CONSTITUTIONAL LAW—THE LAW'S STRONGEST PRESUMPTION COLLIDES WITH MANKIND'S STRONGEST BOND: A PUTATIVE FATHER'S RIGHT TO ESTABLISH HIS RELATIONSHIP WITH HIS CHILD

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"The strongest presumption of the law is the presumption of legitimacy."  

"No human bond is cemented with greater strength than that of parent and child."

I. INTRODUCTION

At common law, a man had no duty to support his illegitimate child. While the law required a father to provide for his legitimate issue, it regarded an illegitimate child as "filius nullius," "the child of no one." Over time, the common law was gradually supplanted by statutes enacted to provide for adjudication of paternity.

Legislatures passed such statutes in order to enable mothers to compel putative fathers to appear in court to prove that these errant men were the fathers of their illegitimate children and therefore responsible for child support. The legislatures, and indeed society, ap-

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1. Thompson v. Nichols, 286 A.D. 810, 810, 141 N.Y.S.2d 590, 591 (1955) (where mother and husband were living in the same apartment at the times of conception and birth of a child, evidence of paternity in another man was not sufficient to overcome the strongest presumption of the law, the presumption of legitimacy); Burns v. Burnes, 60 Misc. 2d 675, 676, 303 N.Y.S.2d 736, 738 (1969) (because presumption of legitimacy is one of the strongest presumptions of law, a married woman's action to have a man other than her husband declared the father of her child must be adjourned to permit notice to the mother's husband, the presumed father).

2. Michelle W. v. Ronald W., 216 Cal. Rptr. 748, 749, 703 P.2d 88, 89 (1985) (where the mother and husband were divorced and mother subsequently married the man who claimed to be the natural father of the child, born during her earlier marriage, the presumption of paternity in the man who was the mother's husband at the time of birth was not overcome), appeal dismissed, Michelle Marie W. v. Riley, 106 S. Ct. 774 (1986).


4. H. CLARK, supra note 3, at 155; H. KRAUSE, supra note 3, at 3-5.


6. In Commonwealth v. Dornes, 239 Mass. 592, 132 N.E. 363 (1921), the Massachusetts Supreme Judicial Court explained the purpose of the Massachusetts statute:

   . . . [T]he purpose of our bastardy laws is to secure the municipality or state against any loss or expense for the child's maintenance. . . . It is true that historically legislation of this character is connected with the system of poor relief; there being no legal obligation on the putative father to support his illegitimate child at common law. . . . Apparently the main object of such legislation has been to provide security for the town liable to support the bastard child. This was
parently never contemplated that a day would come when men themselves would seek to establish paternity, when a man would want to compel a woman into court to prove that he was the father of the woman's child. Today, after more than two decades of profound changes in social attitudes toward sex roles, which have included a new appreciation of men as parents and nurturers, that day has come.

In the recent Massachusetts case of *P.B.C. v. D.H.*, after a divorced woman had given birth to a child, the man with whom the woman had had a sexual relationship prior to her pregnancy and divorce sought a judicial determination that he was the father of the child.\(^7\) The Massachusetts Supreme Judicial Court, relying on the deeply entrenched common law presumption that the husband of a married woman is the father of her child,\(^8\) dismissed the putative father's\(^9\) suit.\(^10\) The court held that as a stranger to the marriage the putative father had no right to attempt to rebut the presumption of paternity in the mother's husband.\(^11\)

This note will examine a putative father's right to prove paternity in the context both of the supreme judicial court's decision in *P.B.C.* and the existing common law and statutory remedies available to putative fathers in Massachusetts. Part II of the note will both set out the facts of *P.B.C.* and analyze the court's holding and reasoning in that

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\(\footnotesize{\text{8. H. CLARK, supra note 3, at 156 (discussion of the history of this presumption).}}\)

Clark explains that at English common law

\(\footnotesize{[\text{a}]\text{ strong presumption [existed] that the child born to a married woman was legitimate. . . .}}\)

\(\footnotesize{[\text{A}]\text{t one point in English legal history it could be rebutted only by proof that the mother's husband was impotent or out of England. In the colorful legal phrase he had to be proved to be 'beyond the four seas.' The presumption survives in our law. . . .}}\)

\(\footnotesize{\text{See also Commonwealth v. Leary, 345 Mass. 59, 185 N.E.2d 641 (1962) (the legal presumption always is that a child born in lawful wedlock is legitimate, but such presumption may be rebutted by facts which prove, beyond all reasonable doubt, that the mother's husband could not have been the father of her child); P.B.C., 1985 Mass. Adv. Sh. at 71, 483 N.E.2d at 1096.}}\)

\(\footnotesize{\text{9. BLACK'S LAW DICTIONARY 1113 (5th ed. 1979) defines putative father as "the alleged or reputed father of an illegitimate child." The term "putative father," as used in this note, shall refer to a man who has asserted his biological paternity of a child, but who has not been adjudicated to be the legal father of the child.}}\)


\(\footnotesize{\text{11. Id. at 71-72, 483 N.E.2d at 1096.}}\)
case. Part III will assess how Massachusetts law affects a putative father's guarantee of equal protection under the fourteenth amendment to the United States Constitution. In this section the note will demonstrate how Massachusetts classifies putative fathers in a way that burdens their right to establish a paternal relationship. Part IV of the note will argue that that right is a fundamental right. Part V will apply a strict scrutiny analysis to illustrate how Massachusetts law violates the equal protection clause of the United States Constitution. In Part VI the note will argue, in the alternative, that if the right of fathers to establish a parent-child relationship is not a fundamental right, the Massachusetts scheme nonetheless fails under a less rigorous rational basis analysis. The note concludes that under the equal protection clause of the United States Constitution, Massachusetts law impermissibly burdens a putative father's right to prove his paternity of his child.

II. FACTS

P.B.C. involved a paternity suit brought under the equity jurisdiction of the probate and family court by a man unmarried to the

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12. The Fourteenth Amendment to the United States Constitution provides that:

\[ \text{[n]} \text{o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.} \]

U.S. CONST. amend. XIV, § 1.

13. By right to establish a paternal relationship, this note refers to the right of a man to have access to the courts to prove his biological paternity. The mere establishment of that relationship is the right denied to the plaintiff in P.B.C. and it is, therefore, that bare right that is the focus of this note. Of course, from that adjudication of paternity may flow other rights, such as custody and visitation, if the granting of such rights is found to be consistent with the child's best interests. See infra note 143.

14. Chapter 215, section 6 of the Massachusetts General Laws provides for the equity jurisdiction of the Probate and Family Court:

The probate and family court department shall have original and concurrent jurisdiction with the supreme judicial court and the superior court department of all cases and matters of equity cognizable under the general principles of equity jurisprudence and, with reference thereto, shall be courts of general equity jurisdiction. . . .

In Normand v. Barkei, 385 Mass. 851, 434 N.E.2d 631 (1982), where a putative father invoked this equity jurisdiction, the supreme judicial court explained that

[w]here a man is acknowledged to be the father of an illegitimate child, the Probate Court has jurisdiction under G. L. c. 215, § 6, first par. (conferring equity jurisdiction), to make judgments concerning the father's visitation rights. . . .

[W]here the plaintiff's paternity is denied or questioned, the court has jurisdiction to determine that issue, and, if paternity is established, to determine what, if any, rights of visitation the plaintiff should have.

Id. at 851-53, 434 N.E.2d at 632-33.
child's mother.\textsuperscript{15} The mother of the child, who was the defendant in the case, had given birth to the child the day after she was divorced from her husband.\textsuperscript{16} Plaintiff sought a decree that he, and not the former husband, was the father of the child.\textsuperscript{17}

The child whose paternity was at issue in \textit{P.B.C.} was conceived in September 1981\textsuperscript{18} and was born on June 10, 1982.\textsuperscript{19} The putative father and the mother agreed that they had engaged in a sexual relationship prior to September 1981\textsuperscript{20} but disputed whether that relationship continued during and after September 1981.\textsuperscript{21}

In May 1981, five months before the child was conceived, the mother filed a complaint for divorce from her husband.\textsuperscript{22} The probate and family court entered a judgment of divorce \textit{nisi}\textsuperscript{23} in December 1981, and the divorce became final on June 9, 1982, the day before the child's birth.\textsuperscript{24} On September 12, 1983, six days after the putative father filed suit for adjudication of paternity, the mother and her former husband remarried.\textsuperscript{25} The mother, her husband, an older child previously born to them, and the child at the center of this controversy continued to live together at the time of the supreme judicial court's decision.\textsuperscript{26}

The child involved in the case has resided with the mother since birth,\textsuperscript{27} and the husband, who is listed as the father on the child's birth certificate, has not taken any legal steps to deny paternity.\textsuperscript{28} The putative father's relationship with the child for the first fifteen months of his life is unclear;\textsuperscript{29} however, beginning in September 1983, the mother

\textsuperscript{16} \textit{Id.} at 70, 483 N.E.2d at 1096.
\textsuperscript{17} \textit{Id.} at 68-69, 483 N.E.2d at 1095.
\textsuperscript{18} \textit{Id.} at 70, 483 N.E.2d at 1096.
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} Plaintiff claimed that the sexual relationship between he and the defendant continued during September, October, and November, 1981. Defendant asserted that their sexual activity had ceased prior to September. \textit{Id.} at 70 n.1, 483 N.E.2d at 1096 n.1.
\textsuperscript{22} \textit{Id.}
\textsuperscript{23} Divorce \textit{nisi} is an interim judgment of divorce. The supreme judicial court has explained that "[A] judgment \textit{nisi} is a judgment of divorce . . . a couple is not divorced until the judgment becomes absolute . . . [t]hus, a second marriage contracted during the interval between the judgment \textit{nisi} and the judgment absolute is void." Ross v. Ross, 385 Mass. 30, 35, 430 N.E.2d 815, 819 (1982).
\textsuperscript{25} \textit{Id.}
\textsuperscript{26} \textit{Id.} at 70-71, 483 N.E.2d at 1096.
\textsuperscript{27} \textit{Id.} at 70, 483 N.E.2d at 1096.
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} Because plaintiff's suit was dismissed before trial, the court made no findings as to the putative father's relationship to the child during his first fifteen months of life. The
denied him visitation or other access to the child. That denial prompted the putative father to file suit in probate court to have himself declared the father of the child.

The putative father moved for a court order that he, the mother, and the child submit to a Human Leukocyte Antigen white blood cell test. Upon a denial of this motion, the putative father instituted proceedings in the appeals court and before a single justice of the supreme judicial court, and an order for the requested test on a specified date was issued.

The mother and child failed to submit to the test, however, and the trial court imposed sanctions that would have had the effect of the

plaintiff's attorney explained that the mother had approached P.B.C. when the child was born, asserting that he was the baby's father and requesting financial assistance as well as help in caring for the child. The plaintiff then supplied his home with baby-care furniture and equipment, including a crib, and cared for the child during the week while the mother worked at an evening shift job. The plaintiff also made payments on a home in which the mother and child lived. Telephone interview with Muriel Carpenter, attorney for the plaintiff in *P.D.C.*, (December 6, 1985).

The defendant's attorney, on the other hand, explained that his client denied that the plaintiff was the father of the child. Although defendant admitted that she had had an affair with the plaintiff, she maintained that she had terminated that involvement prior to the child's birth. She further denied that the plaintiff provided housing for herself and the baby, and instead asserted that she merely rented an apartment in a house which he owned. Telephone interview with Steven Dean, attorney for the defendant in *P.B.C.*, (January 7, 1986).


31. *Id.* at 69, 483 N.E.2d at 1095. The Massachusetts legislature has recognized the reliability and accuracy of blood tests as a method of determining paternity. Chapter 273, section 12A of the Massachusetts General Laws provides for the court to order blood tests in paternity proceedings:

In any proceeding to determine the question of paternity, the court, on the motion of the alleged father, shall order the mother, her child and the alleged father to submit to one or more blood grouping tests, to be made by a duly qualified physician or other duly qualified person, designated by the court, to determine whether or not the alleged father can be excluded as being the father of the child. The results of such tests shall be admissible in evidence only in cases where definite exclusion of the alleged father as such father has been established. If one of the parties refuses to comply with the order of the court relative to such tests, such fact shall be admissible in evidence in such proceeding unless the court, for good cause, otherwise orders.

See *Commonwealth v. Blazo*, 10 Mass. App. Ct. 324, 406 N.E.2d 1323 (1980) (in view of the high level of accuracy attained from human leukocyte antigen white blood cell test and the recognition and acceptance of the test by the scientific and medical communities, order for such test should be seriously considered in a paternity proceeding).

32. *P.B.C.*, 1985 Mass. Adv. Sh. at 69, 483 N.E.2d at 1095. The opinion is unclear about whether the order for the blood test was issued by the trial court, the appeals court, or the supreme judicial court: "there were proceedings in the Appeals Court and before a single justice of this court, as well as further proceedings in the trial court, resulting in the allowance of the plaintiff's motion." *Id.*
mother's making concessions favorable to the putative father's claim.\textsuperscript{33} When the putative father moved that the case be scheduled for trial, the mother responded with a motion to dismiss on the ground that the putative father could not litigate the issue of paternity.\textsuperscript{34} The trial court denied this motion, and ordered that noncompliance with the order for the blood test would result in the mother's incarceration, assessment of daily costs against her, and preclusion of her offering evidence on the issue of paternity.\textsuperscript{35}

The mother then petitioned the appeals court for review of the denial of her motion to dismiss the putative father's complaint.\textsuperscript{36} A single justice of the appeals court authorized an interlocutory appeal to the appeals court from the denial of her motion to dismiss and stayed the proceedings in the trial court.\textsuperscript{37} The supreme judicial court transferred the case on its own initiative.\textsuperscript{38}

Pointing to dual policies of avoiding illegitimacy and protecting family life, the supreme judicial court granted the mother's motion to dismiss.\textsuperscript{39} The court cited the firmly established rule that a child born to a married woman is presumed to be the child of her husband,\textsuperscript{40} and then, because the mother was not married but divorced at the time the child was born, extended that presumption to include a child conceived by a married woman.\textsuperscript{41} While acknowledging that the presumption of legitimacy could be rebutted by a mother or her husband,\textsuperscript{42} the court held that the presumption was irrebuttable by a putative father.\textsuperscript{43} Plaintiff was therefore not allowed to introduce any evidence to prove that he was the father of the child, and the court refused to hear his claim for paternity adjudication.\textsuperscript{44}

\begin{footnotesize}
33. \textit{Id.}
34. \textit{Id.}
35. \textit{Id.}
36. \textit{Id.}
37. \textit{Id.} at 69-70, 483 N.E.2d at 1095.
38. \textit{Id.} at 70, 483 N.E.2d at 1095.
40. \textit{See infra} note 8 and accompanying text.
42. \textit{Id.} at 71, 483 N.E.2d at 1096. \textit{See also} Symonds v. Symonds, 385 Mass. 540, 544, 432 N.E.2d 700, 703 (1982), stating that "[t]he Legislature has authorized a husband and a wife to testify in a nonsupport action concerning the parentage of a child (G. L. c.273 § 7) and has allowed a mother, although married, to testify in an illegitimacy proceeding that a man other than her husband is the father of her child.").
\end{footnotesize}
II. THE CLASSIFICATION OF PARENTS IN MASSACHUSETTS

The Supreme Court of the United States has read the equal protection clause of the fourteenth amendment to the United States Constitution to require that, at a minimum, a governmental classification be rationally related to a legitimate state interest. Where a classification affects a fundamental right or burdens a suspect class, however, a court subjects it to strict judicial scrutiny and must determine that it is the narrowest way to achieve a compelling state end.

The Massachusetts Supreme Judicial Court's decision in P.B.C., read against the backdrop of the statutory and common law rules regarding paternity in Massachusetts, operates to classify men as either presumed or putative fathers and, in so doing, to deny putative fathers the right to prove that they are the fathers of their children. That right, implicating a core relationship between parent and child, is a fundamental right.

Massachusetts paternity law views married men as the presumed fathers of children born to their wives. That same presumption operates to render an unmarried putative father's ability to prove that he is the biological father of a married woman's child difficult, if not impossible. The putative father does not enjoy the benefit of a presumption of paternity, and if the mother of the child is married, he must rebut the presumption of paternity in her husband. As the note will demonstrate, the legal avenues available to a Massachusetts putative father to establish his paternity of a married woman's child are quite limited.

The effect of Massachusetts paternity law is to classify fathers and

45. In City of Cleburne, Tex. v. Cleburne Living Center, 105 S. Ct. 3249, 3254-55 (1985), the Court stated that the general rule regarding the validity of state legislation under equal protection is that such validity is presumed and the law will be sustained if the classification is rationally related to a legitimate state interest. When economic legislation is at issue, the Court has generally shown a deferential attitude. See, e.g., Schweiker v. Wilson, 450 U.S. 221 (1980); New Orleans v. Dukes, 427 U.S. 297 (1976); Williamson v. Lee Optical, 348 U.S. 483 (1955).


47. See infra notes 51-96 and accompanying text.

48. Although mothers constitute another class of parents, a full discussion of the rights and duties of mothers, is outside the scope of this note. For a discussion of maternal rights see H. Clark, supra note 3, § 5.4, at 176-77; G. Douthwaite, Unmarried Couples and the Law § 3.6, at 138 (1979); H. Krause, supra note 3, at 28-29.

49. See infra notes 66-96 and accompanying text.

50. See infra notes 101-166 and accompanying text.

51. See supra note 8 and accompanying text.

52. See infra notes 66-96 and accompanying text.
then to give more rights to presumed than to putative fathers. Such a classification triggers the equal protection clause of the fourteenth amendment.53

Massachusetts' interest in the classification is three-fold: (1) to make children legitimate wherever possible; (2) to protect traditional family units; and (3) to ensure the care and support of children.54 The state classification system affords legitimacy to the greatest number of children through its preference that paternity reside in married rather than unmarried men. It protects traditional family units by erecting barriers to an unmarried, putative father's ability to disrupt an intact family unit through his attempts to prove that he is the father of a child conceived or born during the marriage. Finally, the state classification system ensures the care and support of children by guaranteeing that at least one man will be presumed to be the legal father of a child.

This section of the note will examine the classification of parents in Massachusetts, whereby putative fathers are granted rights inferior to presumed fathers. In the next section the note will demonstrate how the right burdened by the classification, the right of a man to establish a parent-child relationship, is a fundamental right.

A. The Rights of Married Fathers

The law presumes a man to be the father of a child born to his wife.55 No legal proceedings are required to establish a husband's paternity; the presumption of legitimacy operates automatically to make

53. The Equal Protection Clause is triggered by a classification that operates to distinguish between groups of persons who are similarly situated, and then gives more rights to one group than to another. See Eisenstadt v. Baird, 405 U.S. 438 (1972) (Massachusetts statute prohibiting the distribution of contraceptives only to unmarried persons violates equal protection). See also Craig v. Boren, 429 U.S. 190 (1976) (prohibiting the sale of 3.2% beer to males under 21 and to females under 18 violates equal protection); Levy v. Louisiana, 391 U.S. 68 (1968) (denying illegitimate children the right to recover for the wrongful death of their mother while permitting recovery for legitimate children in the same circumstance violates equal protection). For a general discussion of classifications triggering equal protection see G. GUNTHER, CONSTITUTIONAL LAW 586-686 (11th ed. 1985).

54. In P.B.C. the Massachusetts Supreme Judicial Court stressed the primacy of these interests. P.B.C., 1985 Mass. Adv. Sh. at 75, 483 N.E.2d at 1099.

55. See supra note 8 and accompanying text. In P.B.C. the court expressly stated this presumption, and then declared that the "presumption of legitimacy may not be rebutted, even in a civil case, 'except on facts which prove, beyond all reasonable doubt, that the husband could not have been the father.'" P.B.C., 1985 Mass. Adv. Sh. at 71, 483 N.E.2d at 1096 (quoting Phillips v. Allen, 2 Allen 453, 454 (1861)). See also Sayles v. Sayles, 323 Mass. 66, 80 N.E.2d 21 (1948) (mere proof of the wife's adultery while cohabiting with her husband is not sufficient to overcome presumption of legitimacy).
the husband of the mother the legally recognized father of a child born to her.56 The husband, accordingly, is both responsible for the child’s support and entitled to constitutional protection of the resulting parent-child relationship.57

This presumption of legitimacy has its roots in the societal and religious condemnation of out-of-wedlock sexual activity, condemnation which was visited on the child born of such activity as well as on the parents. The plight of the “bastard” child centuries ago provided

56. Because of the strength of the presumption, a husband is legally the father of any child born to his wife unless and until the presumption has been formally rebutted. See supra note 8. Thus, an unmarried man must establish that he is the father of a child, while a married man must establish that he is not.

57. A father’s duty to support his children derives from chapter 273 section 1 of the Massachusetts General Laws which makes desertion and nonsupport a crime, providing in part that:

Any spouse or parent who without just cause deserts his spouse or minor child, whether by going into another town in the commonwealth or into another state, and leaves them or any or either of them without making reasonable provision for their support, and any spouse or parent who unreasonably neglects or refuses to provide for the support and maintenance of his spouse, whether living with him or living apart from him for justifiable cause, or of his minor child, and any spouse or parent who abandons or leaves his spouse or minor child in danger of becoming a burden upon the public and any parent of a minor child or any guardian with care and custody of a minor child, or any custodian of a minor child, who willfully fails to provide necessary and proper physical, educational or moral care and guidance, or who permits said child to grow up under conditions or circumstances damaging to the child’s sound character development, or who fails to provide proper attention for said child, shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than two years, or both.

See, e.g., Custody of a Minor, 378 Mass. 732, 393 N.E.2d 836 (1979) (parents are natural guardians of their children with legal as well as moral obligation to support, educate, and care for their children’s development and well-being, and, as such, it is parents who have the primary right to raise their children as they see fit); Commonwealth v. Brasher, 359 Mass. 550, 270 N.E.2d 389 (1971) (the law gives parents custody and right of control over their children, including power to exercise whatever authority is reasonably necessary for that purpose to enable them to discharge their obligation to support, provide for and protect their children and to provide educational guidance); Commonwealth v. Zarrilli, 5 Mass. App. Ct. 518, 364 N.E.2d 1089 (1977) (husband has a duty to support his wife and minor children).

The Supreme Court has consistently recognized that a parent-child relationship is entitled to constitutional protection. See Stanley v. Illinois, 405 U.S. 645, 651 (1972) (“It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.’ ” (quoting Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”).
the impetus for the presumption of legitimacy. By preventing married couples from bastardizing their own issue, even where adultery may have occurred, the law minimized the number of illegitimate children. Two factors were at work. First, the harsh treatment of illegitimates provided motivation for the law to operate so as to avoid attaching illegitimate status to innocent children whenever possible. Second, the lack of any method of determining paternity as conclusive as modern blood testing was a logical reason for presuming paternity in a husband.

A hypothetical situation illustrates the operation of the presumption of legitimacy. If a married woman (W) conceives a child (C), her husband (H) is presumed to be the father of that child. That presumption applies whether or not H is indeed C's biological father, whether or not H and W were divorced at the time of C's birth, whether or not they subsequently divorce, and even whether or not H has any relationship with or emotional tie to C whatsoever. For example, if during the pregnancy H and W divorce, W alone moves to a distant city, gives birth there, and the ex-husband does not ever see or even

59. H. Clarke, supra note 3, at 172.
60. H. Krause, supra note 3, at 123.
61. This, of course, is the issue in P.B.C. Because the court presumed the mother's husband to be the father of her child and wished to shield the marriage from paternity suits brought by outsiders, the court refused to inquire into the actual biological paternity of the child by means of a blood test. Some courts have refused to relieve husbands from a presumed fatherhood status even in the presence of evidence which clearly establishes that biological paternity does not lie in the husband. See, e.g., Cook v. Perron, 427 So. 2d 499 (La. Ct. App. 1983) (husband precluded from disavowing child notwithstanding blood tests conclusively showing that he could not have been the biological father of the child); People v. Thompson, 89 Cal. App. 3d 193, 152 Cal. Rptr. 478 (1979) (husband is deemed legal father of and is responsible for his wife's child if it is conceived while they are cohabiting, and the issue of biological paternity is irrelevant); Hess v. Whitsett, 257 Cal. App. 2d 552, 65 Cal. Rptr. 45 (1967) (racial differences do not overcome the presumption of legitimacy; where white wife was married to white husband but gave birth to a Negro/white mixed-race child, husband still held to be the father of the child).
62. In P.B.C., the husband and wife were divorced at the time of the child's birth. 1985 Mass. Adv. Sh. at 71, 483 N.E.2d at 1096. See also Cartee v. Carswell, 425 So. 2d 204 (Fla. Dist. Ct. App. 1983) (a child born after a divorce but conceived during marriage is presumed legitimate and thus the ex-husband is presumed to be the father).
64. See Lirette v. Lirette, 430 So. 2d 1150 (La. Ct. App. 1983) (former husband was presumed to be the father of child born to his former wife, even though she committed adultery and then concealed her pregnancy and the fact of the child's birth from him).
meet the child, the law would nevertheless presume him to be the father of that child. 65

B. The Rights of Putative Fathers

In contrast to a married man, a putative father is not presumed to be the father of a child. A putative father must affirmatively establish his paternity, rather than merely relying on the operation of a presumption.

This section of the note will describe the ways in which putative fathers in Massachusetts may establish paternity and will show how the circumstance of the mother's marriage and the resulting presumption of legitimacy preclude the putative father from access to any of the state-provided alternatives.

1. Marriage to the Child's Mother

The first way in which a putative father can establish paternity of his child is to marry the child's mother. If the marriage takes place prior to the birth of the child, the presumption of legitimacy operates to make the husband the presumed father of the child born to his wife, whether or not the couple was married at the time the child was conceived. 66

Marriage to the mother, without more, is not sufficient to establish paternity in Massachusetts when the marriage takes place after the child is born. 67 If the new husband does not acknowledge 68 the child as his own, then paternity is neither established nor presumed solely by virtue of the marriage, and a stepfather-stepchild relationship exists. If, however, marriage is accompanied by the new husband's acknowledgment of his paternity of his wife's child, then Massachusetts law recognizes the husband as the child's father. 69

The problem with this method of securing parental rights is twofold. First, even if the putative father is willing to marry the child's mother, she may already be married, or she may not be willing to

65. Id.
66. See supra notes 55-65 and accompanying text.
67. MASS. GEN. LAWS ANN. ch. 190, § 7 (West 1958) (amended by ch. 190, § 7 (West Supp. 1986)). In 1929, the Massachusetts Attorney-General addressed the question whether "the subsequent marriage of the parents of a child born out of wedlock has the effect of legitimating their child." The Attorney-General advised that acknowledgement by the father was "requisite in addition to intermarriage to legitimize a child born out of wedlock." 8 Op. Att'y Gen. 355 (1927).
68. See infra note 72.
69. See infra note 72.
marry him. In these situations, whether or not the putative father will be able to establish a parent-child relationship will depend wholly on the status and will of the mother. The United States Supreme Court has acknowledged that this method of securing a parent-child relationship, depending as it does on the will of the mother, is not within the putative father's control. It is not, therefore, a particularly effective remedy for the putative father.

Second, even if the mother marries the putative father after the child's birth, if she was married to another man at the time of the child's conception or birth, then the presumption of paternity rests with the former husband. That presumption would not be voided by the mother's later marriage to the third party. In other words, marriage to the mother will transform a putative father into a presumed father only if the mother was not married to anyone else at the time the child was conceived or born.

In the situation of the putative father in *P.B.C.*, the defendant mother was divorced at the time of the child's birth, and marriage between her and the putative father was thus theoretically possible. Even if both parties had agreed to the union, however, it would not have achieved the goal of establishing the putative father's paternity, because the presumption of paternity would have remained with the ex-husband.

Thus, where the parties are unable or unwilling to marry, or where the presumption of legitimacy has already named the mother's former husband as the child's father, this method of establishing paternity fails.

2. Acknowledgment of the Child

The second way in which a putative father may establish paternity of his child is to "acknowledge" the child as his. Massachusetts courts have uniformly held that acknowledgment of a child confers legitimacy on that child. See, e.g., MacIntyre v. Cregg, 350 Mass. 22, 212 N.E.2d 860 (1965) (child born illegitimate whose parents later intermarried and whose father acknowledged him as his became legitimate under chapter 190, section 7 of the Massachusetts General Laws even though the child's birth record was not amended under chapter 46, section 13 of the Massachusetts General Laws); Lowell v. Kowalski, 380 Mass. 663, 405 N.E.2d 135 (1980) (requirement of intermarriage to legitimate a child under chapter 190, § 7 is unconstitutional; statutory requirement of acknowledgment and/or adjudication of paternity is constitutional). The fact of the child's legitimacy necessarily implies that the putative father is now presumed to be the actual father of the child. See Houghton v. Dickinson, 196 Mass. 389, 392, 82 N.E. 481, 482 (1907) (lawful legitimation creates the
formerly required both intermarriage of the parents and acknowledgment by the father to legitimate a child. The intermarriage requirement was judicially abolished in 1980, however, and acknowledgment by the father is now sufficient in itself to confer legitimacy on a child and establish paternity in the acknowledging father.

The statute providing for legitimation does not define acknowledgment relation of parent and child). See infra notes 73-82 and accompanying text for a discussion of the meaning of “acknowledgment.”

73. The statute as it appeared before 1980 provided in pertinent part:
An illegitimate person whose parents have intermarried and whose father has acknowledged him as his child or has been adjudged his father under chapter two hundred and seventy-three shall be deemed legitimate and shall be entitled to take the name of his parents to the same extent as if born in lawful wedlock.

MASS. GEN. LAWS ANN. ch. 190, § 7 (West 1958).

74. Lowell v. Kowalski, 380 Mass. 663, 405 N.E.2d 135 (1980). Lowell was a landmark decision ruling the intermarriage requirement in chapter 190, section 7 of the Massachusetts General Laws unconstitutional. In Lowell, the plaintiff was an illegitimate daughter born very shortly after the death of the putative father. Allyson Lowen sought a declaratory judgment that she was in fact the child of the decedent unwed father and therefore entitled to share in the distribution of his intestate estate. The decedent had never married the child’s mother nor had he ever been adjudicated the father. The probate court held that the child was not entitled to share in the decedent’s intestate estate because her parents had never married, as required by statute.

The supreme judicial court found that the statute, as read, would mean that even where a putative father had publicly and consistently acknowledged the child as his own, the child would not be legitimate nor entitled to an intestate share of the father’s estate unless the parents had intermarried. Conceding that the state had a compelling interest in avoiding fraudulent claims against the estate of a man who died intestate, the Lowell court found no justification for denying the right of a child to inherit from his or her natural father when paternity has been admitted. Accordingly, a child is legitimated under Massachusetts law either by an adjudication of paternity, chapter 273, section 12 of the Massachusetts General Laws Annotated or by a father’s acknowledgment of his illegitimate child.

75. The Massachusetts legislature amended chapter 190, section 7 of the Massachusetts General Laws Annotated after the Lowell decision. The statute now reads:

An illegitimate person whose parents have intermarried and whose father has acknowledged him as his child or has been adjudged his father under chapter two hundred and seventy-three shall be deemed legitimate and shall be entitled to take the name of his parents to the same extent as if born in lawful wedlock. If a decedent has acknowledged paternity of an illegitimate person or if during his lifetime or after his death a decedent has been adjudged to be the father of an illegitimate person, that person is heir of his father and of any person from whom his father might have inherited, if living, and the descendents of an illegitimate person shall represent that person and take by descent any estate which such person would have taken, if living. A person may establish paternity if, within the period provided under section nine of chapter one hundred and ninety-seven of the General Laws for bringing actions against executors and administrators, such person either [a] delivers to the executor or administrator an authenticated copy of a judgment rendered by a court of competent jurisdiction, an action in which the executor or administrator is a named party and in which such paternity is ultimately proved.

MASS. GEN. LAWS ANN. ch. 190, § 7 (West Supp. 1986).
edgment, but Massachusetts courts have construed the term to include written statements of paternity, oral declarations, and conduct that indicates an intent to acknowledge paternity. For example, in *Lowell v. Kowalski*, an illegitimate daughter asserted her right to inherit from her unwed father's intestate estate. The court upheld that right and found that the decedent's written acknowledgment of his paternity of the child was sufficient to constitute acknowledgment and legitimacy for the purpose of intestate succession.

In *Wrenn v. Harris*, the federal district court of Massachusetts considered the claim of an illegitimate child for Social Security Act survivor's benefits after the death of the child's natural father. The court held that under Massachusetts law the decedent's statements of his paternity to his sisters, co-workers, and members of the child's mother's family, as well as statements he made in letters, constituted acknowledgment of the child, who was therefore entitled to benefits. Finally, the Massachusetts appeals court has held in *Higgins v. Ripley*, a case involving the rights of an illegitimate child to share in the intestate estate of the deceased unwed father, that the decedent father's visits to the child, along with testimony of the child's mother, the child's pediatrician, and a friend that the decedent had admitted paternity of the child, were sufficient to show that the decedent had acknowledged the child.

The difficulties presented by acknowledgment as a means by which a putative father can establish paternal rights involve, once

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76. In *Wrenn v. Harris*, 503 F. Supp. 223 (D. Mass. 1980), the district court explained that "[w]hen it amended the statute, the legislature, presumably aware of the *Lowell* decision, nevertheless passed up the opportunity to specify the permissible forms of acknowledgement. Hence, the legislature apparently intended the courts to draw the precise contours of the statutory requirement." *Id.* at 225.

77. In addition to this type of acknowledgement by behavior, Massachusetts provides for a specialized form of acknowledgement by oath to be used only in the context of non-support proceedings. MASS. GEN. LAWS. ANN. ch. 273, § 15 provides that "[i]f [a putative father] has sworn to and executed an acknowledgement of paternity which was accompanied by a written affirmation of paternity sworn to and executed by the mother, such acknowledgement shall be admissible as evidence. . . ." Besides being quite limited in application, the statute poses great obstacles for the putative father seeking to establish paternity. The requirement that a putative father's acknowledgment be accompanied by the mother's oath empowers the mother to prevent a putative father from utilizing this statutory mechanism as evidence of paternity. The statute is, therefore, of extremely limited use in situations such as that arising in *P.B.C.*

78. *Lowell*, 380 Mass. at 670, 405 N.E.2d at 141; see supra note 74.
79. *Id.*
81. *Id.*
again, the extent of the mother's control over the process. In the usual case, a newborn child is in the custody of the mother, whether she is wed or unwed, and no question about her parentage exists. The mother, having custody and control over the child, is thus in a position to determine whether or not the putative father is able to take steps which produce evidence of a parent-child relationship, thereby acknowledging his paternity by his conduct. The putative father's ability to acquire a relationship with his child that would meet the legal requirements of acknowledgment is therefore contingent on the mother's cooperation.

In the situation in P.B.C., the mother prevented the putative father from having contact with the child and ensured that he would be unable to establish paternity by acknowledgment. The putative father, completely subject to the mother's will, was left in the impossible situation of not being able to establish paternity until he had had substantial contact with the child and not being able to have that contact until he had established paternity. Acknowledgment, like marriage to the child's mother, is therefore a remedy of limited value to putative fathers in situations like that of the putative father P.B.C.

3. Adjudication of Paternity

A third possible way for a putative father to establish paternity is through a judicial adjudication of paternity. Massachusetts law provides by statute for "proceedings to determine the father of a child born to an unmarried woman." The legislature intended the statute for use by an unmarried woman who seeks to compel a man to accept responsibility for his paternity and provide child support, and the

83. MASS. GEN. LAWS ANN. ch. 273, § 12 (West Supp. 1985) provides:
Proceedings to determine the father of a child born to an unmarried woman shall be begun, if in the superior court, in the county in which is situated the place where the alleged father or mother of the illegitimate child lives, and if begun in a district court, in the court having such place within the judicial district. If the alleged father pleads guilty or nolo contendere, or is found guilty, the court shall adjudge him the father of the child; but such adjudication shall not be made after a plea of not guilty, against the objection of the alleged father, until the child is born or the court finds that the mother is a least six months pregnant. At the sitting when such adjudication is made by a district court, if made after a plea of not guilty, the alleged father may appeal therefrom to a jury of six session of the district court department in the county where the proceedings were held. The adjudication, whether any sentence be imposed or not, shall be final and conclusive unless an appeal therefrom be taken as hereinbefore provided. . . .

statute apparently does not create a cause of action for fathers. Through references to alleged fathers as defendants, the language of the statute appears to preclude men from filing suit under it,85 and the Massachusetts high court has so interpreted it.86 The P.B.C. plaintiff, therefore, lacked any opportunity to establish his paternity by means of a paternity suit brought pursuant to this statute.

4. Equity Jurisdiction of the Probate and Family Court

The second statutory forum for determining paternity in Massachusetts lies within the general equity jurisdiction of the probate and family court.87 A putative father who believes that he is the father of an illegitimate child may invoke this equity jurisdiction to establish

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85. Chapter 273, section 12 of the Massachusetts General Laws speaks of an alleged father who “pleads guilty or nolo contendere” or “is found guilty” and who may “appeal” from the adjudication “whether any sentence be imposed or not.” Such language clearly implies that men are intended to be defendants, not plaintiffs, in paternity adjudications pursuant to the statute.

86. Gardner v. Rothman, 370 Mass. 79, 80, 345 N.E.2d 370, 371 (1976) (paternity proceedings under chapter 273, section 12 of the Massachusetts General Laws are not initiated by the putative father). In Normand v. Barkei, the supreme judicial court faced the issue of whether a putative father can institute paternity proceedings pursuant to chapter 273, § 12. The plaintiff asserted that he was the father of an illegitimate child and sought visitation rights. Because the child’s mother disputed whether the plaintiff was indeed the father, it was necessary, as a first step, that the court determine paternity prior to issuing an order for visitation. In reviewing the plaintiff’s action, the supreme judicial court emphasized that a putative father’s resort to chapter 273, § 12 could “hardly be expected.” Normand v. Barkei, 385 Mass. 851, 852, 434 N.E.2d 631, 632 (1982).

Likewise, in Gardner, where the father of an illegitimate child sought to obtain rights to visit the child, the court stated that “[p]roceedings under chapter 273, §§ 11-19 are . . . not initiated by the putative father.” Gardner at 80, 345 N.E.2d at 371.

87. MASS. GEN. LAWS ANN. ch. 215, § 6 (West Supp. 1985) provides in pertinent part:

The probate and family court department shall have original and concurrent jurisdiction with the supreme judicial court and the superior court department of all cases and matters of equity cognizable under the general principles of equity jurisprudence and, with reference thereto, shall be courts of general equity jurisdiction, except that the superior court department shall have exclusive original jurisdiction of all actions in which injunctive relief is sought in any matter growing out of a labor dispute as defined in section twenty C of chapter one hundred and forty-nine.

Probate courts shall also have jurisdiction concurrent with the supreme judicial and superior courts, of all cases and matters in which equitable relief is sought relative . . . [and to] grant equitable relief to enforce foreign judgments for support of a wife or a wife and minor children against a husband who is a resident or inhabitant of this commonwealth, upon an action by the wife commenced in the county of which the husband is a resident or inhabitant. They shall, after the divorce judgment has become absolute, also have concurrent jurisdiction to grant equitable relief in controversies over property between persons who have been divorced. . . .
paternity and be afforded visitation rights. 88

In Normand v. Barkei, a man who claimed to be the father of two illegitimate children sought an order from the probate and family court granting him visitation rights. 89 The defendant mother denied that the plaintiff was the father of one of the children and doubted whether he was the father of the other child. 90 In reviewing the trial court’s dismissal for lack of jurisdiction to adjudicate paternity, the Massachusetts Supreme Judicial Court rejected the notion that “the Probate and Family Court could not act where the plaintiff’s paternity has not been conceded by the defendant mother or otherwise established” 91 because to so limit the lower court’s jurisdiction would have the result of endorsing the defendant mother’s “[absolute] control [of] the plaintiff’s access to the courts.” 92

Relying on Normand, 93 the P.B.C. plaintiff brought his claim for an adjudication of paternity under the probate and family court’s equity jurisdiction. 94 The supreme judicial court, however, declared this reliance to be misplaced. The court distinguished Normand, explaining that jurisdiction is conferred on the lower court to adjudicate paternity claims brought solely by fathers of illegitimate children. 95 Where a presumption of paternity in a married woman’s husband affords legitimacy to a child, however, no illegitimate child exists to confer the appropriate jurisdiction on the probate and family court. The

88. Normand, 385 Mass. at 853, 434 N.E.2d at 623. When paternity is acknowledged by both parents and custody or visitation is in dispute, the probate and family court makes findings and orders appropriate to resolving the conflict. Gardner, 370 Mass. at 80, 345 N.E.2d at 371. When paternity is not conceded by the mother, the court simply determines paternity as a first step and then, if the plaintiff is determined to be the father, makes a decision as to what, if any, visitation rights he should have. Normand, 385 Mass. at 853, 434 N.E.2d at 632-33.
90. Id.
91. Id. at 852, 434 N.E.2d at 632.
92. Id. at 853, 434 N.E.2d at 633.
93. In fact, the attorney for the plaintiff in P.B.C. believed that Normand was directly controlling, explaining that “[w]e always thought we were dealing with an illegitimate child.” Telephone interview with Marian Carpenter, attorney for the plaintiff in P.B.C. (December 6, 1985).
95. The court stated:
The question [of whether plaintiff can rebut the presumption of legitimacy] was not before us in Normand v. Barkei, . . . on which the plaintiff relies as support for his contention that he has a right to prove that he is the child’s father. Normand v. Barkei . . . sheds little light on the issue before us because in that case the children’s mother was unmarried when the children were conceived and were born. There was no question of legitimacy.
Id. at 71, 483 N.E.2d at 1096 (emphasis added).
court's ability to hear a putative father's claim, and his corresponding ability to seek redress are thus restricted by the presumption of legitimacy.96

This part of the note has demonstrated how the supreme judicial court's decision in *P.B.C.* in the context of Massachusetts paternity law, classifies parents by giving putative fathers fewer rights than presumed fathers and, indeed, often precluding putative fathers from being able to establish paternity. Because presumed fathers do not have to establish paternity and are provided with ample methods of protecting their parent-child relationship, the classification scheme implicates the equal protection clause of the fourteenth amendment.

When the equal protection clause is so implicated, a court must consider whether the classification affects either a suspect class or a fundamental right.97 If it does, the court must strictly scrutinize the classification, and it will survive constitutional attack only if the state's ends are found to be compelling, and the means to that end are narrowly drawn.98 The next part of the note will argue that the right affected by the classification of parents—the right to establish paternity—is a fundamental right.99

96. The putative father in *P.B.C.* essentially asserted that his child was born out of wedlock, in that the child was the product of a union between himself and a woman not his wife. *P.B.C.*, 1985 Mass. Adv. Sh. 68, 483 N.E.2d 1095. This paralleled the claim of the putative father in *Normand*. *Normand*, 385 Mass. at 851, 434 N.E.2d at 632. In *P.B.C.*, the court did not order an adjudication of paternity because of its adherence to the presumption of legitimacy in the mother's husband. *P.B.C.*, 1985 Mass. Adv. Sh. at 75, 483 N.E.2d at 1099. In the absence of any presumption of legitimacy, the *Normand* court did remand the case to probate court for a determination of paternity. *Normand*, 385 Mass. at 853, 434 N.E.2d at 633. Reading the two cases together reveals, therefore, that, pursuant to chapter 213, section 6 of the Massachusetts General Laws, the probate court, while empowered to adjudicate the paternity of an illegitimate child, is precluded from doing so in the face of presumption of legitimacy.

97. See infra notes 101-166 and accompanying text.

98. See infra note 168 and accompanying text.

99. This note does not assert that putative fathers constitute a suspect class. The Supreme Court has found that suspect classifications under the equal protection clause are those which classify by alienage or national origin or by race. See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Loving v. Virginia*, 388 U.S. 1 (1967) (race). Such classifications will be subjected to strict scrutiny because "[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy. . . . " *City of Cleburne*, Tex. v. *Cleburne Living Center*, 105 S. Ct. 3249, 3255 (1985).

Gender based classifications, because they so often rest on stereotypes rather than valid distinctions between the sexes, are subjected to heightened scrutiny. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

Thus the Court has looked at the nature of the group affected by a classification; where a classification is broadly drawn, and the affected group can resort to the democratic political process to correct unwise or unfair classifications the Court has been willing to uphold
IV. ESTABLISHING PATERNITY: A FUNDAMENTAL RIGHT

The Supreme Court has protected familial interests and concerns in a long line of cases and in a variety of contexts. While emphasizing that the freedom to enter into and maintain family relationships is a "fundamental element of personal liberty," the Court has nonetheless varied the nature and extent of the constitutional protection given to the formation and maintenance of familial associations depending on the particular factual setting involved. Some aspects of familial relationships, then, are considered fundamental and thus worthy of the highest degree of constitutional protection, while others are given less protection or none at all.

In assessing the amount of protection to be afforded to particular familial choices, the Court strives to find a "balance . . . [between] respect for the liberty of the individual . . . and the demands of organized society." In striking that balance, although mindful of traditions which have been discarded as well as those which have endured, the Court has historically afforded the most protection to familial interests associated with such traditional institutions as mar-

the state scheme. See, e.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (retirement guidelines affecting older workers is not a suspect classification). Where a classification affects "discrete and insular minorities" for whom the operation of the political process is seriously curtailed, the Court has found "a more searching judicial inquiry" to be appropriate. United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

Putative fathers, as a class, do not possess such immutable characteristics as sex or race which distinguish them from other fathers. Nor is there any indication that their access to and voice in the political process is hampered. In sum, putative fathers do not share those qualities which the Court has traditionally pointed to in delineating suspect classifications.

100. In Moore v. City of East Cleveland, 431 U.S. 494, 500-01 (1977) (citations omitted), the Court reviewed the parameters of this protection, noting that it had protected family interests "concerned with freedom of choice with respect to childbearing, or with the rights of parents to the custody and companionship of their own children, or with traditional parental authority in matters of childrearing and education."


102. In Roberts, 104 S. Ct. at 3249, the Court articulated the barometer of constitutional protection as the degree of intimacy involved in the particular relationship, stating that "certain kinds of highly personal relationships [will receive] a substantial measure of sanctuary from unjustified intrusion by the state." For the Court in Roberts, those relationships included: "the creation and sustenance of a family—marriage . . . childbirth . . . and cohabitation with one's relatives." Id. at 3250.


104. The Court articulated an awareness of "the traditions from which [this balance of societal versus private interests] developed as well as the traditions from which it broke. That tradition is a living thing. . . . [A] decision which builds on what has survived is likely to be sound." Moore, 431 U.S. at 501 (quoting Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting)).
riage and the nuclear family.\textsuperscript{105} For example, the Court has held that rights associated with marital privacy\textsuperscript{106} and parental authority\textsuperscript{107} are fundamental rights.

Recently, however, the Court has delved beneath the surface of superficial factual settings to protect familial rights and relationships in nontraditional settings\textsuperscript{108} by invoking the basic principles underlying its decisions in traditional areas of family life. In articulating those basic principles, the Court has focused on the "constitutionally recognized liberty interest that derives from blood relationship . . . and basic human right."\textsuperscript{109} Indeed, the Court has concluded that the legal status of families is not the determinant factor in regards to whether a particular interest or relationship should be protected as fundamental.\textsuperscript{110} Rather, the underlying blood tie and the relationship that may arise therefrom are of paramount import.\textsuperscript{111} The Court has thus implicitly acknowledged that "[b]iological [rather than legal] relationship is the test that has been used—since time immemorial— . . . for the fixing of . . . familial obligations, and it is biological relationship that underlies and is traced by legal relationship."\textsuperscript{112}

This section of the note will argue that a putative father's right to establish paternity, although arising in a nontraditional setting, is a fundamental right because it implicates the core biological relationship between parent and child. By examining the Court's treatment of a father's rights arising from his biological relationship to his illegitimate child, as well as the values underlying the Court's decisions in more traditional family contexts, this section of the note will show how granting fundamental status to a father's ability to prove paternity is both a logical extension of and consistent with the Court's deci-

\textsuperscript{105} Moore, 431 U.S. at 503-05.
\textsuperscript{106} Griswold v. Connecticut, 381 U.S. 479 (1965) (state law forbidding the use of contraceptives is an unconstitutional interference with the right of marital privacy).
\textsuperscript{107} Meyer v. Nebraska, 262 U.S. 390 (1923) (parents have the freedom to choose to enroll their children in private schools); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state may not interfere with parental freedom to decide to have children instructed in foreign languages).
\textsuperscript{109} Smith v. Organization of Foster Families, 431 U.S. 816, 846 (1977) (N.Y. procedures for removing children from custody of foster families are constitutionally adequate).
\textsuperscript{110} Smith, 431 U.S. at 845 n.53.
\textsuperscript{111} H. Krause, supra note 3 at 69.
\textsuperscript{112} Id.
sions in this area. 113

A. The Supreme Court’s Approach to Biological Fathers

Since 1972, the Supreme Court has decided four cases regarding the rights of biological fathers in regard to their illegitimate children. In the landmark case of *Stanley v. Illinois*, 114 the Court explicitly recognized the “significant interest” of an unwed father in securing and protecting his relationship with his child. 115 The plaintiff in *Stanley*, an unwed father, challenged an Illinois statute that attached a presumption of parental unfitness to an unwed father and provided, therefore, that upon the death of the child’s mother, the illegitimate child would become a ward of the state. 116 The plaintiff argued that due process entitled him to a fitness hearing before his child could be taken away from him, and the Court agreed. 117

Noting that the unwed father in *Stanley* had taken parental responsibility for his children by living with them since birth, the Court found that his interest in the “companionship, care, [and] custody . . .” of his children was fundamental. 118 The Court further found that, although procedure by presumption was speedy and inexpensive, the important nature of a father’s interest in his child required the protection of a fitness hearing. 119 Although arising in the context of procedural due process, 120 *Stanley* represents a strong indication of the

113. An ongoing debate among scholars of constitutional law concerns whether the Court ought to be deriving “new” fundamental values in the course of constitutional adjudication. While the Constitution guarantees certain specific, named rights, it also contains open-ended provisions which call for judicial interpretation to determine their precise content as applied to a given case. For the view that the Court’s analysis should center on written constitutional text except where the right at issue is one not fully protected by the political process, see, e.g., ELY, DEMOCRACY AND DISTRUST 43-72 (1980). For the view that tradition, history, and basic national values are legitimate sources of constitutional interpretation, see, e.g., Grey, Do We Have An Unwritten Constitution, 27 STAN. L. REV. 703 (1975).


115. The Court stated that “[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.” *Stanley*, 405 U.S. at 651.

116. Id. at 646.

117. Id. at 657-58.

118. Id. at 651-52.

119. Id. at 658.

120. *Stanley* involved a procedural due process claim while this note presents a fundamental right analysis under equal protection. In both cases, however, a state foreclosed a father’s interest in his child by the operation of a presumption. The plaintiff in *Stanley* was afforded no opportunity to rebut the presumption of unfitness of an unwed father; the P.B.C. plaintiff was prevented from attempting to rebut the presumption of legitimacy. Illinois and Massachusetts thus used similar “procedure by presumption” devices to deny a
Court’s desire to afford maximum protection to parent-child relationships.

Six years later, in *Quilloin v. Walcott,* the Court encountered another situation involving the rights of an unwed father. In *Quilloin,* the plaintiff attempted to veto the adoption of his child by the child’s mother and her husband. Finding that the plaintiff had never exercised any significant responsibility for the child during its eleven years, the Court was able to distinguish *Stanley* and hold that the plaintiff in *Quilloin* had no right to veto the adoption.

One year after *Quilloin,* an unwed father who had significantly participated in his child’s upbringing, even though he was not then living with the child, appealed to the Supreme Court the denial of his attempt to veto the child’s adoption. In *Caban v. Mohammed,* the Court held that when a biological father takes paternal responsibility for his child, the Constitution will protect his rights to that child whether or not he lives with the child. Caban was thus entitled to participate in the decision concerning his child’s adoption.

The most recent biological father case to come before the Court was *Lehr v. Robertson.* In *Lehr* the Supreme Court rejected a claim from a putative father challenging a New York statute which denied him notice and a hearing before the adoption of his illegitimate child. The Court noted that the putative father had not used the state procedure for asserting parental rights—signing New York’s putative father registry, which would have assured him of notice of adoption. This note argues that establishing paternity is a similarly vital parental interest for the plaintiff in *P.B.C.* See infra notes 138-143 and accompanying text. The *Stanley* Court placed a high value on protecting the parent-child relationship; so high, indeed, that had Illinois burdened that relationship by means of a substantive rather than procedural law, the Court’s solicitude for the parent-child tie would have led to judicial invalidation of the law even under substantive due process. Fundamental values, although derived under substantive due process, are also a touchstone for analysis under equal protection. See, e.g., *Zablocki v. Redhail,* 434 U.S. 374 (1978) (the right to marry, determined to be fundamental in a substantive due process analysis, examined under equal protection strict scrutiny analysis).

122. *Id.* at 247.
123. *Id.* at 255-56.
125. *Id.* at 393-94.
126. *Id.* at 394.
128. *Id.* at 250.
tion proceedings—and upheld the constitutionality of the statute.\footnote{129} 

In \textit{Lehr} the Court drew on the principles underlying its decisions in \textit{Stanley}, \textit{Quilloin}, and \textit{Caban} to announce the principle that the Constitution protects an established relationship between parents and their children, but not "the mere existence of biological links. . . ."\footnote{130} The Court described "[t]he significance of the biological connection . . ." in \textit{Lehr} as "offer[ing] . . . an opportunity . . . to develop a relationship" with the child.\footnote{131} The Court explained that

If [the biological father] 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. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child’s best interests lie.\footnote{132} Both Stanley and Caban had “grasp[ed] [the] opportunity,” and the Court held the resulting relationship to be worthy of the highest degree of constitutional protection.\footnote{133} Quilloin, on the other hand, who had not acted on the opportunity to develop a relationship with his child, did not have a fundamental interest worthy of constitutional protection.\footnote{134} 

\textit{Lehr} was significantly different from \textit{Stanley}, \textit{Quilloin}, and \textit{Caban} because it was the only case in which the putative father alleged that the child’s mother had thwarted his efforts to “grasp [the] opportunity” to develop a relationship with his child.\footnote{135} Nevertheless, the Court stressed that, via the putative father registry, the state had provided Lehr with an alternative method for asserting parental rights. Thus the Court found no constitutional infirmity where the claiming

\begin{itemize}
\item \footnote{129} Id. at 250-51.
\item \footnote{130} Id. at 261.
\item \footnote{131} Id. at 262.
\item \footnote{132} Id.
\item \footnote{133} In \textit{Stanley}, the mother and putative father had lived together "intermittently" for 18 years. During that time they had three children. \textit{Stanley}, 405 U.S. at 646. In \textit{Caban}, the couple lived together from September, 1968 until the latter part of 1973. The mother, Maria, gave birth to two children, David in 1969, and Denise in 1971. \textit{Caban}, 441 U.S. at 382.
\item \footnote{134} In \textit{Quilloin}, the mother and natural father never married nor lived together. The child was born in 1964, however, adoption proceedings were not begun until 1976 and it was at this time that the natural father first expressed an interest in him. \textit{Quilloin}, 434 U.S. at 247. The Court noted that the father had “never exercised actual or legal custody over his child, and thus had never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child.” \textit{Id.} at 256.
\item \footnote{135} \textit{Lehr}, 463 U.S. at 269 (White, J., dissenting).
\end{itemize}
father had not availed himself of this state-provided alternative. The Court expressed doubt, however, about the constitutionality of a scheme which would place the putative father's ability to establish a parent-child relationship—protectable as a fundamental right—wholly beyond his control.

The Court has never addressed the issue presented by P.B.C., that of protecting a putative father's right to develop a relationship with his child when he is given no opportunity to do so. In the situation faced by the putative father in P.B.C., the child's mother resisted his efforts to participate in the child's upbringing, and the state, offering no effective alternative method for securing parental rights, ultimately blocked his last attempt to gain an interest in the child that might be his. Despite his alleged biological connection to the child, neither the state nor the mother gave the putative father an opportunity to take the steps which would establish a parent-child relationship "of the highest constitutional significance." Clearly, without such an

136. Id. at 265.
137. Justice Stevens, writing for the majority, recognized that, "if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate." Id. at 264.
138. While Massachusetts, like New York, does provide a statutory method by which a putative father may receive notice of adoption proceedings, that method would not have helped the putative father in P.B.C. to prove paternity.

Chapter 210, section 4A of the Massachusetts General Laws provides that when an unmarried woman gives birth to a child, a man claiming to be the father may file a paternal responsibility claim with the Massachusetts Department of Social Services. Such a filing entitles a putative father to receive notice of any adoption proceedings involving the child.

Two problems arise under this statute for a putative father who, like the plaintiff in P.B.C., seeks not only notice of adoption, but also the right to establish a parent-child relationship with a child who was conceived by a married woman.

First, the statute provides merely for notice of adoption proceedings. This was not the remedy sought by P.B.C. Mere notice of adoption is a hollow remedy for a man who seeks to prove his paternity, and upon that biological link, develop an intimate familial relationship with his child. This statute thus provides an inadequate remedy to a putative father who desires to make a "full commitment to the responsibilities of parenthood."

Secondly, the statute allows paternal responsibility claims regarding children "born out of wedlock." The supreme judicial court has explicitly stated that a child conceived by a married woman is not illegitimate even though she is no longer married at the time of the child's birth. This administrative procedure would therefore have been unavailable to a putative father whose child was conceived by a married woman, as was the circumstance for the plaintiff in P.B.C. P.B.C., 1985 Mass. Adv. Sh. at 68, 483 N.E.2d at 1095.

The paternal responsibility claim is therefore an ineffective remedy for a putative father who seeks rights more extensive than simple notice of adoption and whose child was presumed to be the legitimate issue of a married woman and her former husband.


opportunity, "the protected [relationship] . . . will never arise."\textsuperscript{141}

If an established parent-child relationship is protected by the Constitution as a fundamental right, the critical question raised by \textit{P.B.C.} is whether the opportunity to develop that relationship should also be protected as a fundamental right. This note argues that it must be, for not protecting the opportunity has the effect of completely eviscerating the right.

Treating an unwed father's right to prove paternity as a fundamental right is a logical extension of the doctrine developed in \textit{Stanley, Quilloin, Caban,} and \textit{Lehr.} If the Court is to protect as fundamental established relationships between fathers and their children,\textsuperscript{142} then it must also give utmost protection to the means by which a putative father may achieve that established relationship. When a mother blocks a putative father's attempts to establish a relationship with his alleged child, and the state provides no alternative means for him to do so, then the putative father's only recourse is a judicial determination that he is, indeed, the father of the child. Only that determination will enable the putative father to gain visitation, custody, or other access to the child,\textsuperscript{143} which will, in turn, allow him to establish a rela-

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} See supra notes 114-134 and accompanying text.

\textsuperscript{143} Once a putative father is adjudicated the biological father of a child, he will have the opportunity to develop a relationship with the child, if that is in the child's best interest. Massachusetts courts are required to make decisions affecting children with the goal of determining and effectuating the best interest of the child. See \textit{Mass. Gen. Laws Ann.} ch. 208, \S 31 (West Supp. 1985):

In making an order or judgment relative to the custody of children pending a controversy between their parents, or relative to their final possession, the rights of the parents shall, in the absence of misconduct, be held to be equal, and the \textit{happiness and welfare of the children shall determine} their custody or possession.

Upon the filing of an action in accordance with the provisions of this section, section twenty-eight of this chapter or section thirty-two of chapter two hundred and nine and until a judgment on the merits is rendered, absent emergency conditions, abuse or neglect, the parents shall have shared legal custody of any minor child of the marriage; provided, however, that the judge may enter an order for temporary legal custody for one parent if written findings are made that such shared custody would not be \textit{in the best interest of the child} and that the parties do not have a history of being able and willing to cooperate in matters concerning the child. The court shall require the parents to submit a plan in writing to the court within thirty days of the entry of the temporary custody order setting forth the details of shared legal custody including but not limited to procedures for resolving disputes between the parties with respect to child raising decisions and duties. If at the time of the hearing on the merits the parties have filed such a plan with respect to shared legal custody, and the court determines that the plan has made proper provisions \textit{in the best interest of the child}, and that the parties have carried out the provisions of the plan \textit{in the best interest of the child}, both parties shall continue to have shared legal custody of the child. The court may
relationship worthy of protection as a fundamental right. Protecting as fundamental a man’s right to prove that he is the biological father of his child is thus a logical and necessary extension of constitutional doctrine in the area of familial relationships.

If the right to establish paternity is not a fundamental right, then a court would be able to rebuff a putative father’s effort to adjudicate paternity. Not recognized legally as the father and turned away by the mother, the putative father would be left empty handed and would have no hope of ever establishing a paternal relationship significant enough to be protected as fundamental. If a putative father’s right to prove paternity is not treated as a fundamental right, then the putative father’s fundamental right that arises from an established relationship stems from the purely fortuitous circumstance that the child’s mother permitted it. To anchor the father’s right to his child to the good will of the mother is wholly inconsistent with the Court’s demonstrated concern for the rights of fathers.

B. Fundamental Rights in the Areas of Procreation, Privacy, and Child-Rearing

In addition to being a logical and necessary extension of existing law in the area of biological fathers’ relationships with their children, finding fundamental a putative father’s right to prove paternity is con-
sistent with the values the Supreme Court has sought to protect in the areas of procreation, privacy, and child-rearing.

1. Procreation

The Supreme Court acknowledged that the right of procreation is a fundamental right in *Skinner v. Oklahoma ex. rel Williamson*. In *Skinner*, an Oklahoma statute required compulsory sterilization upon a third conviction for certain felonies, while exempting other enumerated felonies from the sterilization requirement. The Court struck down the statute, holding that it violated the equal protection clause of the fourteenth amendment to the Constitution by singling out some felonies, such as larceny, for punishment by sterilization, while exempting similar crimes, such as embezzlement.

In *Skinner* the Court found procreation to be "one of the basic civil rights of man," explaining that the right to have children is "fundamental to the very existence and survival of the race," and that one who loses that right is "forever deprived of a basic human liberty." In *Skinner*, the Supreme Court thus exhibited its deep concern for a person's freedom to choose to be a parent.

A putative father's right to prove paternity embodies values similar to Skinner's right to procreate. In both instances, the right involves fatherhood, blood ties, and progeny. A man who is precluded from asserting his paternity of a child is denied any sense of fatherhood as surely as a man who is rendered sexually sterile. The vasectomy imposed on Skinner by Oklahoma law would have left his sexual functioning intact but without any possibility of resulting fatherhood; similarly, refusing to permit a putative father to prove paternity would have no effect on his sexual freedom or ability, but it would prevent him from being a father to his child. Because the right of a man to prove paternity implicates the same values the Court protected as fund-

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144. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). Since *Skinner*, procreation has been protected as a fundamental right in a number of cases. *See, e.g., In re Moe*, 385 Mass. 555, 432 N.E.2d 712 (1982), in which the court emphasized that the personal rights at issue in a request by a parent or guardian for the sterilization of an adult mentally retarded female require the judge to use utmost care in effectuating the substituted judgment of the ward. *Id.* at 572, 432 N.E.2d at 724. The court reasoned that the right to reproduce and the decision whether or not to have a child are central to the fundamental right of privacy. *Id.* at 563-64, 432 N.E.2d at 719.


146. *Id.* at 541.

147. *Id.*

148. *Id.*

149. *Id.*
damental in *Skinner*, it should also be protected as a fundamental right.

2. Privacy

The Supreme Court has also held that the right of privacy is a fundamental right. The Court first identified the right of privacy in *Griswold v. Connecticut*. In *Griswold*, the state of Connecticut prohibited the use of contraceptives by any person, whether married or unmarried. The Court found that marital privacy was a fundamental right, explaining that specific constitutional guarantees have "penumbras, formed by emanations from those guarantees that help give them life and substance." In *Griswold* the Court conceded that the right of marital privacy *per se* was not an express provision of the Constitution, but went on to state that an analysis of the values protected in the Bill of Rights revealed that certain relationships lie "within the zone of privacy created by several fundamental constitutional guarantees." The Court held that the right of marital privacy, while not expressed in the Constitution, was "necessary in making the express guarantees fully meaningful." Because the Connecticut statute so deeply intruded upon the right of marital privacy, the Court held that it was unconstitutional.

Aware of the *Griswold* ruling, Massachusetts tailored its anticontraception statute to forbid the distribution of contraceptive articles to unmarried persons. The Supreme Court struck down that statute in *Eisenstadt v. Baird* and held that the distinction between married and unmarried persons was impermissible. Explaining that the right of privacy is not limited to married persons, the Court declared that "[i]f..."

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152. *Id.* at 480, quoting *CONN. GEN. STAT. ANN.* § 53-32 (West 1958): "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." (Section 53-32 was repealed in 1969.)
153. *Griswold*, 381 U.S. at 484.
154. *Id.* at 485.
155. *Id.* at 483.
156. *Id.* at 485-86.
157. *Eisenstadt v. Baird*, 405 U.S. 438, 450 (1972). The Court noted that "[t]he Massachusetts Legislature merely made what it thought to be the precise accommodation necessary to escape the *Griswold* ruling."
158. *Id.* at 453. The Court explained that "[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike."
the right of 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." In Griswold and Baird, therefore, the Court further evidenced its commitment to protecting the privacy of a person's decision in regards to parenthood and extended that commitment to unmarried persons.

The Court had another opportunity to consider the parameters of the right of privacy in Roe v. Wade. In Roe, the Court found that the right of privacy includes a woman's decision to have an abortion. The Court drew on previous decisions in which it had found fundamental rights in activities relating to parenting, such as Skinner, Baird, Pierce v. Society of Sisters, and Meyers v. Nebraska to conclude that a woman's choice to abort is a fundamental right. In Roe, therefore, the Court reaffirmed its commitment to protect as fundamental those choices and responsibilities that involve a person's opportunity to become a parent.

The right of a putative father to establish paternity involves values similar to those involved in a person's right to choose whether or not to bring a child into the world. Each situation strikes at the heart of one's opportunity to choose whether or not to become a parent, and it is the protection of that interest that appears to be of particular importance to the Court. A putative father's inability to prove that he is the biological father of a child destroys his potential relationship with

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159. Id. at 453 (emphasis added).

160. Justice Brennan, the author of the Baird opinion, later reflected on the Griswold-Baird line of cases and offered that, "[r]ead in light of its progeny, the teaching of Griswold is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." Carey v. Population Services International, 431 U.S. 678, 687 (1977). Although Griswold dealt with couples in a marital relationship, Baird "made clear that the constitutional protection of individual autonomy in matters of childbearing is not dependent on that element." Id.


162. Id. at 154. After determining that the fundamental right to privacy encompasses abortion, the Court considered the nature and weight of the state's interest in regulating or even proscribing abortion. After such consideration the Court held that the state's interest in regulating abortion in the first trimester of the pregnancy is not compelling enough to overcome the woman's fundamental right to terminate the pregnancy. Id. at 163. In the second trimester, however, the state's interest in protecting the mother's health becomes sufficiently compelling to permit regulation of the abortion procedure in such ways as to effectuate that interest, such as licensing the physician who performs the abortion or the facility in which it is performed. Id. Finally, in the last trimester of the pregnancy, when the fetus has reached "viability," the state's interest in protecting fetal life reaches a level of significance to justify an absolute proscription on abortion. Id. at 163-64.

163. Id. at 152-53.
that child as surely as if the child were never born. That the potential relationship arises in a nonmarital setting has no impact on the degree of intimacy and privacy involved, just as the marital status of a person seeking to use contraceptives is irrelevant to the importance of the underlying interest. If the Constitution protects a person's childbearing decision as fundamental, so it must protect a man's opportunity to establish paternity.

3. Child-Rearing

In addition to procreation and privacy, the Supreme Court has recognized that the authority of parents to make decisions regarding their children's upbringing is a fundamental right. In *Meyers*, the Court invalidated a state law forbidding the teaching of certain foreign languages to children, holding that the law unreasonably infringed upon a basic liberty, guaranteed by the Constitution, "to establish a home and bring up children."164 Similarly, the Court applied the highest degree of constitutional protection for parental authority in *Pierce*.165 Reasoning that a parent's traditional authority in decisions affecting his child is a fundamental right, the Court held that a state must allow parents the freedom to choose to send their children to private rather than public schools.166 These cases reveal the Court's strong concern that traditional parental decisionmaking be free from unwarranted intrusion by the government.

A putative father who is not permitted to establish his paternity of a child is perforce precluded from playing any role in the rearing of his child. A parental relationship with the child is an obvious prerequisite to the exercise of any parental authority over that child. *Meyers* and *Pierce* concededly involved governmental respect for the authority of those who were undisputedly the parents of the children affected by the decisions, while *P.B.C.* involves a putative father whose paternity is controverted. Nevertheless, the fundamental liberty of a parent to raise his or her child is meaningless where a parent is unable, as a first step, to show even the existence of a parent-child link. By refusing to allow this putative father to attempt to prove his paternity, Massachusetts has effectively eliminated any possibility of *P.B.C.*'s enjoying a fundamental right that belongs to all parents.

This section of the note has demonstrated that a putative father's right to prove paternity must be protected as a fundamental right for

166. *Id.* at 535.
two reasons. The first reason is because treating it as a fundamental right is a logical and necessary extension of the Supreme Court’s decisions in the area of unwed fathers and their illegitimate children. Granting a putative father the opportunity to prove his biological relationship to a child enables him to obtain visitation and other access to that child. With such access, he will be able to establish a relationship with the child. With that established relationship, he will be afforded the utmost constitutional protection of his biological relationship to the child. The removal of the first link, the opportunity to prove paternity, results in the collapse of the entire structure: the putative father’s biological relationship with his child is not protected because it is not “established,” and it is not “established” because he is not able to prove the fact of the biological link. Such a result would severely undercut the Court’s decisions from Stanley to Lehr.

The second reason why a putative father’s right to prove paternity should be protected as a fundamental right is because doing so would be consistent with the values that the Supreme Court has protected in the areas of procreation, privacy, and child-rearing. From Skinner to Griswold to Baird and Roe, from Meyers to Pierce, the Court has sought to protect as fundamental both a person’s choice to become a parent and the resulting decisions that arise from such a choice. Depriving a man of the right to prove that he is the father of a child has the effect of depriving him not only of the right to choose to become a parent, but also of the right to make any decisions in regards to that child. Granting a putative father the right to establish paternity would, on the other hand, give effect to his choice to become a parent and thus be consistent with the Court’s decisions in these areas.

V. Strict Scrutiny Analysis of the Massachusetts Classification

Where a state action burdens a fundamental right, the Supreme Court has applied strict judicial scrutiny to assess the constitutionality of the action.167 When strict scrutiny is applied, the state action will

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167. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Texas system of school financing, based on local property taxes, upheld despite resulting disparities in funds available to local school districts) “We must decide first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny.” Id. at 17.

If the state action does not impact upon a fundamental right, then a less rigorous “rational basis” test is used to assess the validity of the action. If no fundamental right is involved, “the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an
survive constitutional attack only if it serves a compelling state interest, and the means are narrowly tailored to effect that interest.\textsuperscript{168} This part of the note will analyze the Massachusetts parental classification system described in Part III in the context of strict scrutiny and will argue that that classification system which burdens a putative father's fundamental right to establish his paternity, does not survive such a strict scrutiny analysis.

The Massachusetts Supreme Judicial Court identified three state interests to support its holding in \textit{P.B.C.}. These are promoting the legitimacy of children,\textsuperscript{169} protecting family harmony,\textsuperscript{170} and ensuring the care and support of children.\textsuperscript{171} Each interest will be discussed in turn.\textsuperscript{172}

\textbf{A. Promoting the Legitimacy of Children}

In \textit{P.B.C.} the supreme judicial court relied upon "the important social policy of affording legitimacy to children whenever possible"\textsuperscript{173} to justify its refusal to allow the putative father to rebut the presumption of legitimacy in the mother's husband. This part of the note will

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168. \textit{See}, \textit{e.g.}, \textit{In re Griffiths}, 413 U.S. 717, 725 (1973) (resident alien’s right to practice law not overcome even in the face of the state’s interest in assuring the qualifications of persons permitted to practice law, because state failed to show that the classification was “necessary to the promoting or safeguarding of this interest.”); \textit{Graham v. Richardson}, 403 U.S. 365 (1971) (state laws excluding aliens from state public assistance benefits or imposing a long residency requirement struck down because such laws were not adequately justified by interest in preserving public resources); \textit{Shapiro v. Thompson}, 394 U.S. 618 (1969) (state interest in conserving revenue by imposing a waiting period as a prerequisite to receiving welfare benefits struck down as an impermissible burden on the fundamental right to interstate travel); \textit{Loving v. Virginia}, 388 U.S. 1, 11 (1967) (state law prohibiting interracial marriages struck down because state failed to show that the law was “necessary to the accomplishment of some permissible state objective”).
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170. \textit{Id.} at 73, 483 N.E.2d at 1097.
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172. \textit{In Wrenn v. Harris}, 503 F. Supp. 233 (1980), the Massachusetts federal district court commented on another state interest of relevance here, the interest in avoiding fraudulent paternity claims, and alluded to "the danger that the wrong person may be charged with fatherhood." \textit{Id.} at 226. The Supreme Court has found that medical progress has rendered this state interest less compelling as paternity testing has become more accurate. In \textit{Pickett v. Brown}, 462 U.S. 1 (1983), a case striking down a two-year statute of limitations on the bringing of paternity actions, the Court stated that "the State's interest in preventing the litigation of state or fraudulent paternity claims has become more attenuated as scientific advances in blood testing have alleviated the problems of proof surrounding paternity actions." \textit{Id.} at 17.
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argue that a policy favoring legitimacy over illegitimacy is impermissible under the Constitution.

Prejudice against illegitimacy undeniably exists in our society. Although the stigma attached to illegitimacy may well be diminishing, it nonetheless remains an important social force. The issue is less whether social stigma is cast on illegitimacy than "whether the reality of private biases . . . [is a] permissible consideration" upon which the state may base its action.

In *Palmore v. Sidoti*, the Supreme Court reviewed the decision of a Florida state court divesting a mother of custody of her child. Pursuant to a divorce decree, Linda Sidoti had been awarded custody of the couple's three-year-old daughter. Fifteen months later her former husband, the child's father, sought a change in the order and an award of custody to him, based on the circumstance that the child's mother had begun living with a black man, whom she married two months later. The Florida court agreed with the father that the mother's choice of live-in companion would likely cause the child to suffer from "the social stigmatization" that would be cast on a racially mixed household. Accordingly, the court concluded that awarding custody to the father would serve the best interest of the child. The Second District Court of Appeals affirmed the decision without opinion.

The Supreme Court agreed that the primary concern should be the child's welfare but forcefully rejected the notion that a court could promote that welfare by giving constitutional force and effect to private prejudices. Conceding that the child might be subject to "a variety of pressures and stress" stemming from her mother's interracial marriage, the Court held that "the reality of private biases and the possible injury they might inflict are [not] permissible considera-

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174. *Palmore v. Sidoti*, 466 U.S. 429 (1984). "It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated." *Id.* at 429.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 430.
179. *Id.*
180. *Id.*
181. *Id.* at 431.
182. *Id.*
183. *Id.*
184. *Id.* at 432.
185. *Id.* at 433.
tions” on which a state may rely in custody proceedings. 186 The Court concluded that “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.” 187

The Palmore decision is concededly distinguishable from P.B.C. in that Palmore involved consideration of race as the primary factor in the Sidotis’ custody dispute, whereas the issue in P.B.C. is illegitimacy. The reasoning underlying the Palmore decision is nevertheless applicable to P.B.C. Both classifications have their source in social prejudice. In both cases the courts focused their inquiries not on parental fitness, but on the negative social attitudes attaching to parental choices and lifestyles. Mrs. Sidoti lived with a black man; P.B.C. was not married to his child’s mother. Both situations are met with societal disfavor which may extend to the child as well as to the adults involved. 188

Under Palmore, therefore, the Massachusetts court cannot rely on the prejudice that attaches to illegitimacy as the announced motivation behind a judicial decision. Because the court’s reliance on the avoidance of the stigma of illegitimacy gives recognition and effect to this form of prejudice, it is constitutionally impermissible.

Because it is impermissible, the state’s interest in promoting the legitimacy of its children fails to justify the parental classification that burdens a putative father’s fundamental right to establish a parent-child relationship.

B. Protecting Family Harmony

In addition to promoting legitimacy, the Massachusetts Supreme
Judicial Court cited the state’s interest in protecting family harmony to support its dismissal of the putative father’s paternity action, stating that “the Commonwealth has legitimate and strong interests in the strengthening and encouragement of family life for the protection and care of children.”

The family harmony the court wished to protect derives from the fact of the marriage itself. Because a paternity suit brought by an outsider could destroy the marriage, the court employed the irrebuttable presumption to remove that threat. Beyond the initial impact of the litigation on the marriage, however, the court implied concern for the continuing irritant of the third party father’s presence in the couple’s lives in the exercise of any potential visitation rights and extinguished the putative father’s ability to establish parentage in the interest of removing this continuing threat.

Neither of these aims survives a strict scrutiny analysis. Protecting the family from the initial disruption of litigation seems particularly unjustified in light of the facts of \( P.B.C. \), in which the mother and husband had been married, divorced, and remarried before the litigation ever began. Conceding that “appropriate social policy might be clearer if the marriage had been uninterrupted since the child was conceived,” the court nevertheless chose to extinguish the putative father’s claim for the sake of a policy muddied by the past instability of the marriage.

As to the potential for discord that may inhere in continued contact between the newly established family unit and the outsider father, the Massachusetts Appeals Court has declared in another context that that problem is not compelling enough to justify depriving a natural father of a relationship with his child. In \( \text{In re Carson} \), the court denied an adoption petition by a mother and her third husband where the father, the mother’s first husband, intervened in opposition to the

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189. \( P.B.C. \), 1985 Mass. Adv. Sh. at 73, 483 N.E.2d at 1097 (quoting MASS. GEN. LAWS ANN. ch. 119, § 1 (West Supp. 1985)).

190. \textit{Id.} at 74-75, 483 N.E.2d at 1098.

191. \textit{Id.} The court’s concern for family harmony implies a desire to protect not only the family unit as a whole, but also the married couple whose relationship forms the basis of the family. Protecting the marital unit as the foundation of the family is a logical way of protecting the family structure.

192. \textit{Id.} at 75, 483 N.E.2d at 1098-99.

193. \textit{Id.} at 70-71, 483 N.E.2d at 1096.

194. \textit{Id.} at 73, 483 N.E.2d at 1097.

adoption. Although the mother, her third husband, and the child lived together as a family unit while the father was an "outsider" to that unit, the court insisted that any awkwardness or discomfort to the child, and thereby to the family, caused by the persistent presence of a former husband did not outweigh the father's right to associate with his child. The court held that a father's right to associate with his child should not be severed absent a showing of unfitness. This was especially true when the absence of a parent-child relationship was due to the mother's conduct.

For the court in *Carson*, therefore, the goal of protecting family harmony was not sufficiently compelling to justify excluding a natural parent from developing a parent-child relationship. Because the state cannot subordinate a father's interest in a parent-child relationship to the goal of enhancing family harmony, the state's interest in protecting family harmony is not sufficiently compelling to support its classification of fathers.

The court in *Carson* was concerned that a father's ability to achieve a relationship with his child should not turn on whether the child and its mother constitute part of a family unit which does not include the father. These concerns were likewise important to the *P.B.C.* court. Although it is undeniable that granting a putative father the right to rebut the presumption of legitimacy and establish his paternity would require the family to make adjustments to the presence of multiple father figures, *Carson* demonstrates that the burden of difficult family adjustments does not outweigh a father's interest in knowing his child.

C. Ensuring Care and Support of Children

The third state interest identified by the supreme judicial court to support its decision is that of ensuring care and support of children. The state's interest in making fathers responsible for their children clearly is compelling. Through its *parens patriae* power, the state is

196. *Id.* at 667, 382 N.E.2d at 1117-18.
197. *Id.* at 669, 382 N.E.2d at 1118-19.
198. *Id.* at 669, 382 N.E.2d at 1119.
199. *Id.* at 669, 382 N.E.2d at 1119.
201. Massachusetts has a compelling interest in assuring the protection of children from abuse or other maltreatment. See, e.g.; MASS. GEN. LAWS ANN. ch. 18A, §§ 1-2 (West 1981 & Supp. 1985) (establishing Department of Youth Services and a program of delinquency prevention); MASS. GEN. LAWS ANN. ch. 18B, § 2 (West 1981 & Supp. 1985) (Department of Social Services to provide protective services for children); MASS. GEN. LAWS ANN. ch. 18B, § 6A (West Supp. 1985) (foster care review unit established); MASS.
responsible for ensuring that children will receive the support they require, that fathers will be held accountable for the children they sire, and that the state will not be burdened by the support of children.

The presumption of legitimacy, made irrebuttable as to the plaintiff in *P.B.C.*, together with the statutory and common law framework of parental rights in Massachusetts, does not, however, advance this compelling state interest. Refusing to hear the putative father's claim, whereby a caring and willing man offers to shoulder the responsibility for his alleged child's financial support and offers to participate in the care and upbringing of his child, does not ensure support for the child.

Indeed, the supreme judicial court's decision could actually interfere with the state's interest in ensuring care and support of children. The following scenario illustrates this potential danger. The defendant mother's husband, who was not a party to this proceeding, could bring a future action to adjudicate the paternity of this child. If he is then excluded as the father and excused from the obligation to support the child, the child would be left without any legal father. The putative father could conceivably be of unknown whereabouts without knowledge of such a turn of events, or he may at that point be unwilling to come forward to assert paternity. Massachusetts could then find itself in the peculiar position of initiating paternity proceedings against a putative father whose claim of paternity it had refused to hear.

The state's interest in this area is not confined, however, to the mere assurance that children are supported, but rather includes the policy that they be supported by those appropriately responsible for them. In *Symonds v. Symonds*, a case involving a divorce and an accompanying denial of paternity by the husband, the Massachusetts Supreme Judicial Court stressed that, "[a] married man should have no duty to support a child born to his wife during their marriage but fathered by another man, any more than a wife should have a duty to


202. *See supra* notes 15-16. The law presumes that a husband is the father of a child born to his wife. Thus, he is legally recognized as the father until he rebuts the presumption pursuant to **Mass. Gen. Laws Ann. ch. 215, § 6 (West Supp. 1985)**.

203. Massachusetts courts have interpreted **Mass. Gen. Laws Ann. ch. 273, § 12** as permitting the state to initiate paternity proceedings. *See, e.g.*, Commonwealth v. Lobo, 385 Mass. 436, 432 N.E.2d 496, 503 (1982) ("Massachusetts may bring a complaint initiating proceedings for paternity, because the statutory scheme protects the interests of the state as well as those of the illegitimate child.").

support a child fathered by her husband during their marriage but born of another woman." By refusing to adjudicate paternity in P.B.C., thereby anchoring the duty of support not to a proven relationship to the child, but rather to a marital relationship with the mother, the supreme judicial court has completely abandoned the policy announced in Symonds. Not only may the child end up without any paternal support, but also, even if the husband does remain involved, the child may be receiving support from one who is not actually responsible for that support.

The P.B.C. rule, operating within the scheme of Massachusetts paternity law, thereby works to deny a putative father the opportunity to support the child he claims as his. The rule imposes the support obligation on a man whose only proven relationship is to his wife. The presumption of legitimacy, made irrebuttable as to putative fathers, promotes neither the state goal of ensuring that minor children are supported nor the judicially enunciated policy of attaching the duty of support to the man who actually fathered the child.

Because the state's interest in promoting legitimacy is constitutionally impermissible; its interest in protecting family harmony is neither compelling nor, in light of the facts of P.B.C., served by the classification; and its interest in ensuring care and support of children is actually hindered by the classification, the classification does not survive a strict scrutiny analysis. Thwarting a putative father's ability to establish his paternity is thus an unconstitutional infringement of his rights.

VI. RATIONAL RELATIONSHIP ANALYSIS OF THE MASSACHUSETTS CLASSIFICATION

If the reviewing court does not deem the interest of a putative father in establishing his paternity a fundamental right, then it must apply a rational relationship test, rather than strict scrutiny, to the classification. The rational relationship standard of review provides that if the classification is rationally related to a legitimate state interest, the court should defer to the legislative judgment and uphold the

205. Id. at 544, 432 N.E.2d at 703. See also Lobo, 385 Mass. at 446, 432 N.E.2d at 502 ("The support and maintenance of children should be shared by those responsible for bringing them into the world."). The Superior Court of Pennsylvania reached the same conclusion, finding "no justification or morality in a rule which tends to absolve the rightful father of his duty of support, while imposing such an obligation upon an innocent husband merely because of his marital relationship." Commonwealth ex rel. Savruk v. Derby, 235 Pa. Super. 560, 564, 344 A.2d 624, 627 (1975) (quoting Commonwealth ex rel. Leider v. Leider, 210 Pa. Super. 433, 442, 233 A.2d 917, 921 (1967) (Hoffman, J., dissenting).
challenged state action.206

A. Traditional Rational Basis Review

Under this general rule of minimum level scrutiny, the Supreme Court has often adopted a deferential approach, particularly in the area of exclusively economic regulation. In Williamson v. Lee Optical, Oklahoma opticians raised an equal protection challenge to the validity of a law that distinguished between opticians and sellers of ready-to-wear glasses, subjecting the former, but not the latter, group to regulations prior to the fitting of eyeglasses.207 The trial court, after careful consideration of the record, concluded that the law was unconstitutional because the means were “neither reasonably necessary nor reasonably related” to the state purpose of regulating the visual health care of the public.208

The Supreme Court reversed, declaring that “[t]he prohibition of the Equal Protection Clause goes no further than the invidious classification.”209 The Court admitted that the law might “exact a needless, wasteful requirement in many cases,” but nonetheless chose to defer to the legislative judgment, announcing that

[i]t is for the legislature, not the courts, to balance the advantages and disadvantages. . . . The day is gone when this Court uses the Due Process Clause [to] strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.210

B. Rational Basis Review “With Bite”

Although the Court has demonstrated extreme deference to legislative judgment in the area of economic regulation, rational basis

206. In City of Cleburne, Tex. v. Cleburne Living Center, 105 S. Ct. 3249, 3254-55 (1985), the Court described the “general rule” of equal protection analysis, absent implication of a fundamental right or involvement of a suspect class, in the following terms:

The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the states wide latitude, and the constitution presumes that even improvident decisions will eventually be rectified by the democratic process.


208. Id. at 486.

209. Id. at 489.

210. Id. at 487-88 (emphasis added).
analysis does not always mean automatic deference. In recent years, legal scholars and at least some members of the Court have begun to express dissatisfaction with the rigidity of the traditional two-tiered equal protection system, whereby classifications affecting fundamental rights or suspect classes are virtually always struck down via the application of strict scrutiny, while other classifications, particularly in the economic sphere, are almost always upheld under a rational basis analysis.

Justice Marshall has been the most vociferous member of the Court in criticizing the two-tiered system, recommending that it be replaced with a more fluid approach. In his dissent in *San Antonio Ind. School Dist. v. Rodriguez*, a case involving the constitutionality of the Texas system of school financing, based on local property taxes and resulting in disparities between richer and poorer districts, Justice Marshall suggested that a "principled reading" of the Court's decisions reveals that it has not treated equal protection claims merely as either strict scrutiny or rational basis cases. Rather, the Court "has applied a spectrum of standards" to decide equal protection cases. In Justice Marshall's opinion, where a particular case lies on that spectrum should depend on "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."

Constitutional scholars have also noted the blurring of sharp dividing lines between the levels of the strict, two-tiered system. Professor Gunther, for example, argues that the Court has begun to blur the traditional distinctions between strict scrutiny and rational basis by adding "bite" to the lower level of scrutiny. This rational basis "with bite" approach has enabled the Court to strike down some laws that burden neither a fundamental right nor a suspect class.

Several cases serve to illustrate this developing "bite" to rational basis scrutiny. By examining the reasons why the Court chose to do more than simply defer to the legislative judgment in those cases, this part of the note will demonstrate how the application of a more in-

212. Id.
213. Id.
214. G. Gunther, CONSTITUTIONAL LAW 589-90 (11th ed. 1985). Professor Gunther comments that, "for the first time in years, old equal protection standards occasionally mean something other than perfunctory opinions sustaining the law under attack. Occasionally, moreover, reformulations of 'mere rationality' standards hint at increased bite to the scrutiny." Id. at 590.
tense rational basis analysis is equally appropriate in the case of a putative father’s right to establish paternity.

In the area of illegitimacy, for example, the Court has dealt with attacks on state statutes that evidenced a preference for legitimate over illegitimate children. Although the Court has never considered illegitimate children a suspect class, it has consistently accorded laws that affect them more than deferential, “toothless” scrutiny. For example, in \textit{Trimble v. Gordon} the Court struck down a statute that barred intestate succession by illegitimate children from natural fathers, even in the presence of an adjudication of paternity. The Court carefully considered the state's interest at stake, that of promoting legitimacy, and concluded that that interest was not significant enough to justify the classification. Even under a rational basis test, the Court explained, “the Equal Protection Clause requires more than the mere incantation of a proper state purpose.” Because \textit{Trimble} involved a legally disadvantaged group of people who needed special judicial protection and because the classification impacted on substantive rights, the Court chose to look very closely at the validity of the statute. This was a marked departure from the Court’s posture of virtually

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217. \textit{Id.} at 776.

218. \textit{Id.} at 768-69.

219. \textit{Id.} at 769.

220. \textit{Trimble} is one in a line of cases in which the Supreme Court examined classifications based on illegitimacy. In \textit{Levy v. Louisiana}, 391 U.S. 68 (1968), the Court struck down a state law which made wrongful death damages available to legitimate, but not illegitimate, children upon the death of their mothers. Four years later, in \textit{Weber v. Aetna Cas. \& Sur. Co.}, 406 U.S. 164 (1972), the Court refused to permit the claims of dependent unacknowledged illegitimate children to be subordinated to the claims of legitimate children under a workers' compensation law.

In other cases, the Supreme Court continued to demonstrate that while illegitimacy was not to be considered a suspect classification, and therefore not subject to strict scrutiny, the rational basis analysis that was appropriate would not be “toothless.” For example, in \textit{Mathews}, 427 U.S. 495, the Court held that in claims for Social Security benefits for dependent children, it was permissible to presume dependency in the case of legitimate children while requiring illegitimate children to prove dependency. The court explained that “perhaps in part because illegitimacy does not carry an obvious badge, as race or sex do, this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes.” \textit{Id.} at 506.

automatic deference in Lee Optical.\textsuperscript{221}

Rational basis "with bite" is further illustrated in the case of Logan v. Zimmerman Brush Co., in which the Court held unconstitutional a statute extinguishing employment discrimination claims that were not processed within a designated amount of time.\textsuperscript{222} The plaintiff had raised both procedural due process and equal protection challenges to the statute. The Court's opinion rested on procedural due process grounds, but four justices found the equal protection claim "sufficiently important" to write a separate opinion invalidating the statute under equal protection.\textsuperscript{223}

The Illinois law at issue in Logan required that a hearing take place within 120 days of the filing of an employment discrimination claim.\textsuperscript{224} The agency that handled the claims inadvertently scheduled plaintiff's hearing for a date five days after the statutory period and was thus deprived of jurisdiction over the claim.\textsuperscript{225} The justices who considered plaintiff's equal protection claim, conceding its "unconventional" nature, nonetheless found that the statute created a classification whereby one class of claims—those processed within 120 days—would be preserved, while another class—those not processed within 120 days—would be extinguished.\textsuperscript{226} Emphasizing that the "rational-basis standard is 'not a toothless one,' "\textsuperscript{227} the justices evaluated the state's interests at hand—eradicating employment discrimination and discouraging false claims against employers—and found that the classification did not rationally advance those interests.\textsuperscript{228}

While the justices professed to be doing no more than applying mere rational basis scrutiny, at least one commentator has noted the "unusual" nature of the Court's approach to the case.\textsuperscript{229} Justice Blackmun, who wrote the majority opinion for the Court striking down the Illinois law on procedural due process grounds, nevertheless took the additional step of submitting a separate opinion in which he

\begin{itemize}
\item \textsuperscript{221} See supra notes 207-210 and accompanying text.
\item \textsuperscript{222} Logan, 455 U.S. 422, 437-38 (1982).
\item \textsuperscript{223} Justice Blackmun authored the separate opinion, with which Justices Brennan, Marshall, and O'Connor joined. Id. at 438-42.
\item \textsuperscript{224} Logan, 455 U.S. at 424.
\item \textsuperscript{225} Id. at 426-27.
\item \textsuperscript{226} The Court explained that Logan was an "unconventional" equal protection case because the statute contained no classification on its face. The effect of the statute, however, was to divide claims into two groups and treat each group differently and in that way the statute triggered equal protection. Id. at 438-39.
\item \textsuperscript{227} Id. at 439 (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)).
\item \textsuperscript{228} Logan, 455 U.S. at 427.
\item \textsuperscript{229} G. Gunther, supra note 53, at 619.
\end{itemize}
pointed out that the statute would also fail under equal protection.230 Justice Blackmun and the three justices who joined in this separate opinion found that the equal protection issue, while unnecessary to the decision, was so important that it merited discussion. Applying the least rigorous intensity of judicial review, Justice Blackmun found that the statute failed to withstand constitutional attack.231 In a concurring opinion, Justice Powell urged a narrow decision yet agreed that the statute did not meet even the minimum rationality test.232 The striking aspect of the Court's disposition of *Logan*, therefore, is its willingness to put "bite" into the lowest level of scrutiny and to invalidate a law under an equal protection analysis of the least intensity.

Most recently, the Court has signaled its inclination to apply rationality "with bite" in a case involving the rights of mentally retarded people to live in residential communities. In *City of Cleburne, Tex. v. Cleburne Living Center*, the Court considered a zoning regulation aimed at preventing the establishment of a group home in a residential neighborhood.233 The Court refused to find that mentally retarded people constitute a suspect or quasi-suspect class but was concerned enough about the rights of mentally retarded people to strike down the law nonetheless.234

The Court, upon careful review of the record, concluded that it did not "reveal any rational basis for believing that the [group] home would pose any special threat to the city's legitimate interests,"235 and that the zoning ordinance appeared to rest on no more than "an irrational prejudice against the mentally retarded."236

Such cases as *Trimble, Logan*, and *Cleburne* establish that automatic deference is not the only alternative under the rational basis tier of analysis under the equal protection clause. When the Court perceives a case close to triggering strict scrutiny, it will pay particular attention to the state's interests and the ways in which the state action advances those interests. This note asserts that the right of putative

231. *Id.* at 439.
232. *Id.* at 443-44 (Powell, J., concurring).
234. *Id.* at 3255-56.
235. *Id.* at 3259.
236. *Id.* at 3260. Despite its searching review of the record and subsequent invalidation of the ordinance, the Court insisted that it was only following established rational basis doctrine. The dissenters questioned this, stating that the ordinance "surely would be valid under the traditional rational basis test" and suggesting that the Court actually was applying a heightened level of review. *Id.* at 3263 (Marshall, J., dissenting in part).
fathers to establish paternity is just the kind of "close" case in which application of rational basis "with bite" is appropriate.

In Trimble, Logan, and Cleburne, the Court found neither suspect classes nor fundamental rights, but something about the status of illegitimate children, workers alleging discrimination, and mentally retarded people compelled the Court to consider carefully their claims. That something special, this note asserts, is the proximity of such groups and their rights to suspect class or fundamental right status. The cases merit heightened review because, in Justice Marshall's words, their interests are of particular "constitutional and societal importance." The Constitution and society have traditionally accorded the utmost protection to children, workers suffering from discrimination, and mentally retarded people. On the other hand, the purely economic interests of such groups as opticians are not considered of particular import, and thus the Court has had no trouble deferring to the legislative judgment in those cases.237

Putative fathers and their interests in establishing paternity are more like the groups and interests protected in Trimble, Logan, and Cleburne than they are like those interests at stake in the cases in which the Court has found it easy to defer. Even if establishing paternity is not a fundamental right, it is closer to a fundamental right than to a purely economic interest. The interest of a putative father in proving that he is the father of a child implicates human values, family values, and privacy values—all values that society and the Constitution have historically found significant. Like Trimble, Logan, and Cleburne, P.B.C. is just the kind of close case in which the Court must do more than simply defer.

When carefully considering the interests of Massachusetts in disallowing a putative father to prove paternity, the Court will look at factors similar to those discussed in Part V of this note.238 For the same reasons that the irrebuttable presumption of legitimacy does not survive strict scrutiny, it will also not satisfy a rational basis "with bite" analysis. In essence, Massachusetts has failed to demonstrate a rational relationship between disallowing a putative father's attempts to prove paternity and the state's goals of ensuring support for children or protecting family harmony; nor has it established the validity of a policy of preferring legitimacy over illegitimacy. For these reasons, the state's denial of a putative father's attempt to prove paternity

238. See supra text accompanying notes 167-205.
must be struck down under the appropriate level of rational basis review.

VII. CONCLUSION

A putative father's right to establish paternity is a fundamental right. Because Massachusetts classifies fathers in such a way as to burden that right, without state interests sufficient to overcome that burden under either a strict scrutiny or a rational basis analysis, the classification scheme is unconstitutional. The presumption of legitimacy may therefore not constitutionally stand in the way of a putative father's efforts to prove that he is the father of a child.

When a married woman conceives and bears the child of a man who, though not her husband, is willing to shoulder the responsibilities of fatherhood, the court should not apply a rigid presumption of paternity in the mother's husband to foreclose the putative father's opportunity to establish paternity. The application of that presumption both violates the putative father's constitutional right to equal protection and severely undercuts the newly emerging role of men as full and equal parents in our society.

Susan J. Barnes