the parents who seek religious exemptions are likely to succeed on the merits of their [Free Exercise Clause](#) claim. California's policies likely trigger strict scrutiny under that provision because they substantially interfere with the “right of parents to guide the religious development of their children.” [Mahmoud](#), 606 U. S., at 559, 145 S. Ct. 2332, 222 L. Ed. 2d 695 (citing [Wisconsin v. Yoder](#), 406 U. S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)). The parents who assert a free exercise claim have sincere religious beliefs about sex and gender, and they feel a religious obligation to raise

their children in accordance with those beliefs. California’s policies violate those beliefs and “impos[e] the kind of burden on religious exercise that *Yoder* found unacceptable.” [606 U. S., at 550, 145 S. Ct. 2332, 222 L. Ed. 2d 695](#). Indeed, the intrusion on parents’ free exercise rights here—unconsented facilitation of a child’s gender transition—is greater than the introduction of LGBTQ storybooks we considered sufficient to trigger strict scrutiny in *Mahmoud*. See [id., at 563, 145 S. Ct. 2332, 222 L. Ed. 2d 695](#).

[*314]** California’s policies will likely not survive the strict scrutiny that *Mahmoud* demands. The State argues that its policies advance a compelling interest in student safety and privacy. But those policies cut out the primary protectors **[*497]** of children’s best interests: their parents. See [Troxel v. Granville, 530 U. S. 57, 68-69, 120 S. Ct. 2054, 147 L. Ed. 2d 49 \(2000\)](#) (plurality **[****6]** opinion). California’s policies also appear to fail the narrow-tailoring requirement. The State’s interest in safety could be served by a policy that allows religious exemptions **[**803]** while precluding gender-identity disclosure to parents who would engage in abuse. For these reasons, the parents who object to the California policies on free exercise grounds are likely to succeed on the merits.

The same is true for the subclass of parents who object to those policies on due process grounds. [HN1](#) Under long-established precedent, parents—not the State—have primary authority with respect to “the upbringing and education of children.” [Pierce v. Society of Sisters, 268 U. S. 510, 534-535, 45 S. Ct. 571, 69 L. Ed. 1070 \(1925\)](#); accord, [Meyer v. Nebraska, 262 U. S. 390, 399-400, 43 S. Ct. 625, 67 L. Ed. 1042 \(1923\)](#). The right protected by these precedents includes the right not to be shut out of participation in decisions regarding their children’s mental health. [Parham v. J. R., 442 U. S. 584, 602, 99 S. Ct. 2493, 61 L. Ed. 2d 101 \(1979\)](#). Gender dysphoria is a condition that has an important bearing on a child’s mental health, but when a child exhibits symptoms of gender dysphoria at school,

California’s policies conceal that information from parents and facilitate a degree of gender transitioning during school hours. These policies likely violate parents’ rights to direct the upbringing and education of their children.

Irreparable harm. The **[****7]** denial of plaintiffs’ constitutional rights during the potentially protracted appellate process constitutes irreparable harm. [Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U. S. 14, 19, 141 S. Ct. 63, 208 L. Ed. 2d 206 \(2020\)](#) (*per curiam*).

Balance of equities. Finally, the “equities do not justify depriving [the parents] of the District Court’s judgment in their favor.” [Alabama Assn. of Realtors, 594 U. S., at 765, 141 S. Ct. 2485, 210 L. Ed. 2d 856](#). Everyone agrees that children’s safety is the overriding equity. And the injunction here promotes child safety by guaranteeing fit parents a role in some of the most consequential decisions in their children’s lives. The injunction **[*498]** also permits the State to shield children from unfit parents by enforcing child-abuse laws and removing children from parental custody in appropriate cases.

III

The Ninth Circuit’s procedural objections to the injunction are unlikely to prevail.

First, the parents protected by the injunction very likely have standing because they are objects of the challenged exclusion policies. See [Diamond Alternative Energy, LLC v. EPA, 606 U. S. 100, 114, 145 S. Ct. 2121, 222 L. Ed. 2d 370 \(2025\)](#). Contrary to the Ninth Circuit’s suggestion, the injunction does not provide relief for all the parents of California public school students, but only for those parents who object to the challenged policies or seek religious exemptions.

[*315]** Second, class certification was likely proper. The District Court addressed **[****8]** the requirements for certification under [Rule 23](#) and explained why it concluded that they were met.

Application to vacate the Ninth Circuit’s stay presented to JUSTICE KAGAN and by her referred to the Court granted as to the parents but otherwise denied.

JUSTICE THOMAS and JUSTICE ALITO would grant the application in full.

JUSTICE SOTOMAYOR would deny the application in full.

Concur by: BARRETT

Concur

[804]** JUSTICE BARRETT, with whom THE CHIEF JUSTICE and JUSTICE KAVANAUGH join, concurring.

As the dissent observes, substantive due process is a controversial doctrine. Judges typically interpret express constitutional rights, such as the freedom of speech or religion. But substantive due process asks us to find unexpressed rights in a constitutional provision that guarantees only “process” before a person is deprived of life, liberty, or property. U. S. Const., Amdt. 14, §1. When rights are unstated, **[*499]** how do judges know what they are? The obvious risk is that judges will use their own values as a guide, thereby jeopardizing the People’s right to self-governance. To mitigate this risk, the Court has crafted a demanding test for recognizing unexpressed rights: They must be “deeply rooted in this Nation’s history and tradition” and “implicit **[***9]** in the concept of ordered liberty.” *Washington v. Glucksberg*, 521 U. S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997) (internal quotation marks omitted). Relevant here, the doctrine of substantive due process has long embraced a parent’s right to raise her child, which includes the right to participate in significant decisions about her child’s mental health. See *Pierce v. Society of Sisters*, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed.

[1042 \(1923\)](#); *Parham v. J. R.*, 442 U. S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

The parent-applicants are likely to succeed on the merits under a straightforward application of these cases. California prohibits its public schools from informing parents of their child’s gender transition at school unless the child consents. The record in this case indicates that the State’s nondisclosure policy applies even if parents expressly ask for information about their child’s gender identification. One set of parents learned of their child’s transition at school only after the child attempted suicide. Strikingly, even after this tragic event, school administrators continued to withhold information about the student’s gender identification. California’s nondisclosure policy thus quite obviously excludes parents from highly important decisions about their child’s mental health, see *Parham*, 442 U. S., at 601-604, 99 S. Ct. 2493, 61 L. Ed. 2d 101, and is unlikely to satisfy heightened scrutiny. Our resolution of the parents’ likelihood of success on this claim is dictated by existing law.

The dissent questions how the Court can adhere to parental-rights **[***316]** precedent after its decision in *Dobbs v. Jackson Women’s Health Org.*, 597 U. S. 215, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022). *Post*, at 505 (opinion of KAGAN, J.). But *Dobbs* calls into question neither the doctrine of substantive due process nor the other **[*500]** unexpressed rights that the doctrine protects. Applying *Glucksberg*, *Dobbs* holds that *Roe v. Wade*, 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), were incorrectly decided because a right to abortion is not “‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’” *Dobbs*, 597 U. S., at 231, 142 S. Ct. 2228, 213 L. Ed. 2d 545. And because the Court concluded that the *stare decisis* factors counseled against retaining these cases, *Dobbs* overruled them. *Id.*, at 263-290, 142 S. Ct. 2228, 213 L. Ed.

[2d 545](#). It does not follow from *Dobbs* that all our substantive due process cases conflict with [Glucksberg](#), much less that *stare decisis* would counsel **[****10]** overruling any that do.

No party to this dispute questions the continued validity of [Meyer](#), [Pierce](#), or [Parham](#). For all its concerns about deciding the issue in this posture, the dissent **[**805]** expresses “no doubt that parents have rights, even though unenumerated, concerning their children and the life choices they make.” *Post*, at 507. And the precedent recognizing those rights controls our assessment of whether the parents are likely to succeed on the merits.

The word “likely” is important, because it reflects that our assessment is preliminary. We consider the merits not to conclusively resolve them, but because they bear on the limited question before us: Are the parents entitled to the benefit of the judgment entered by the District Court while California tries to overturn that judgment on appeal? The Ninth Circuit—itself acting on an interim basis—said “no.” We disagree. The parents must continue to litigate in the Ninth Circuit, and if necessary, this Court. But in the meantime, the injunction of California’s policy—which, incidentally, was entered after a full merits process—remains in place.

And contrary to the dissent’s charge, granting interim relief is not a sign of the Court’s “impatience” to reach the merits. *Post*, at 503. Instead, the grant reflects the Court’s judgment about the risk of irreparable harm to the parents. **[*501]** See [Nken v. Holder](#), 556 U. S. 418, 435, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009). If the parents were probably right but would suffer little **[****11]** harm from the Ninth Circuit’s stay, they would not be entitled to interim relief. *Ibid*. But that is not the situation here. Under California’s policy, parents will be excluded—perhaps for years—from participating in consequential decisions about their child’s mental health and well-being. Thus, the parents are likely to suffer irreparable harm if California enforces its policy

while this litigation winds its way through the courts. *Ante*, at 497.

One last point: The Court has chosen to accompany today’s order with a *per curiam* opinion that explains its reasoning. The choice to say more rather than less is perhaps the source of the dissent’s concern that our disposition **[***317]** of this application will be taken as a “conclusive merits judgment.” *Post*, at 504. But see, e.g., [Whole Woman’s Health v. Jackson](#), 594 U. S. ___, ___, 141 S. Ct. 2494, 210 L. Ed. 2d 1014 (2021) (KAGAN, J., dissenting from denial of application for injunctive relief) (slip op., at 1) (critiquing this Court’s interim orders for “barely bother[ing] to explain [their] conclusion[s]”); [Trump v. Boyle](#), 606 U. S. ___, ___, 145 S. Ct. 2653, 222 L. Ed. 2d 1181 (2025) (KAGAN, J., dissenting from grant of application for stay) (slip op., at 3) (similar). Interim applications routinely require the Court to balance the lock-in risk of saying too much against the transparency cost of saying too little. See **[****12]** [Labrador v. Poe](#), 601 U. S. ___, ___, 144 S. Ct. 921, 218 L. Ed. 2d 400 (2024) (KAVANAUGH, J., concurring in grant of stay) (slip op., at 11-12). In my judgment, the benefits of explanation win out here. The Ninth Circuit (following the Sixth Circuit) significantly misunderstood [Mahmoud v. Taylor](#), 606 U. S. 522, 145 S. Ct. 2332, 222 L. Ed. 2d 695 (2025), and general course correction will allow the case to progress efficiently. And because of the *Dobbs* point that JUSTICE KAGAN raises, it would have been unwise to issue an unreasoned order on the parents’ substantive due process claim.

When an interim application comes to us, “we must decide it—grant or deny.” *Labrador*, 601 U. S., at ___, 144 S. Ct. 921, 218 L. Ed. 2d 400 (KAVANAUGH, J., concurring in grant of stay) (slip op., at 2). Because the [Nken](#) **[*502]** factors strongly favor the parents, *ante*, at 496-497, I see no basis for denying this application.

Dissent by: KAGAN

Dissent

JUSTICE KAGAN, with whom JUSTICE JACKSON joins, dissenting.

Today’s decision shows, not for the first time, how our emergency docket can malfunction. **[**806]** A case raising novel legal questions and arousing strong views comes to this Court via an application about whether to stay a district court’s injunction pending appeal. The ordinary appellate process has barely started; only a district court has ruled on the case’s merits. The Court receives scant and, frankly, inadequate briefing about the legal issues in **[****13]** dispute. It does not hold oral argument or deliberate in conference, as regular procedures dictate. It considers the request on a short fuse—a matter of weeks. And then the Court grants relief by means of a terse, tonally dismissive ruling designed to conclusively resolve the dispute. The Court does all this even though the application of existing law to the case raises tricky questions, and so cries out for reflection and explanation. The Court is impatient: It already knows what it thinks, and insists on getting everything over quickly. See also, e.g., [*Department of State v. AIDS Vaccine Advocacy Coalition*, 606 U. S. _____, 146 S. Ct. 19, 222 L. Ed. 2d 1235 \(2025\)](#) (KAGAN, J., dissenting from grant of stay application) (slip op., at 2-3); [*Trump v. Wilcox*, 605 U. S. _____, 145 S. Ct. 1415, 221 L. Ed. 2d 985 \(2025\)](#) (KAGAN, J., dissenting from grant of stay application) (slip op., at 2-3, 8).

Indeed, the precipitousness of the Court’s decision today has yet a further—and wholly new—dimension: In granting emergency relief, the Court cannot even wait for an appellate court to conclude its own process for deciding the identical issue. As the Court notes, a Ninth Circuit panel last month stayed the District Court’s injunction against the challenged policies, pending the State’s appeal of **[***318]** that order. See *ante*, at 495-496. The plaintiffs responded by simultaneously filing two motions—one asking this Court to vacate the

panel’s **[*503]** stay and the other asking the Ninth Circuit to do the same thing through en banc review. The Ninth Circuit is already acting on the motion filed there: The court promptly called for (and has now received) a response from the State, preparatory to exchanging memoranda and voting on reconsideration of the panel’s decision. Regular order counsels that, in this situation, the Ninth Circuit should go first. The lower court, that is, should decide whether to vacate the stay; and only then should this Court decide whether further action is needed. Cf. [*Supreme Court Rule 23.3*](#) (Stay applications “shall set out with particularity why the relief sought is not available from any other court”). But the Court’s impatience cannot be contained for even that long. The Court jumps the line, pre-empting the Ninth Circuit’s normal (and notably reflective) en banc process. Why wait for appellate procedures to play out when the Court already knows what it wants?

And still, there is worse: The Court resolves the issues raised through shortcut procedures on the emergency docket even though it has had—for months now—the option of doing so the regular way, on our merits docket. Since November of last year, a petition for certiorari has been pending in a case that, in critical respects, is a carbon copy of this one. In [*Foote v. Ludlow School Comm.*, 128 F. 4th 336 \(CA1 2025\)](#) (*per curiam* **[****14]**), cert. pending, No. 25-77, as here, a public school adopted a policy, conforming to a state agency’s guidance, about students who identify as transgender. There, as here, the policy requires school employees to use only a student’s preferred name and pronouns, while barring employees from disclosing the student’s at-school gender identity to parents. And there, as here, parents challenge that policy as a violation of their right to substantive due process. See *id.*, at 340-344.² **[**807]** Why

² The one difference between this case and *Foote* is that this case also involves a [First Amendment](#) free exercise claim, which would (if successful) give relief to parents with religious objections to the State’s policy. But as addressed later, the Court’s recognition of the substantive due process claim here makes the free exercise claim

not, then, just grant certiorari in [*504] *Foote*, and decide it this coming fall? Or if there is some reason that *Foote* is not suitable, the Court could take one of the many cases lined up behind it. By recent count, almost 40 cases raising due process and/or free exercise objections to similar school policies are currently in the judicial system (with several recently decided by appellate courts), so this Court would not have to wait long. See Pet. for Cert. in *Foote*, O. T. 2025, No. 25-77, p. 32. By granting certiorari on one (or more) of those cases, the Court could ensure that the issues raised by such policies receive the careful, disciplined consideration they merit, rather than the inevitably truncated review the Court affords emergency applications.

Certainly, the Court cannot claim [***319] that thought and care are not needed. If nothing else, this Court owes it to a sovereign State to avoid throwing over its policies in a slapdash way, if the Court can provide normal procedures. And throwing over a State's policy is what the Court does today. To be sure, the Court sprinkles the word "likely" atop its assessment of which party's arguments will succeed. But no one—in particular, neither a state official nor a lower court—is apt to read the Court's *per curiam*, brusque though it is, as anything less than a conclusive merits judgment.

In any event, there *is* something else: This case presents some thorny legal issues. The Court grants relief to parents on the same two substantive grounds that supported the District Court's injunction. First, the Court says, some parents can show that the State's policy "substantially interfere[s]" [*505] with their [First Amendment](#) right "to guide the religious development of their children." *Ante*, at 496. Here, the Court analogizes

to [Mahmoud v. Taylor](#), 606 U. S. 522, 145 S. Ct. 2332, 222 L. Ed. 2d 695 (2025), a decision issued [****15] last Term about school curriculum. The ink on that decision is barely dry, and courts have just begun to consider its meaning and reach. But even assume the Court is right on the free exercise score; still, that could not justify extending relief to *all* the parents here. After all, some of those parents object to the State's policy not for religious reasons, but simply because it prevents them from taking part in their children's most crucial life decisions. So the District Court also ruled on substantive due process grounds, finding a parental right to "direct the upbringing and medical care of their children." App. to Emergency Application 54a. And indeed, in doing so, the court made its free exercise ruling superfluous, because the due process ground protects every parent, whether or not religious. See *supra*, at 503-504, n. 1. This Court, to affirm the relief given, must follow the same course: It explains that the State's policy "excludes parents" from "participation in decisions regarding their children's mental health." *Ante*, at 497. But the very phrasing the Court uses betrays the delicateness of the operation: Even in recognizing that parental right, the Court cannot quite bring [****16] itself to name the legal [**808] doctrine—it is, again, substantive due process—that provides the right's only basis.

Anyone remotely familiar with recent debates in constitutional law will understand why: Substantive due process has not been of late in the good graces of this Court—and especially of the Members of today's majority. The [Due Process Clause](#), needless to say, does not expressly grant parental rights of any kind. The relevant text bars a State only from depriving a person of "liberty" "without due process of law." Members of the majority often have expressed skepticism—sometimes outright hostility—to understanding the "capacious" term "liberty" to enshrine specific rights. [Dobbs v. Jackson Women's Health Org.](#), 597 U. S. 215, 239, 142 S. Ct. 2228, 213 L. Ed. 2d 545 [*506] (2022). Substantive due process, one has stated, is a

immaterial. See *infra*, at 505. That is because accepting the due process claim gives relief to *all* objecting parents, religious and non-religious alike. So granting certiorari in *Foote* would allow the Court to consider, on its regular merits docket, the only claim doing actual work here. And if it is nonetheless thought important to address the [First Amendment](#) issue as well, the Court could grant certiorari (as I next explain) on one of multiple other cases raising both issues that are likely to reach us in short order.

“particularly dangerous” “legal fiction” because it “invites judges” to “roa[m] at large in the constitutional field guided only by their personal views.” [McDonald v. Chicago](#), 561 U. S. 742, 811, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) [***320] (THOMAS, J., concurring in part and concurring in judgment); [Obergefell v. Hodges](#), 576 U. S. 644, 721, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) (THOMAS, J., dissenting).³ Another has pointed to the “judicial misuse of the so-called ‘substantive component’ of due process to dictate policy on matters that belonged to the people to decide.” [Sessions v. Dimaya](#), 584 U. S. 148, 191, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018) (GORSUCH, J., concurring in part and concurring in judgment). And yet a third, when defending the Court’s elimination of a 50-year-old right grounded in substantive due process, explained that the “Constitution does not grant the nine unelected Members of this Court the unilateral authority to rewrite the Constitution.” [Dobbs](#), 597 U. S., at 340, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (KAVANAUGH, J., concurring). There are many such statements to choose from in this Court’s recent substantive due process caselaw. Especially given the Court’s last venture into the field, today’s decision cannot but induce a strong sense of whiplash. Compare *ante*, at 497 (recognizing a parent’s right to make important decisions about her child’s health), with [Dobbs](#), 597 U. S., at 231, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (repudiating a woman’s right to make important decisions about her own health).⁴

³ For that reason, JUSTICE THOMAS has called for overruling “all” of this Court’s “substantive due process precedents.” [Dobbs](#), 597 U. S., at 332-333, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (concurring opinion). That invitation presumably extends to the precedents supporting both the District Court’s decision and today’s *per curiam*. See *ante*, at 497 (citing [Meyer v. Nebraska](#), 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); [Pierce v. Society of Sisters](#), 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); and [Parham v. J. R.](#), 442 U. S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979)); App. to Emergency Application 38a-39a.

⁴ Another contrast—this time, between this case and [United States v. Skrametti](#), 605 U. S. 495, 145 S. Ct. 1816, 222 L. Ed. 2d 136 (2025)—is also striking. In [Skrametti](#), several parents challenged Tennessee’s ban on gender-affirming care for minors. The suit raised claims

[**809] None of this is to say that the Court gets the merits here wrong. It may not—as to the plaintiffs’ free exercise claim, [*507] or their substantive due process claim, or both. As to due process particularly—because, again, that claim alone does all the load-bearing work in this case, see *supra*, at 503-504, n. 1, 505—I have no doubt that parents have rights, even though unenumerated, concerning their children and the life choices they make. See [Pierce v. Society of Sisters](#), 268 U. S. 510, 534-535, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); [Parham v. J. R.](#), 442 U. S. 584, 602-603, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979). On the other side of the ledger, of course, a State has critical interests in the care and education of children. But California’s policy, in depriving all parents of information [***321] critical to their children’s health and well-being, could have crossed the constitutional line. And that would entitle the parents, at the end of the day, to relief.

The Court, however, would be far better equipped to draw the appropriate line and to explain its legal basis—in short, to do [****17] law in the right way—if it had followed our ordinary processes. A mere decade ago, this Court would never have granted relief in this posture. (Indeed, I am confident that the plaintiffs would never have thought to ask, at this stage, for the Court’s involvement.) Then, though apparently not now, we understood that our normal processes—full briefing, oral argument, conference, and opinion writing, along with the time they take—exist for a reason. They ensure that before the Court makes a decision, it has marshaled all the [*508] relevant

grounded in both equal protection and substantive due process. As to the latter, the parents in [Skrametti](#), similarly to the parents here, asserted a right “to make decisions concerning medical care for their minor children.” Pet. for Cert., O. T. 2023, No. 23-466, p. 34; see *id.*, at 18 (invoking a “right of parents with respect to the care, custody, and control of their children, including in decisions about medical care”). And in support of that right, the [Skrametti](#) parents relied on the same precedents the Court does today: [Parham](#), 442 U. S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101, and [Pierce](#), 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070. See Pet. for Cert., No. 23-466, at 34-36; *ante*, at 497. But the Court, when deciding to grant certiorari in [Skrametti](#), limited its review to the equal protection issue: It would not even hear the parents out on their substantive due process claim.

facts; considered all interested parties' and multiple lower courts' legal arguments; and deliberated internally, with full understanding of each other's perspectives, on all disputed issues. So too, those processes enable us to think through the best legal rationale for, and scope of, any decision, given both the views we have earlier expressed and the related issues that will soon come before us. And they allow us to explain ourselves well and carefully, both to the parties and to the public. Our processes are, in short, the hallmark of judicial probity, and alike its guarantor. There was no reason to abandon them here. I respectfully dissent.