THE CASE FOR THE GENETIC PARENT: STANLEY, QUILLION, CABAN, LEHR, AND MICHAEL H. REVISITED

Anthony Miller
The Case for the Genetic Parent: Stanley, Quilloin, Caban, Lehr, and Michael H. Revisited

by

Anthony Miller

Abstract

Does a genetic parent have a constitutional right to exercise the fundamental rights which the United States Constitution affords parents? If a lesbian couple has a child with one woman donating the ova, which is artificially inseminated and implanted in the other woman, is the donor woman a mother under the Constitution? If sometime in the future a heterosexual couple has a child through the process if in vitro fertilization and through the use of an artificial womb, would the woman and man be the child’s mother and father for constitutional purposes? While the United States Supreme Court has recognized that parents have many fundamental rights regarding their relationship with their children, the Court has never fully explored the issue of who qualifies as a child’s parent for constitutional purposes. The Court has explored this subject only in regard to the rights of unwed fathers. Four cases, Stanley v. Illinois, Quilloin v. Woolcott, Caban v. Mohamed, and Lehr v. Robertson established that a genetic father who has participated in his child’s upbringing both psychologically and financially, even though he was not married to the child’s mother, should be afforded parental rights. This rule, however, was rejected by the plurality opinion of Michael H. v. Gerald D. with the result that the four unwed father cases are often thought to be overruled. Not only are these cases still viable, but they also have greater applicability today simply because modern reproductive technology has created situations where they apply not only to men who are not unwed fathers but also to many women

1Professor of Law, Pepperdine University School of Law.
who have children using new technology. The rule of Stanley v. Illinois, Quilloin v. Woolcott, Caban v. Mohamed, and Lehr v. Robertson should be revisited and applied to all genetic parents who have participated in their child’s life, especially to women who are genetic parents but who have not given birth to their genetic children.

Outline

I. INTRODUCTION: THE PROBLEM

II. THE RIGHTS OF PARENTS.
   A. Substantive Due Process
   B. Equal Protection
   C. Procedural Due Process
   D. Additional Cases Supporting the Rights of Parents

III. THE CASES DEALING WITH UNWED FATHERS
   A. Stanley v. Illinois
   B. Quilloin v. Walcott
   C. Caban v. Mohammed
   D. Lehr v. Robertson
   E. Michael H. v. Gerald D.
      1. Justice Scalia’s Plurality Opinion
      2. The Concurring Opinion of Justice O’Connor
      3. The Concurring Opinion of Justice Stevens
      4. The Dissenting Opinion of Justice Brennan
      5. The Dissenting opinion of Justice White
2 I have chosen to use the term “genetic” rather than biological or natural because it seems to me that a mother who gives birth has a claim to the term natural mother or biological mother whether she is a genetic mother or not. By referring to the “purely genetic parent,” I mean the genetic parent who has no other indicia of parenthood. As I discuss in Part II of this article, the concept of parent is complicated because there are a number of indicia of parenthood used in our legal system: besides genetic parents, there are birth parents, presumed parents, intended parents, functioning parents, participatory parents, step-parents, and, of course, adoptive parents. Also, by purely genetic parent, I mean a parent who has a genetic relationship with a child but who has not waived the rights associated with that relationship. A semen donor who has waived parental rights is not a “purely genetic parent.” However, for the purpose of this article a semen donor who has not waived rights is a “genetic parent.”
years off. In the future, medical scientists create an artificial womb, something like that envisioned in the novel *Brave New World*\(^3\); however, in this vision of the future, artificial gestation is not controlled by the state but is available to anyone who can afford it in the marketplace. In this setting, an unmarried couple\(^4\) decide to have a child using their own genetic


\(^{4}\)The hypothetical is stated in terms of an unmarried couple simply to remove the possibility that the father of the child might acquire Constitutional rights by virtue of rights being bestowed upon the mother, which is after all the traditional way that fathers acquired rights in regard to their children. The hypothetical still illustrates the problem posed for the genetic parents even if they are married. There are of course several other variations on this hypothetical which pose the same question at least as it applies to the same question. The hypothetical can be revised to apply to gay or lesbian couples and it can even be applied to a scenario in which a single person decides to have a child. The hypothetical of the single woman who utilizes the artificial womb is, indeed, the perfect hypothetical for dealing with the question of whether a purely genetic parent has a constitutional right to form a parent-child relationship with her child. Since a woman is involved, issues of moral fault and the irresponsibility of unmarried fathers is not an issue. Since the woman is single in the hypothetical, issues regarding marriage and family are to a large removed from the discussion as criteria for parenthood. Most importantly, the constitutional rights of purely genetic mothers have never really been an issue simply because it was always so easy to determine the mother of the child. The mother, of course, was the woman who gave birth, and until the most recent times, the birth mother and the genetic mother were always the same.

In recent years, ovum donation and gestational surrogacy have made it possible for the birth mother and the genetic mother to be two different women. The constitutional rights are usually not an issue in situations involving these techniques because in most cases the one potential mother has waived any rights to develop a relationship with a child. If ovum donation alone is used, the donor usually waives parental rights. If gestational surrogacy is used, usually the birth mother waives her parental rights. In one case in which the rights of the birth mother were pitted against those of the genetic mother, the court avoided the constitutional issue by applying a tie-breaker awarding the child to the genetic mother, not because of her genetic relationship, but because she was the intended mother. Johnson v. Calvert, 851 P. 2d 776 (Cal. 1993), *cert. denied*, 510 U.S. 874 (1993).

The hypothetical of a married couple who utilize their own genetic material to have a child through the process of in vitro fertilization and the yet-to-be invented artificial womb does not perfectly raise this issue of the purely genetic parent because married couples, as we see from Justice Scalia’s plurality opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) might obtain
material and the new reproductive technology of the artificial womb. In this hypothetical, most of the technology is familiar: the woman’s ovum would be combined with her partner’s sperm using in vitro fertilization and the resulting embryo would be implanted in the artificial womb with the result that after the proper period of gestation a child is born. The parents take the child home to raise.

The real life facts which illustrated the problem posed by the question in the first line of this article are found in the case of *K.M. v. E.G.* In this case, two women made the decision to have a child together through the process of sperm donation, in vitro fertilization, and . . .

implantation. One woman donated the ova, which was fertilized by sperm from an anonymous donor, and implanted in the other woman. The child was born and both women and the child lived together for five years when the couple split up. The issue presented by the case was whether the donor mother had any of the normal rights afforded a parent such as the right to be considered for custody or visitation. Ultimately, the California Supreme Court decided that this donor mother—the genetic mother—should be afforded the normal rights of a parent under the law of California which is a version of the Uniform Parentage Act without reference to the United States Constitution or to the cases which are the subject of this article.

---

5117 P.3d 673 (Cal. 2005).

6CAL. FAM. CODE § 7600 (West 2005).


8*K.M.*, 117 P.3d at 682 (“A woman who supplies ova to be used to impregnate her lesbian partner, with the understanding that the resulting child will be raised in their joint home, cannot waive her responsibility to support that child. Nor can such a purported waiver effectively cause
The point is, of course, that the mother the father in the hypothetical and the donor mother in the facts presented by K.M. v. E.G.⁹ are connected to their children only by their genetic bond and by their relationship. While this is not an uncommon situation for fathers, it is only because of new technology that mothers find themselves in this situation. The question posed is would these parents particularly the mothers have a Constitutional right—not just a right under state legislation and case law-- to avail themselves of the Constitutional protections afforded to parents who have children in the traditional¹⁰ manner? For example, under present law, the state cannot sever the parental relationship between mother and child without a showing of clear and convincing evidence that the mother is unfit.¹¹ Would this rule apply to the wife in this hypothetical and the facts of K.M. v. E.G.?¹²

While the Supreme Court of the United States has established that the Constitution protects many parental rights, the court has for the most part left the issue of who qualifies as a parent unresolved. This omission is critical. The power to determine who can exercise a right is as important as the determination of the right itself. If the Court were to leave the definition of parent to the state, then the state legislature, by defining the word parent, would be able to determine who had a constitutional right. The closest the Court has come to an attempt to

__________

that woman to relinquish her parental rights.”)

⁹K.M., 117 P.3d 673.

¹⁰I have used the term “traditional” as shorthand—perhaps as a euphemism—for a child born prior to modern reproductive technology.


¹²117 P.3d 673 (Cal. 2005).
resolve this issue has been in those cases which have dealt with the rights of unwed fathers: the line of cases which includes Stanley v. Illinois, Quilloin v. Woolcott, Caban v. Mohamed, and Lehr v. Robertson and the case of Michael H. v. Gerald D. The Stanley-Lehr line of cases is, of course, very important because it does establish that genetic parents (in this case unwed fathers) who have participated in their child’s upbringing do have a fundamental right to have a relationship with their children and a procedural right to establish their genetic and personal relationship with the child. However, these cases have, to some degree, been disregarded in recent times because of the case of Michael H., which appears to severely limit the rights of an unwed fathers and hence genetic parents in general. For example the case of K.M. v. E.G. does not mention any of the five cases which are the subject of this article. The effect of Michael H. has been, unfortunately, much too broad. The result in that case is so narrow that it cannot be applied beyond the constricted facts presented in that case. There is clearly no majority opinion which can be used to resolve the issue of who is a parent, and, indeed

---

18 Id.
19 117 P.3d 673 (Cal. 2005).
20 Michael H., 491 U.S. 110.
a careful reading of all the opinions in *Michael H.* leads to the conclusion, or at least makes a strong case, that the majority of justices in that case actually favored the principle that genetic participatory parents have constitutional rights as parents.

It is the thesis of this article that the combined effect of the four cases—*Stanley*, *Quillon*, *Caban* and *Lehr*—should still be considered good law, that these cases taken as a whole create a viable definition of the term “parents” for constitutional purposes—one that takes into consideration both tradition and the pragmatic needs of society facing new reproductive technology—to mean genetic parents who have to some degree participated in the lives of their children. It is not the position of this paper to argue that the genetic participatory parent is the exclusive parent for Constitutional purposes, but that the genetic participatory parent must be included in the group of parents whose constitutional rights may have to be balanced by the court. In terms of structure, Part II of this article summarizes the basic rights that have been afforded parents under the Constitution by the Supreme Court. Part III examines the cases

---

21 *Id.*

22 *Stanley*, 405 U.S. 645.

23 *Quillon*, 434 U.S. 246.

24 *Caban*, 441 U.S. 380.

involved with unwed fathers, *Stanley*,26 *Quillon*,27 *Caban*,28 *Lehr*29 and *Michael H.*30 Finally, Part IV discusses the reasons why the principle based on the line of cases from *Stanley* to *Lehr* should be considered still viable and why the United States Supreme Court if it confronts the issue of parental rights again, should maintain the rights of the genetic participatory parent.

II. THE RIGHTS OF PARENTS

Throughout the last century, the Supreme Court of the United States repeatedly protected fundamental rights related to procreation, family, and child rearing. This protection extended not only to the tripartite family—mother, father, and children—but to individual parents as well.31 The Court decided the early cases, *Meyer v. Nebraska*32 and *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*33 in 1923 and 1925 respectively; and, in the year 2000, the Court decided the most recent in this line of cases, *Troxel v. Granville*.34 In these cases, and the ones

26*Stanley*, 405 U.S. 645.
27*Quillon*, 434 U.S. 246.
28*Caban*, 441 U.S. 380.
29*Lehr*, 463 U.S. 248.
31*See* discussion below regarding *Michael H. v. Gerald D.*
32262 U.S. 390 (1923).
33268 U.S. 510 (1925).
which have been decided by the Court in the intervening 77 years, the Court’s primary function has been to decide important and difficult issues about the rights of parents rather than to create a systematic body of law; nevertheless, these cases constitute a remarkably clear and coherent statement of the basic rights which attach to parenthood and to the family, albeit rights which are stated in very general terms. The vehicle for the protection of these rights has been, of course, the Equal Protection Clause of the Fourteenth Amendment, and interestingly, the Court has used every aspect of the Clause in defending the rights of parents. The largest and most important group of cases, at least for this discussion, are those which fall under the rubric of substantive due process. In my discussion of the substantive due process cases, I have included cases which never mention this term but still, at their core, uphold substantive due process rights. The equal protection clause is also used to protect parental rights, although the most important of these cases, *Skinner v. Oklahoma,* was resolved at the time that substantive due process was an anathema. Finally, a number of these cases have been resolved using procedural due process. In this discussion of the basic rights of parents, I have excluded five very important cases which are discussed in full in Part III of this article.

**A. Substantive Due Process.**


Meyer v. Nebraska\textsuperscript{37} and Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary,\textsuperscript{38} both decided prior to the demise of Lochnerian substantive due process,\textsuperscript{39} stand today as the foundation of parental rights and of the much more limited, but revivified, substantive due process rights which surround procreation, family, and parenting. Later cases have expanded the doctrine, provided theoretical support, and expressly labeled the doctrine substantive due process. In \textit{Meyer}, the issue was the validity of a statute which prohibited anyone from teaching “any subject to any person in any language other than the English language” unless the person being taught had “attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.”\textsuperscript{40}

The statute was struck down, and \textit{Meyer} is generally cited for the proposition that the liberty interest of the Fourteenth Amendment encompasses parental rights regarding the care and education of children. The actual right as stated by the Court in \textit{Meyer} is couched in somewhat broad terms:

\begin{quote}
While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential
\end{quote}

\textsuperscript{37}262 U.S. 390 (1923).

\textsuperscript{38}268 U.S. 510 (1925).

\textsuperscript{39}United States v. Carolene Products Co., 304 U.S. 144 (1938).

\textsuperscript{40}Meyer, 262 U.S. at 397.
to the orderly pursuit of happiness by free men.\textsuperscript{41}

\textit{Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary}\textsuperscript{42} stands for exactly the same proposition as \textit{Meyer} but the court in \textit{Pierce} attempted to state the liberty interest more precisely. Rather than upholding the rights of parents to send their children to German language or military schools, \textit{Pierce}, as the name of the case indicates, upheld the rights of parents to send their children to parochial schools,\textsuperscript{43} although the free exercise of religion does not play a role in \textit{Pierce} as it would later in \textit{Prince v. Massachusetts}\textsuperscript{44} and \textit{Wisconsin v. Yoder}.\textsuperscript{45} The Court in \textit{Pierce} stated, “Under the doctrine of \textit{Meyer v. Nebraska}, . . . we think it entirely plain that the Act of 1922\textsuperscript{46} unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”\textsuperscript{47} Interestingly, in both \textit{Meyer} and \textit{Pierce}, the liberty interest of the parent is so strong that it can be asserted by someone other than the parent. In \textit{Meyer}, it is asserted by the German language teacher\textsuperscript{48} and in \textit{Pierce} by the schools

\begin{footnotesize}
\textsuperscript{41}Id. at 399.
\textsuperscript{42}268 U.S. 510 (1925).
\textsuperscript{43}Id. at 535.
\textsuperscript{44}321 U.S. 158 (1944).
\textsuperscript{45}406 U.S. 205 (1972).
\textsuperscript{46}This statute required the public school attendance for children from the ages of eight to sixteen.
\textsuperscript{47}Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534 (1925) (\textit{citations omitted}).
\textsuperscript{48}The issue is originally framed in terms of the right of the teacher who has instructed the children in German:

Plaintiff in error was tried and convicted in the district court for Hamilton county, Nebraska, under an information which charged
\end{footnotesize}
that on May 25, 1920, while an instructor in Zion Parochial School
he unlawfully taught the subject of reading in the German language
to Raymond Parpart, a child of 10 years, who had not attained. . . .
The problem for our determination is whether the statute as
construed and applied unreasonably infringes the liberty guaranteed
to the plaintiff in error by the Fourteenth Amendment. . . .
Meyer v. Nebraska, 262 U.S. 390, 396, 399 (1923). Nevertheless, the right is ultimately stated
not only in terms of the teacher but also the parents: “Evidently, the Legislature has attempted
materially to interfere with the calling of modern language teachers, with the opportunities of
pupils to acquire knowledge, and with the power of parents to control the education of their
own.”

In Pierce, the right is asserted by the Society of the Sisters of the Holy Names of Jesus
and Mary and by Hill Military Academy, both of whom operated private schools which lost
enrollment because of the requirement of public school attendance. The only explanation of this
application is that the Society and the Academy have both suffered a loss:

Appellees are corporations, and therefore, it is said, they cannot
claim for themselves the liberty which the Fourteenth Amendment
guarantees. Accepted in the proper sense, this is true. Northwestern
168, 7 Ann. Cas. 1104; Western Turf Association v. Greenberg,
204 U. S. 359, 363, 27 S. Ct. 384, 51 L. Ed. 520. But they have
business and property for which they claim protection. These are
threatened with destruction through the unwarranted compulsion
which appellants are exercising over present and prospective
patrons of their schools. And this court has gone very far to protect
against loss threatened by such action. Truax v. Raich, 239 U. S.
1917B, 283; Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 66 L.
Ed. 254, 27 A. L. R. 375; Terrace v. Thompson, 263 U. S. 197, 44
S. Ct. 15, 68 L. Ed. 255.


51Id. at 166, (citing Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925)). Despite this strong statement of parental rights, the case ultimately stands for the proposition that parental rights, even coupled with free exercise rights, must yield to the state’s important role to protect children from the dangers associated with child labor and more specifically the dangers of peddling religious tracts on the public thoroughfare:

But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. . . . And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. . . . The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction. (Citations and footnotes omitted).

Id. at 167-8.
Later cases, specifically *Stanley v. Illinois* and *Quilloin v. Wolcott*, would expand this fundamental right beyond the right to care and control the upbringing of the child to also include the right of a genetic parent to have a relationship with the child once that relationship has been initiated. These cases will be more fully discussed in the next section of this article, but suffice it to say at this point, that the court in its post-Lochnerian period still does not call this right substantive due process. More time must pass before the court fully articulates the new non-economic substantive due process in the case dealing with contraception and abortion. While the majority in *Griswold v. Connecticut* experimented with the penumbra theory, the concurring opinion of Justice Goldberg anticipated the theoretical framework for modern substantive due process in finding the fundamental right of privacy in the liberty interest of the Due Process Clause. Later, Justice O’Conner in *Planned Parenthood of Southeastern Pennsylvania v. Casey* fully articulates modern non-economic substantive due process.

*Roe* determined that a woman's decision to terminate her pregnancy is a "liberty" protected against state interference by the substantive

---

52. 405 U.S. 645 (1972): The 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. 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.' *Kovacs v. Cooper*, 336 U.S. 77, 95, 69 S. Ct. 448, 458, 93 L. Ed. 513 (1949) (Frankfurter, J., concurring).

*Id.* at 651.

53. 434 U.S. 246 (1978): “We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.” *Id.* at 255.

54. 381 U.S. 479 (1965) (Goldberg, J., concurring).
component of the Due Process Clause of the Fourteenth Amendment. Neither the Bill of Rights nor the specific practices of States at the time of the Fourteenth Amendment's adoption marks the outer limits of the substantive sphere of such "liberty." Rather, the adjudication of substantive due process claims may require this Court to exercise its reasoned judgment in determining the boundaries between the individual's liberty and the demands of organized society.\textsuperscript{55}

The view that these cases are truly substantive due process also gained support even more recently from \textit{Washington v. Glucksberg},\textsuperscript{56} which tackled the difficult issue of “whether the ‘liberty’ specially protected by the Due Process Clause included a right to commit suicide which itself includes a right to assistance in doing so.”\textsuperscript{57} The court concluded that “liberty” did not include this right. But more importantly for this discussion, Justice Rehnquist writing for the majority made an endorsement of the substantive due process rights of parents and fixed this right in the liberty interest of the due process clause.\textsuperscript{58} He said,

In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, \textit{Loving} . . . ; to have children, \textit{Skinner} . . . ; to direct the education and upbringing of one's children, \textit{Meyer} . . . ; \textit{Pierce} . . . ; to marital privacy, \textit{Griswold} . . . ; to use contraception, ibid.; \textit{Eisenstadt} . . . to bodily integrity, \textit{Rochin} . . . , and to abortion, \textit{Casey}, . . . . We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse

\textsuperscript{55}505 U.S. 833 (1992).
\textsuperscript{56}521 U.S. 702 (1997).
\textsuperscript{57}\textit{Id.} at 723.
\textsuperscript{58}\textit{Id.} at 720.
More importantly, he reiterated that there are two criteria for determining which rights are fundamental. The first criteria is the tradition test: “we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation's history and tradition. . . .” The second criteria ignores tradition and ranks rights as fundamental when they are “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed. . . .”

The most recent statement of the fundamental right of parents is Troxel v. Granville, in which the Court struck down a statute which provided that “[a]ny person may petition the court for visitation rights at any time” and which, in effect, allowed grandparents to petition for

unwanted lifesaving medical treatment. Cruzan, . . .

It is interesting that when the rights of grandparents are not competing with those of parents, the Court has recognized that to some degree grandparents, at least when they are standing in loco parentis, share in the rights of parents. In Moore v. East Cleveland, 431 U.S. 494 (1977), which struck down a city ordinance which defined family for zoning purposes in a manner that excluded a grandmother and grandchild, the court stated, “[d]ecisions concerning child rearing, which Yoder, Meyer, Pierce and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household indeed who may take on major responsibility for the rearing of the children.” Id. at 505.
visitation against the wishes of the parent. After a lengthy summary of the case law, the Court concluded, “[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”65 Appropriately the Court traces this right all the way back to Meyer: “[m]ore than 75 years ago, in *Meyer v. Nebraska*, . . . we held that the ‘liberty’ protected by the Due Process Clause includes the right of parents to ‘establish a home and bring up children’ and ‘to control the education of their own.’”66

I believe that the vehicle for the constitutional expression of parental rights is in the end appropriately called substantive due process. Yet, regardless of the term that is used, it is clear the Supreme Court has protected the fundamental parenting rights throughout the Twentieth Century67 and that it has done so without resort to the equal protection clause.68 The basis for protection in these situations has been the Due Process Clause and, more specifically, the liberty interest protected by that clause. Even Justice Scalia acknowledged this substantive component to the Due Process Clause: “It is an established part of our constitutional jurisprudence that the


66 *Id.* at 65 *(citing Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923)).

67 The only concerted refusal to protect parental rights were those cases involving unwed fathers which are the main subject of this article: *Quilloin v. Woolcott*, 434 U.S. 246 (1978); *Lehr v. Robertson*, 463 U.S. 248 (1983); and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

68 In there arena of procreative rights, although the most preeminent early case in this regard claims to be an equal protection case, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), that form of equal protection which prohibits invidious discrimination, not when a suspect classification is involved but when a fundamental right is infringed.
term "liberty" in the Due Process Clause extends beyond freedom from physical restraint."


Justice Scalia articulates these rights in terms of the family and, in Michael H., he was primarily concerned with limiting the extension and application of the liberty interest. And it must be admitted that these modern non-economic rights do protect the family. As the court stated in Stanley v. Illinois,

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one’s children have been deemed “essential,” Meyer v. Nebraska, . . ., “basic civil rights of man,” Skinner v. Oklahoma, . . . and “(r)ights far more precious . . . than property rights,” May v. Anderson, . . . “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.” Prince v. Massachusetts, . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, . . . the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, . . . and the Ninth Amendment, Griswold v. Connecticut, . . .


But even Justice Scalia acknowledges that these rights are not just family rights but also parental rights when he states, “This insistence that the asserted liberty interest be rooted in history and tradition is evident, as elsewhere, in our cases according constitutional protection to certain parental rights.” Michael H. v. Gerald D., 491 U.S. 110, 123 (1989). And, there is a great deal of additional evidence that these rights attach to individuals. Procreational rights most prominently attach to individuals. By procreational rights, I am referring to rights of individuals to have children rather than the rights of people who have had children, who have procreated, to have a relationship with their children. The existence of a fundamental right to procreate at least leads to an inference that there is a fundamental right to have a relationship with one’s child after procreation has taken place. Many other cases deal with parents in unformed family relationships or, at least, in relationships that require a much broader definition of family than that of the traditional tripartite family or the marriage family contemplated in Michael H. See e.g. Stanley v. Illinois, 405 U.S. 645 (1972), Caban v. Mohamed, 441 U.S. 380 (1979), Moore v. East Cleveland, 431 U.S. 494 (1977), Smith v. Org. of Foster Families, 431 U.S. 81, Little v. Streater, 452 U.S. 1 (1981), Santosky v. Kramer, 455 U.S.745 (1982), and M.L.B. v. S.L.J., 117 S. Ct. 555 (1996). Finally, almost all of the cases in this area, dealing with the child rearing right and what I will characterize as the right to have a relationship, have language which I believe makes it just as likely that these cases establish a parental right, not just a family right.
B. *Equal Protection.*

Even when the Equal Protection Clause is used to protect parental rights, it has been that form of equal protection which prohibits invidious discrimination, not when a suspect classification is involved, but rather when a fundamental right has been infringed.70 Roughly two decades after *Meyers* and *Pierce*, the Supreme Court decided *Skinner v. Oklahoma.*71 *Skinner* established that an individual has a right to procreate, which includes the right to be free from sterilization and there is no doubt that this right is fundamental:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.72

---

70This approach was used in M.L.B. v. S.L.J., 117 S. Ct. 555 (1996) (discussed below), which is a fairly recent case; however, I have chosen to treat that case as a procedural due process case. Most of the cases involving equal protection are in the shadow of the post-Lochner period and are not cases dealing with procreative rights or the rights of parents. See Griffin v. Douglas, 351 U.S. 12 (1956) (holding that indigents have the right to free transcripts for criminal appeals); Douglas v. California, 372 U.S. 353 (1963) (holding that indigents have the right to counsel for criminal appeals); Reynolds v. Sims, 377 U.S. 533 (1964) (establishing the famous one person, one vote standard); Harper v. Va. Bd. of Elections 383 U.S. 663 (1966) (holding that the right to vote may not be conditioned on the payment of a fee); Boddie v. Connecticut, 401 U.S. 371 (1971) (holding that indigents have a right to a waiver of fees when filing for divorce).


72*Id.* at 541. This language is remarkably similar to the language of Justice Douglas in *Griswold v. Connecticut*:

> We deal with a right of privacy older than the Bill of Rights--older than our political parties, older than our school system. Marriage is
Unlike *Griswold v. Connecticut*, which also dealt with what might be called negative procreative rights (the right not to procreate) there is no struggle and debate in *Skinner* as to the source of this right. The Court establishes this right without citation to any specific language in the Constitution or to any previous case. The right to procreate is simply self evidently fundamental. Neither *Meyers* nor *Pierce* was cited, and the failure to cite these cases might indicate that the Court in *Skinner* was dealing with an entirely separate right from the one established in *Meyers* and *Pierce*. Nevertheless, with time it appears that the rules of *Meyers*, *Pierce* and *Skinner* have blended together so that there is one fundamental right to have and rear children. The three cases are often cited together; however, *Meyers* and *Pierce*, are usually considered as substantive due process cases while *Skinner*, at least on its face, is an equal protection case. Justice Douglas, writing for the majority, uses the fundamental right to procreate to elevate the level of scrutiny. Because the fundamental right is involved, the Court applied the strict scrutiny test rather than the rational basis test. The Equal Protection Clause was violated because the Oklahoma law authorizing sterilization treated different classes of felons differently. Someone who was

> a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.


---


74 See *e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720 (1997).
“thrice” convicted of stealing a chicken could be sterilized but someone “thrice” convicted of embezzlement could not, “a clear, pointed, unmistakable discrimination.” Justice Stone, in his concurring opinion, deals with that form of procedural due process that really protects a substantive right. In other words, he says that the hearing procedure is inadequate because it does not give the prisoner a chance to prove that he is not a member of the class of criminal who will pass on their criminal traits to their offspring. To me it seems obvious that both Justices were working in the vacuum created by the demise of substantive due process. The better

75Skinner, 316 U.S. at 541.

76 There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned (See United States v. Carolene Prods. Co., 304 U.S. 144, 152, n. 4, 58 S. Ct. 778, 783, 82 L. Ed. 1234) and where the presumption is resorted to only to dispense with a procedure which the ordinary dictates of prudence would seem to demand for the protection of the individual from arbitrary action. Although petitioner here was given a hearing to ascertain whether sterilization would be detrimental to his health, he was given none to discover whether his criminal tendencies are of an inheritable type. Undoubtedly a state may, after appropriate inquiry, constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies. Buck v. Bell, 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 1000. But until now we have not been called upon to say that it may do so without giving him a hearing and opportunity to challenge the existence as to him of the only facts which could justify so drastic a measure.

Id. at 544.

77 Continuing in chronological order, the next United States Supreme Court case dealing with parental rights would be May v. Anderson, 345 U.S. 528 (1953). May is really a personal jurisdiction case holding that in an habeas corpus proceeding brought by the father in the mother’s domiciliary state, the court does not have to give full faith and credit to a judgment of a court in the father’s home state awarding him custody when that court did not have personal jurisdiction over the mother. While the case contains very little discussion of theory regarding parental rights it does state that “where a mother is neither domiciled, resident nor present, may
analysis is that the fundamental right to procreate is violated by any law which orders sterilization unless that law is supported by a compelling state interest and narrowly tailored to support that interest. It is worthy of mention that cases which are the converse of Skinner, those holding that individuals have the right not to procreate through the use of birth control78 (even if they are not married79) and, for women, to terminate a pregnancy at least prior to the time the fetus is viable,80 are all recognized to be substantive due process cases.

C. Procedural Due Process.

The procedural due process cases are important to this discussion for two reasons. First, they rely on the same basic rationale as the substantive due process cases. Before there is a procedural right, there must be some liberty interest to be protected by the procedures.81 Secondly, there is no question that these procedural rights are rights which attach to individual parents. These are not family rights; indeed most of these rights exist after the family unit has cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her in personam. Rights far more precious to appellant than property rights will be cut off if she is to be bound by the Wisconsin award of custody.” Id. at 533.

Also, Wisconsin v. Yoder, 406 U.S. 205 (1972), has overtones of parental rights but perhaps the better classification of this case would be to consider it a free exercise case. However, the Court did make the following statement: “The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.” Id. at 232.


81See Justice Scalia’s discussion in Michael H.
been broken or, at the very least, stressed almost to the breaking point. Indeed, most of these cases involve proceedings to terminate the rights of parents, and all but one establish elevated procedural safeguards in termination cases. *Lassiter v. Department of Social Services*\(^{82}\) is, in a sense, the one hold out case. Nevertheless, in this case, the Court was not insensitive to the special rights of parents. Although the Court did not hold that there was a blanket right to counsel for indigent parents, it did indicate that procedural fairness requires trial courts to make a case by case determination of the need for counsel and order counsel for indigent parents where counsel was needed. The two other cases dealing with termination of rights firmly established elevated procedural safeguards in these cases. No case makes a stronger statement than *Santosky v. Kramer*.\(^{83}\) To terminate a parent’s rights, the Due Process Clause demands “at least clear and convincing evidence.”\(^{84}\) The rationale of the Court is straightforward and touching; due process protection is not lost simply because a person has been less than a good parent and, by inference, it is not lost even when a person has been a bad parent. As the court stated quite eloquently,

> The fundamental liberty interest of natural parents in the care,

---

\(^{82}\)452 U.S. 18 (1981). Perhaps the best summary of *Lassiter* comes from *M.L.B*: “*Lassiter* concerned the appointment of counsel for indigent persons seeking to defend against the State’s termination of their parental status. The Court held that appointed counsel was not routinely required to assure a fair adjudication; instead, a case-by-case determination of the need for counsel would suffice, an assessment to be made “in the first instance by the trial court, subject ... to appellate review. 452 U.S. at 32, 101 S.Ct. at 2162.” M.L.B. v. S.L.J., 519 U.S. 102, 117 (1996).

\(^{83}\)455 U.S.745 (1982).

\(^{84}\)Id. at 748-49. The full statement of the holding is very powerful: “Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.” *Id.* at 748-49.
custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.\textsuperscript{85}

Likewise, in \textit{M.L.B. v. S.L.J.}, based on a similar rationale and upon equal protection arguments, the Court held that the state may not “condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees.” Such a condition effectively blocks the right of the indigent parent to appeal the “sufficiency of the evidence” and the law as applied in the court’s determination that the appellant was an unfit parent.\textsuperscript{86}

\textsuperscript{85} \textit{Id.} at 753-54. Emphasis added.

\textsuperscript{86} The same procedural protection that is afforded parents in termination of rights cases is not extended to men in paternity cases. In \textit{Rivera v. Minnich}, 483 U.S. 574 (1987), the Court decided that the higher standard of proof, clear and convincing evidence, required in termination proceedings did not apply to paternity hearings. Preponderance of the evidence was sufficient. The man seeking to avoid paternity simply has no right to assert against the state’s interest in establishing paternity:

Resolving the question whether there is a causal connection between an alleged physical act of a putative father and the subsequent birth of the plaintiff's child sufficient to impose financial liability on the father will not trammel any pre-existing rights; the putative father has no legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law.

\textit{Id.} at 579-80. On the other hand, the parent who faces termination already has a substantial constitutional right. With this said, it is important to mention that \textit{Little v. Streater}, 452 U.S. 1 (1981), decided on the same day as \textit{Lassiter}, concluded that although there was no right to an attorney at a termination hearing, the state must pay for a blood test in a paternity action against an indigent putative father. In this case, the putative father, who was in prison at the time of the
D. Additional Cases Supporting the Rights of Parents

The final group of cases that I believe are worth mentioning here are those which do not deal directly with parental rights but rather with some other fundamental right or with an asserted fundamental right and discuss parental rights as dicta. These cases are important in that they make such strong and eloquent statements regarding parental rights. *Moore v. City of East Cleveland*, 87 to some extent, extended the rights of parents to other biological parents:

“[d]ecisions concerning child rearing, which *Yoder, Meyer, Pierce* and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household indeed who may take on major responsibility for the rearing of the children.” 88 In *Smith v. Organization of Foster Families*, 89 the Court declined to extend the rights of parents to foster parents. Although foster parents were not without some due process protection, they were not entitled to the same rights as natural parents. The foster parent-child relationship stems from state action, and, while constitutional interest can be created from positive law, it cannot stand up to the constitutional right of natural parents: “the usual understanding of ‘family’ implies biological relationships, and most decisions treating the

paternity action, had be adjudicated to be the father even though blood tests had been ordered but never performed because the putative father could not pay for them. As one might expect, this rationale is based on procedural fairness rather than parental rights.


88 Id. at 505.

relation between parent and child have stressed this element. In *Parham v. J. R.*, which deals with the commitment of a minor to a mental facility, the court held that parental rights to care and control their children outweighed the child’s due process right to a hearing before being

---

*Id.* at 843. The Court in *Smith* elaborated this basic concept more fully: At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals. . . .

But there are also important distinctions between the foster family and the natural family. First, unlike the earlier cases recognizing a right to family privacy, the State here seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements. The individual's freedom to marry and reproduce is "older than the Bill of Rights," . . . Accordingly, unlike the property interests that are also protected by the Fourteenth Amendment . . . , the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in "this Nation's history and tradition." . . . Here, however, whatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset. While the Court has recognized that liberty interests may in some cases arise from positive-law sources, . . . in such a case, and particularly where, as here, the claimed interest derives from a knowingly assumed contractual relation with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties. In this case, the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional "liberty" in the foster family.

*Id.* at 844-846 (citations omitted).

---

*442 U.S. 584 (1979).*
involuntarily committed. The Court balanced the liberty interest of the child against the parent’s right to control and make medical decisions regarding the child and concluded that:

Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is “the mere creature of the State” and, on the contrary, asserted that parents generally “have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.”92

92Id. at 602 (citing Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925)). See also Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).
THE CASES DEALING WITH UNWED FATHERS

There are five Supreme Court cases which deal with unwed fathers—in chronological order—Stanley v. Illinois, Quilloin v. Walcott, Caban v. Mohammed, Lehr v. Robertson and Michael H. v. Gerald D. The four cases which precede Michael H. present a succinct statement of the rights of unwed fathers and, in doing so, the Court, by implication, also provides a constitutional definition of a parent. While it is evident in these four short cases that the Supreme Court was involved in the important judicial function of resolving the issues presented by the facts of the cases and that the cases do not present a systematic theoretical scheme, it is


The page count of the opinion for each of these cases is as follows: Stanley is 23 pages, Quilloin is 10 pages, Caban is 37 pages, Lehr is 28 pages, and Michael H. is 53 pages. Stanley, 405 U.S. at 645-68; Quilloin, 434 U.S. at 246-56; Caban, 441 U.S. at 380-417; Lehr, 463 U.S. at 248-76; Michael H., 491 U.S. at 110-63. My theory regarding the relative brevity of these cases is that, when the court is dealing with fundamental rights, those rights that are fundamental to our notion of ordered liberty, there is really not much for the court to say; the rights are either self evident or not.

Although Caban applies a well-recognized equal protection approach to gender-based discrimination using the test established in Craig v. Boren, 429 U.S. 190 (1976) and Reed v. Reed, 404 U.S. 71 (1971). The court in Caban stated, “Gender-based distinctions ‘must serve important governmental objectives and must be substantially related to achievement of those objectives’ in order to withstand judicial scrutiny under the Equal Protection Clause. . . .” Caban, 441 U.S. at 388 (citing Craig v. Boren, 429 U.S. 190, 197 (1976)). The rest of the cases exhibit a substantive due process approach. In the plurality opinion of Michael H., Justice Scalia acknowledges that the underlying theory is substantive due process, but then he attempts to limit substantive due process when he unveils his “most specific level” approach.
also clear that each of the cases builds on its predecessor in a manner that, collectively, they present a coherent statement regarding the parental rights of unwed fathers. The four cases stand for a proposition of general applicability—that father who has participated in his child’s life has a constitutional right to have a relationship with his child regardless of whether or not he is married to the mother. This proposition is strongly supported by *Caban*,100 which actually upholds the rights of the unwed participatory father, and both *Lehr* and *Quilloin*, even though they refuse to enforce the rights of the unwed fathers because they had not participated in their child’s lives, still acknowledge substantial rights for an unwed participatory father.101 Since the unwed father does not meet any of the other criteria for establishing parenthood, which traditionally involved marriage to the mother, the strong implication is that by “father” the courts were referring to the natural father, the biological father, ultimately the genetic father. The rule can be restated as the genetic father who has participated in the child’s life has a constitutional right to have a relationship with his child.

The question is, of course, to what degree is this proposition rejected by *Michael H.*, the last of the unwed father cases.102 If nothing else, *Michael H.* causes great confusion. There is no majority opinion, and it is genuinely difficult to pinpoint the exact position of the Justices.103 Accordingly, it is almost impossible to develop a constitutional rule of broad application from that case. However, it is my view that although the result in *Michael H.* is a rejection of the rule

100See *Caban*, 441 U.S. 380 (1979).

101See *Quilloin*, 434 U.S. at 256; *Lehr* 463 U.S. at 260-61.

102See *Michael H.*, 491 U.S. at 143 (Brennan, J., dissenting).

of *Stanley*, *Quilloon*, *Caban*, and *Lehr*, five Justices still accepted the validity of rule from these cases. As a result all, five “unwed father” cases are relevant when addressing the issue of the constitutional status of the genetic parent. Simply put, prior to modern technology, the only genetic parent, whose status as a parent was questioned, was the unwed father. The genetic mother was always connected by birth to the child. Thanks to technology, this is no longer true.

A. *Stanley v. Illinois*

Of all the Supreme Court opinions dealing with the rights of unwed fathers, *Stanley v. Illinois* shows the most sympathy of the unwed father, to such a degree that, I think is uncharacteristic of the court. Justice White set the stage by stating the following in the opening lines of the majority opinion: “Joan Stanley lived with Peter Stanley intermittently for 18 years, during which time they had three children. When Joan Stanley died, Peter Stanley lost not only her but also his children.” Stanley lost his children because of an Illinois statute which stated that “the children of unwed fathers become wards of the State upon the death of the mother.”

---

104 He was genetically the parent, but he obviously was not the birth parent, nor was he was married to the birth parent. He probably was not the intended parent, and in some of the cases he was not the parent by virtue of having cared for, nurtured and supported the child (although sometime this lack of participation in the child’s life was through no fault of the unwed father).


107 *Id.*
The Court reviewed the application of this statute to the Stanley family and concluded, in effect, that the statute was invalid because Mr. Stanley and, indeed, “all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody.”\textsuperscript{108} If Mr. Stanley and those similarly situated to him—that is, other unwed fathers—were denied such hearings while the state granted them to unwed mothers and married mothers and fathers, the state’s action would be “inescapably contrary to the Equal Protection Clause.”\textsuperscript{109}

\textbf{However,} although the result is couched in terms of equal protection, and although the case establishes the requirement of a hearing (which seems similar to procedural due process), there is a substantive due process component to this case. The Court mentions, but does not expand on, the exact nature of the due process violation,\textsuperscript{110} probably because modern non-economic substantive due process had not been fully articulated at the time of this case and, in fact, would only begin to be fully recognized as substantive due process in the cases following \textit{Stanley}. Although the Court calls it a “private interest,” the substantive right involved here is “that of a man in the children he has sired and raised,” and the Court holds that this right or interest “undeniably warrants deference and, absent a powerful countervailing interest, protection.”\textsuperscript{111} As to the weight of this interest, the Court states that the “authorities make it clear that, at the least, Stanley’s interest in retaining custody of his children is cognizable and

\begin{quote}
\textsuperscript{108} \textit{Id.} at 658.

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} See \textit{Id.} at 649-50.

\textsuperscript{111} \textit{Id.} at 651.
\end{quote}
substantial.”

Interestingly, in addressing the weight of this right, the Court added a comment which could possibly be viewed as foundation for modern substantive due process—the non-economic substantive due process which surrounds parental rights and decisions to procreate: “[i]t 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.’” In the end, there is a right to a hearing on fitness because of the protectable interest of Stanley and other unwed fathers. Equal protection is violated not because unwed fathers are a suspect class, but because

\[\text{\footnotesize 112 Id. at 652. The authorities referred to in this quotation are the same ones which served as a basis for the fundamental right of privacy. The Stanley Court cited these authorities as follows:}
\]

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed “essential,” Meyer v. Nebraska, 262 U.S. 390, 399 (1923), “basic civil rights of man,” Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and “(r)ights far more precious . . . than property rights,” May v. Anderson, 345 U.S. 528, 533 (1953). “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.” Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, at 399, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

Stanley, 405 U.S. at 651.

\[\text{\footnotesize 113 Id. (citing Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).}\]
the classification, as in *Skinner*,\(^{114}\) encroaches on a fundamental right.\(^{115}\)

**B. Quilloin v. Walcott**

In *Quilloin*, the Court held that there was no constitutionally protected interest for an unwed natural father who had never legitimized his child, never had custody, and never “shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child.”\(^{116}\) Although Georgia law required only the consent of the mother to the adoption of an illegitimate child, the child’s father had attempted to block his eleven-year-old son’s stepfather from adopting the boy by filing a petition for habeas corpus and a petition to legitimize the child. After a full hearing,

the trial court found that, although the child had never been abandoned or deprived, appellant had provided support only on an irregular basis. Moreover, while the child previously had visited with appellant on “many occasions,” and had been given toys and gifts by appellant “from time to time,” the mother had recently concluded that these contacts were having a disruptive effect on the child and on appellees’ entire family.\(^{117}\)

The trial court concluded that it was not in the best interest of the child to grant the petition to legitimize the child and that the natural father lacked standing to veto the adoption.\(^ {118}\)

The Supreme Court analyzed *Quilloin* on both substantive due process and equal protection grounds. Although the Court does not use the term “substantive due process,” but

\(^{114}\) *Stanley*, 405 U.S. at 651 (citing *Skinner* v. Oklahoma, 316 U.S. 535, 541 (1942)).

\(^{115}\) This protectable interest seems to be the same one that the court found in *Santosky* v. *Kramer*, 455 U.S. 745 (1982).


\(^{117}\) *Id.* at 251.

\(^{118}\) *Id.* at 251-52.
rather speaks in terms of a violation of the Due Process Clause, the Court does conclude that the father’s “substantive rights were not violated by application of a ‘best interests of the child’ standard.”\textsuperscript{119} The Court acknowledged that “the relationship between parent and child is constitutionally protected,”\textsuperscript{120} that “the custody, care and nurture of the child reside first in the parents,”\textsuperscript{121} and that “the Due Process Clause would be offended ‘[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.’”\textsuperscript{122} However, the Court concluded that because the natural father had

\textsuperscript{119}Id. at 254.

\textsuperscript{120}Quilloin, 434 U.S. at 255 (citing Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923)).

\textsuperscript{121}Id. (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

\textsuperscript{122}Id. (quoting Smith v. Org. of Foster Families, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring) (emphasis added)). In Smith, the term “natural family” seems to be specifically chosen to mean more than the married family. According to the Smith Court, ...

...there are also important distinctions between the foster family and the natural family. First, unlike the earlier cases recognizing a right to family privacy, the State here seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements. The individual's freedom to marry and reproduce is "older than the Bill of Rights," Griswold v. Connecticut, [381 U.S. 479] at 486. Accordingly, unlike the property interests that are also protected by the Fourteenth Amendment, cf. Board of Regents v. Roth, 408 U.S., at 577, the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law,[*] but in intrinsic human rights, as they have been understood in "this Nation's history and tradition." Moore v. City of East Cleveland, [431 U.S.] at 503. Cf. also Meachum v. Fano, 427 U.S., at 230, (Stevens, J., dissenting)."

Smith, 431 U.S. at 845. The Smith opinion’s note 53, indicated by an asterisk [*] in the quote above, makes it clear that “[t]he legal status of families has never been regarded as controlling: ‘Nor has the (Constitution) refused to recognize those family relationships unlegitimized by a marriage ceremony.’” Id. at 845 n.53 (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).
never sought custody and because the adoption would give full recognition to a family unit which already existed, the state was not constitutionally obligated “to find anything more than that the adoption, and denial of legitimation, were in the ‘best interests of the child.’”\textsuperscript{123}

As to the equal protection element, the natural father asserted that his right should be determined “by the same standard that would have been applied to a married father.”\textsuperscript{124} In other words, although the Court does not use the usual equal protection terminology, the discriminatory classification is between unwed fathers and married fathers, particularly those who are “separated or divorced.”\textsuperscript{125} The Court declined to give any constitutional weight to the disparate treatment of these two classes simply because “[w]e think appellant's interests are readily distinguishable from those of a separated or divorced father, and accordingly believe that the State could permissibly give appellant less veto authority than it provides to a married father.”\textsuperscript{126} The Court’s explanation is that the father in this case never had custody, or perhaps more importantly, never “shouldered” daily responsibility.\textsuperscript{127}

By modern standards, the Court’s due process and equal protection analyses in \textit{Quilloin} are incomplete and dismissive. The decision itself is relatively short\textsuperscript{128} and the discussions of

\begin{itemize}
\item \textsuperscript{123} \textit{Quilloin}, 434 U.S. at 255.
\item \textsuperscript{124} \textit{Id.} at 255-56.
\item \textsuperscript{125} \textit{Id.} at 256.
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{Supra} note 97.
\end{itemize}
due process and equal protection comprise only three paragraphs each.\textsuperscript{129} None of the normal due process and equal protection terminology are used. There is no discussion of fundamental rights, strict scrutiny, or rational basis. There is no discussion of gender discrimination, although the statute involved discriminates on its face.\textsuperscript{130} It is possible to infer that the Court is very much taken by either the moral fault or at least the irresponsibility of the natural father, but it is difficult to determine which of these (or perhaps both) influence the Court. And, it is difficult to determine the exact nature and location of the line which has been drawn by the Court, which speaks of terms of both custody and significant responsibility as criteria for full parental rights. Must an unwed father have had custody in order to have constitutional protection or will it be sufficient if he has shouldered significant responsibility? If significant responsibility is the test, how much responsibly is sufficient? \textit{Quilloin} informs us that constitutional protection does not arise when the natural father merely has provided gifts and visited the child on “many occasions.”\textsuperscript{131} The question remains what must a natural father do to achieve significant constitutional protection? Would it be enough if the father had paid regular support, or would he had to have paid support and have had summer-long visitation?

\textsuperscript{129}\textit{Quilloin}, 434 U.S. at 254-56.

\textsuperscript{130}The Court declined to consider the fatherʼs claim that the statute violated his equal protection on the basis of gender because it “was not presented in [his] jurisdictional statement.” \textit{Id.} at 253 n.13. There is also a procedural due process issue which is not discussed because the father had received a “full hearing” by the trial court. \textit{Id.} at 253. If \textit{Quilloin} stands for the proposition that the best interest standard sufficiently protects the interest of an unwed father who has never had custody and has not shouldered significant responsibility regarding the child, then doesnʼt that father have a procedural due process right to have a hearing regarding the application of the “best interest standard”?

\textsuperscript{131}\textit{Id.} at 251.
However, this degree of certainty is deceptive. Although the line that has been drawn is somewhat vague, nevertheless a line has been drawn. If the unwed father does not have a right to ascertain his relationship with his child and block the adoption because he has not developed a sufficient relationship with his child, then the converse is true as well. At some point, an unwed father’s participation in his child’s life will be sufficient for him to assert his parental rights. While the case does not say exactly when the parental right mature, it does not deny that they can. *Stanley* said that unwed fathers had rights, and *Quilloin* began to delineate those rights.

C. **Caban v. Mohammed**

*Caban v. Mohammed*,\(^{132}\) presented the Court with the opportunity to draw the appropriate line. The Court responds by making it clear in *Caban* when the constitutional protection becomes adheres to the unwed genetic father. Specifically, the Court reinforces the distinction drawn in *Quilloin*: “[i]n those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child.”\(^{133}\) Accordingly, the New York


\(^{133}\)Id. at 392. There is no doubt that this is an Equal Protection case. Like *Quilloin*, Caban involved the natural father’s right to withhold consent to a stepparent’s adoption of his child under a statute that allowed the natural mother an absolute right to veto or consent to the adoption. The Court explained the relevant New York law as follows:

[A]n unwed mother has the authority under New York law to block the adoption of her child simply by withholding consent. The unwed father has no similar control over the fate of his child, even when his parental relationship is substantial—as in this case. He may prevent the termination of his parental rights only by showing that the best interests of the child would not permit the child’s adoption by the petitioning couple.

*Id.* at 386-87. The Court used what has become known as the mid-tier test for gender-based discrimination, requiring that “[g]ender-based distinctions ‘must serve important governmental objectives and must be substantially related to achievement of those objectives’ in order to
statute was invalid as applied to a father who had “established a substantial relationship with the child and...admitted his paternity.”

Although the result is different from that of Quilloin, the cases are consistent, and both conclude that the biological relationship alone is not enough.

But what is really interesting about Caban is the implied rationale for drawing the
distinction between the participatory and non-participatory genetic parent. Like in *Quilico*, the Court does not fully explain this distinction, but two statements by Justice Powell in the majority opinion give some insight the reasoning of Justice Powell, at least, and perhaps the entire majority. Justice Powell points out that “[i]ndeed, under the [New York] statute [§ 111] as it now stands the surrogate may proceed in the absence of consent when the parent whose consent otherwise would be required never has come forward or has abandoned the child.” He then immediately follows this statement with a footnote in which he elaborates by saying, “we do not question a State's right to do what New York has done in this portion of § 111: provide that fathers who have abandoned their children have no right to block adoption of those children.”

The key term in both statements is “abandoned.” Justice Powell is expressing the universally accepted notion that the state may, at some point, terminate the rights of parents who have abandoned their children. While Justice Powell does not elaborate further on this concept, he does appear to be saying that a father who has never come forward to develop a relationship with his child is the equivalent of the father who has abandoned the child.

Indeed, by equating these two concepts Justice Powell implies something very important: both the father who abandons a child and the father who fails to form a relationship have lost their right as parents. The Court is not saying that these types of fathers never had rights, but rather that, because of their conduct, they have failed to maintain those rights. In fact, the implication is that abandonment means affirmative conduct: a father who had not cared for his child or even communicated with his child for a period of years would not be said to have

---

136 *Id.* at 392.

137 *Id.* at 392 n.13.
abandoned his child if the father has spent those years as a prisoner of war. Likewise, a father who, through no fault of his own (whether because he was in a prison camp or because the child had been hidden by the mother) had never been able to develop a relationship with a newborn child, could not be said to have abandoned his child.

Therefore, what should happen if a genetic parent is deprived, through no fault of his own, of the opportunity to participate and develop a relationship with his child? This was the question that could have been answered in *Lehr v. Robertson*.138

D. *Lehr v. Robertson*

The holding of *Lehr v. Robertson*139 is quite narrow. The issue as stated by the Court is “whether New York has sufficiently protected an unmarried father's inchoate relationship with a child whom he has never supported and rarely seen in the two years since her birth.”140 The Court concluded that the maintenance of the New York “putative father registry” provided sufficient due process protection of the natural father’s rights.141

This case would appear to be straightforward and simple if it were not for two very interesting and important aspects. The first of these aspects is the truly remarkable disconnect between the majority opinion and the dissent regarding the facts. The majority views the facts almost as a generalized hypothetical that was designed to prove a point. The dissent, however,

---


139 *Id.*

140 *Id.* at 249-50.

141 *Id.* at 250-51.
states the facts in great detail\textsuperscript{142} for the purpose of showing what I am sure they believe to be a significant injustice. The second aspect is the extensive and perhaps gratuitous discussion which is used to make the case in the majority opinion against greater rights for the natural father. The majority’s portrayal of the facts and its ultimate conclusion regarding the non-participatory father are intimately connected, which allows the majority to dodge a key question in determining the rights of natural (genetic) parents: what are the rights of a natural parent who have been deprived, through no fault of their own, the opportunity to become participatory parents?

The majority views the facts of these case as incredibly simple. The trial court terminated the parental rights of a putative father without notice and an opportunity to be heard when it allowed the child to be adopted, at age two, by her stepfather.\textsuperscript{143} Although the putative father had filed an action asserting his paternity in a separate action in a different county from the locus of the adoption, and the trial court knew about the paternity action when it granted the adoption, the trial court correctly, as it turned out, decided that there was no obligation to give the putative father notice of the adoption proceeding or an opportunity to be heard simply because the putative father had never signed the state putative father registry.\textsuperscript{144}

How this state of affairs came to be is, of course, much more complex that the above summary indicates, and the dissent, based upon the allegations of the petition, sets forth facts of a

\textsuperscript{142}See infra note 144.

\textsuperscript{143}Lehr, 463 U.S. at 252-53. Lehr, referred to in the case as the putative father, did admit his paternity. Though there was no hearing and Lehr never had the opportunity to prove that he was the natural father, the majority assumes that he is the natural father for purposes of discussion.

\textsuperscript{144}Id. at 254.
chaotic two year period beginning with the birth of the baby girl, Jessica. The dissenters view these two years as a time when the putative father, after acknowledging his paternity, did everything possible, except enter his name on the registry, to establish a relationship with his child, despite the best efforts of the child’s mother who, among other things, concealed the child’s whereabouts from him for long periods of time. The majority is completely silent as to

---

145 Id. at 268-69. The facts of the case are best understood when viewed chronologically:

1. November 9, 1976: Jessica born out of wedlock.
3. August 1978: Lehr, the putative father, found location of mother and Jessica, offered support and trust fund for Jessica and asked for visitation.
4. December 1978: The mother and stepfather filed for adoption in Ulster County, New York, perhaps as a response to threatened legal action by Lehr. Lehr is not served.
5. Jan. 30, 1979: Lehr filed a petition for declaration of paternity and for visitation Westchester County.
8. March 3, 1979: Lehr receives notice of the motion to change venue and learns of adoption for the first time.
9. March 7, 1979: Lehr’s attorney contacts Ulster Judge and notifies him of plan to seek stay of adoption and learns that adoption has already taken place.

146 The dissenters presented the facts as follows:
According to Lehr, he and Jessica's mother met in 1971 and began living together in 1974. The couple cohabited for approximately 2 years, until Jessica's birth in 1976. Throughout the pregnancy and after the birth, Lorraine acknowledged to friends and relatives that Lehr was Jessica's father; Lorraine told Lehr that she had reported to the New York State Department of Social Services that he was the father. Lehr visited Lorraine and Jessica in the hospital every day during Lorraine's confinement. According to Lehr, from the time Lorraine was discharged from the hospital until August, 1978, she concealed her whereabouts from him. During this time Lehr never ceased his efforts to locate Lorraine and Jessica and achieved sporadic success until August, 1977, after which time
the alleged attempts of the putative father to find the child and establish a relationship and apparently views this period as a time in which the putative father not only missed his opportunity to have a relationship with his child but also completely shirked his parental responsibilities.

In making the case against the natural father, and hence the genetic parent, the *Lehr* majority couches its discussion in terms of due process and, to a small degree, equal protection. Nevertheless, this case is not memorable for the depth of its analysis of either due process or

he was unable to locate them at all. On those occasions when he did determine Lorraine's location, he visited with her and her children to the extent she was willing to permit it. When Lehr, with the aid of a detective agency, located Lorraine and Jessica in August, 1978, Lorraine was already married to Mr. Robertson. Lehr asserts that at this time he offered to provide financial assistance and to set up a trust fund for Jessica, but that Lorraine refused. Lorraine threatened Lehr with arrest unless he stayed away and refused to permit him to see Jessica. Thereafter Lehr retained counsel who wrote to Lorraine in early December, 1978, requesting that she permit Lehr to visit Jessica and threatening legal action on Lehr's behalf. On December 21, 1978, perhaps as a response to Lehr's threatened legal action, appellees commenced the adoption action at issue here.

*Id.* at 268-269.

147 In contrast to the dissenters' accounting of the facts, the majority’s description is terse indeed:

Jessica M. was born out of wedlock on November 9, 1976. Her mother, Lorraine Robertson, married Richard Robertson eight months after Jessica's birth. On December 21, 1978, when Jessica was over two years old, the Robertsons filed an adoption petition in the Family Court of Ulster County, New York. The court heard their testimony and received a favorable report from the Ulster County Department of Social Services. On March 7, 1979, the court entered an order of adoption. In this proceeding, appellant contends that the adoption order is invalid because he, Jessica's putative father, was not given advance notice of the adoption proceeding.

*Id.* at 250.
equal protection. It is the Court’s analysis of the parental relationship that deserves special consideration. Unlike Quilloin and Caban, the Court in Lehr treats this as a true procedural due process case in which the putative father, whose whereabouts and whose attempts to assert parental rights were known to the mother and stepfather, their attorney, and to the judge who granted the stepparent adoption, was denied a hearing. Once the Court determines the nature of the putative father’s interest, the Court rather summarily concludes that no hearing was necessary because registry statute adequately protected whatever right or interest the appellant had. The Court applies little rationale for this holding, indicating obliquely that the father’s interest was outweighed by the state’s interests in not complicating “the adoption process,” not threatening “the privacy interests of unwed mothers,” not creating “the risk of unnecessary controversy,” and not impairing “the desired finality of adoption decrees.”

Regarding equal protection gender-based discrimination, the Court again focused on the status of the putative father. If the father’s situation is similar to the mother’s, the statute would invidiously discriminate against him; however, a mere biological father is not similarly situated. The biological father’s status must be elevated to achieve the same level as the mother, and he elevates his status “by ‘[coming] forward to participate in the rearing of his child[.]’”

The bulk of the majority discussion is devoted to determining the status of the biological parent, and the Court concludes that the biological or genetic relationship counts for very little by itself. In order to reach this conclusion, the Court relies upon four a priori statements, the

148 Lehr, 463 U.S. at 265.

149 Id. at 264.

150 Id. at 261 (quoting Caban v. Mohammed, 441 U.S. 380, 392).
sources of which go largely unrevealed and the truth of which goes unquestioned by the majority. In these statements, the Court is engaged in constitutional line drawing, and in doing so the Court gives the statements validity the sense that a constitutional line is valid because the Court chooses to draw it or to draw it in such a manner. But it is clear that the Court is also making statements about the nature of parenthood and the parent-child relationship, and it is in this area that the Court fails to question the validity of these statements. Not only does the Court, for the most part, fail to reveal the source of these statement, it does not pretend that these statements are empirical or anything more than normative judgements about unwed fathers. Moreover, the Court also ignores the question posed by the facts and by the dissent, the question which most fully allows an exploration of the rights of a purely biological parent: what are the rights of a natural father if, through not fault of his own, he is deprived of an opportunity to develop a relationship with his child?

The Court’s majority decision is based upon a series of conclusions. First, “[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring.” 151 Therefore, legal rights do not flow from the biological relationship, but rather they must come from some other source: “‘Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.’” 152 The source for parental rights (these more enduring relationships), can be found in two forms, of which the first is better than the second and the second is only used when the first is unavailable. The first source is, of course, marriage

151 Lehr, 463 U.S. at 262.

152 Id. at 260 (quoting Caban, 441 U.S. at 397 (Stewart, J., dissenting) (emphasis added)).
to the mother: “[t]he most effective protection of the putative father's opportunity to develop a relationship with his child is provided by the laws that authorize formal marriage and govern its consequences.” However, if this source of rights is unavailable, the father’s assumption of a parental role is sufficient to establish the parent child relationship and to invoke constitutional protection for the relationship.

The Lehr majority in Lehr does appear to transpose the view of the parental relationship implicit in Caban. The biological relationship is not the basis for the parent-child relationship which, as Justice Powell suggested in Caban, can be lost if the parent abandons the child. Rather, the biological relationship is the mere starting point of parenthood which then must be perfected. Based on this view, it’s no wonder the Lehr majority does not want to take up the question of the status of the biological parent who, through no fault of his own, is denied the opportunity to perfect his parent-child relationship.

The vigorous dissent in Lehr does tackle this difficult question. The dissent starts by pointing out that, in the minds of most people, the biological connection counts for much more than just the potential of having a relationship. Justice White, the author of the dissenting opinion in Lehr, quotes Smith v. Org. of Foster Families: “‘[The] usual understanding of ‘family’ implies biological relationships, and most decisions treating the relation between parent and child

153 Lehr, 463 U.S. at 263. The Court recognizes that marriage is “dependent on the will of both parents of the child[,]” and is, therefore, out of the exclusive control of one of the parents. Id.

154 Id. at 261 (quoting Caban, 441 U.S. at 392).
have stressed this element.”155 While in today’s society we recognize many types of families, including those with no biological relationship, the plain and ordinary meaning of that term denotes a “blood” relationship. It is the non-biological meaning of that term which will require further explanation. The Lehr dissenters conclude that “[t]he ‘biological connection’ is itself a relationship that creates a protected interest[,]” and the degree of the relationship of the parent with the child goes to the weight of the interest.156

The dissenters in Lehr do, in fact, view the putative father to be that type of biological father who, through no fault of his own, and despite his best efforts, has been unsuccessful, even thwarted, in his attempt to establish a relationship with his child. Justice White is undoubtedly dismayed that the majority so callously disregards Lehr’s attempts to establish a relationship with his child. Since the biological relation counts for something, since the biological father has attempted to establish a relationship, and since the biological father has made his presence known to the trial court, the dissenters see it as grossly unfair that the trial court and the majority of the Supreme Court have taken such “a grudging and crabbed approach to due process.”157 The dissenters would recognize that the biological relationship, plus the attempt to shoulder parental responsibilities, invokes basic due process protections of notice and opportunity to be heard.158

In the end, the majority view in Lehr, although it is hostile to the mere biological

155 Lehr, 463 U.S. at 272 (quoting Smith v. Org. of Foster Families, 431 U.S. 816, 843 (1977)).

156 Id.

157 Id. at 275.

158 See Id. at 272-73.
relationship of the unwed father, does make the case for the unwed father who has participated sufficiently in his child’s upbringing. Indeed, the majority makes the definite statement of the status of the unwed father, the statement which ultimately summarizes the cases four cases discussed so far:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by ‘com[ing] forward to participate in the rearing of his child,’ his interest in personal contact with his child acquires substantial protection under the due process clause. At that point it may be said that he ‘act[s] as a father toward his children.’

E.  

*Michael H. v. Gerald D.*

*Michael H. v. Gerald D.* is a deeply fragmented decision, and this fragmentation makes it very difficult to determine its precedential value. There is a plurality opinion written by Justice Scalia, and joined by Justices Rehnquist, O’Connor, Justice Kennedy. Justice O’Connor and Justice Kennedy also write a concurring opinion, in which they express their disagreement with Justice Scalia’s method as it was explained in the plurality decision. Justice Stevens, although he votes in favor of the outcome in the case, in his concurring opinion, significantly disagrees with the plurality regarding the legal principle involved. Justice Brennan, Justice Marshall, and Justice Blackmun dissent, as does Justice White, who writes a separate opinion

---

159 *Id.* at 261 (quoting Caban, 441 U.S. at 392).


161 *Id.* at 132.

162 *Id.* at 132.

163 *Id.* at 136.
which is also joined by Justice Brennan.\textsuperscript{164} It is difficult to account for the degree of fragmentation in this decision, because there seems to be a greater degree of conceptual agreement among the justices than appears on the surface of the case.

Nevertheless, this case could have been quite simple. It could have been the culmination of the four cases, from \textit{Stanley} to \textit{Lehr}, which had set forth a workable, if incomplete, rule for dealing with the unwed father cases: the unwed biological father who accepts parental responsibility and develops a relationship with his child has a fundamental liberty interest in having a continuing relationship with his child. This rule could have been affirmed, and the law would have been settled. The facts of \textit{Michael H.} justified this application of this rule. It was undisputed that Michael was the genetic or as the case says natural father of the child Victoria. Michael had significantly participated in Victoria’s life. He and the child’s mother Carole\textsuperscript{165} had lived together in a family unit with Victoria for perhaps as many as eleven months.\textsuperscript{166} He held

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{164}] \textit{Id.} at 157.
\item[\textsuperscript{165}] It is also important to mention that Carol, and along with her Victoria, had cohabited with her husband Gerald and, at different times with another man named Scott.
\item[\textsuperscript{166}] It is difficult to calculate the exact amount of time. Michael and Carole lived together for two periods. The Justice Scalia stated, “In January 1982, Carole visited Michael in St. Thomas, where his primary business interests were based. There Michael held Victoria out as his child. In March, however, Carole left Michael and returned to California. . . .” \textit{Id.} at 114. Later, Carole and Victoria moved in with Michael in Los Angeles. In the words of Justice Scalia, In August, however, she returned to California, became involved once again with Michael . . . . For the ensuing eight months, when Michael was not in St. Thomas he lived with Carole andVictoria in Carole’s apartment in Los Angeles and held Victoria out as his daughter. In April 1984, Carole and Michael signed a stipulation that Michael was Victoria’s natural father. Carole left Michael the next month, however, and instructed her attorneys not to file the stipulation. In June 1984, Carole reconciled with Gerald and joined him in New York, where they now live with Victoria and
\end{enumerate}
\end{footnotesize}
Victoria out as his child and signed a stipulation that he was the father.\textsuperscript{167} The Court could have simply said that the unwed father, Michael, had significantly participated in Victoria’s life and concluded that for constitutional purposes he was the child’s father. Presumably, as the father, he would have the right to seek visitation, which was all that he was seeking, and there would have been a hearing to determine if the best interests of the child justified visitation, which, incidentally, is exactly what had happened before the constitutional issue was raised. The California Superior court had “appointed a psychologist to evaluate Victoria, Gerald, Michael, and Carole” who “recommended that Carole retain sole custody, but that Michael be allowed continued contact with Victoria pursuant to a restricted visitation schedule.”\textsuperscript{168} The Superior Court had issued a visitation order when Gerald stepped in and asserted his rights under what was known at that time as the conclusive presumption of paternity.\textsuperscript{169}

This presumption was a former version of California’s statutory presumption of paternity, which stated, “the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.”\textsuperscript{170} Although the statute used the term

\textsuperscript{167} Id. at 114-115.
\textsuperscript{168} Id. at 115.
\textsuperscript{169} Id.
\textsuperscript{170} CAL. EVID. CODE § 621 (West 1989) (repealed 1992). Here is the entire version of the conclusive presumption applied in \textit{Michael H. v. Gerald D.}:

\section*{§ 621. Child of the marriage; notice of motion for blood tests}

(a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.
“conclusive,” and at one time was truly conclusive in the sense that there was no opportunity to rebut the presumption, it had been modified to allow limited rebuttal. At the time of this case there was a two-year window immediately following the child’s birth in which the presumption could be rebutted by blood tests. The husband of the mother had an absolute right to challenge the presumption and disavow his paternity during this two year period. Bizarrely, the mother could only challenge the presumption if she had a signed affidavit by the biological father acknowledging his paternity. At this time under the statute, the genetic father, had no statutory right to rebut the presumption.

(b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

(c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.

(d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

(e) The provisions of subdivision (b) shall not apply to any case coming within the provisions of Section 7005 of the Civil Code [dealing with artificial insemination] or to any case in which the wife, with the consent of the husband, conceived by means of a surgical procedure.


172CAL. EVID. CODE § 621 (d) (West 1989) (repealed 1992). The rationale for this must have been to insure that there would be a man to support the child, but this does not make sense in light of the husbands absolute right to disprove his paternity and escapes support.

173See CAL. EVID. CODE § 621 (West 1989) (repealed 1992). There is no mention of the right to rebut on the part of any one but the mother and the mother’s husband.
After the trial court had determined that visitation by Michael was appropriate, Gerald asserted his statutory rights under the conclusive presumption. Carole had conceived and given birth to Michael while cohabiting with Gerald, who was not impotent or sterile, and regardless of what she apparently had done with Michael, Gerald was the father. Based upon the affidavits of Carole and Gerald, the Superior Court granted Gerald’s motion for summary judgment, declared Gerald to be the father, and terminated Michael’s visitation. Michael and Victoria challenged this statutory limitation on his right to establish paternity as a violation of both procedural and substantive due process. The California Court of Appeal upheld the constitutionality of the statute and affirmed the judgment; the California Supreme Court “denied discretionary review.” Simply put, if Gerald was the father and not Michael, Michael had no right to visitation. End of story, unless the United States Supreme Court found the conclusive presumption was unconstitutional.

1. Justice Scalia’s Plurality Opinion

---

174 Although the affidavits presented by Carole and Gerald in support of his claim asserted that Carole had been cohabiting with Gerald at the time Victoria was conceived, the conclusive presumption did not require that; it was enough if she was cohabiting at the time of birth.


176 Id.


178 Michael H., 491 U.S. at 116.

179 Id. (citing Vincent B. v. Joan R., 179 Cal.Rptr. 9, 13 (Ct. App. 1981), appeal dism’d, 459 U.S. 807 (1982), “an earlier California case. . . which had held that once an assertion of biological paternity is ‘determined to be legally impossible’ under § 621, visitation against the wishes of the mother should be denied under § 4601.”)
What can be said about Justice Scalia’s plurality opinion? Even though it is joined by three other justices, it appears to be a highly personal document. He approaches the facts somewhat naively and is appalled by the conduct of the parties. He frames the issue as one of substantive due process rather than procedural due process and concludes that the unwed father of a child born to a woman who is married to another man has no fundamental liberty interest in his relationship to his child.

This conclusion is based on Justice Scalia’s view that fundamental rights are determined by historical traditions viewed at “the most specific level,” which in this case indicates that our laws and traditions have never protected an adulterous man who has impregnated another man’s wife. Despite his apparent allegiance to constitutional specificity, in this case Justice Scalia subscribes to a generalized idea that the constitution does not really protect the parent-child relationship, but rather protects the “unitary family,” although he grudgingly acknowledges that there may be other legitimate types of family units.

Justice Scalia begins the plurality opinion with the somewhat naive statement that “[t]he facts of this case are, we must hope, extraordinary.” On the contrary, the facts stated in their simplest form are common. A woman, Carole, who is married to one man, Gerald, gets pregnant by another man, Michael, and has a child Victoria. The question is, of course, who is the father? But Justice Scalia is not just surprised by the facts—he is appalled by the sexual mores of the

---

180 Michael H., 491 U.S. at 127.
181 Id. at 123.
182 Id. at 124 n.3.
183 Id. at 113.
parties. He refers to the relationship between Carole and Michael as the “adulterous affair.” 184 He refers to Michael several times as the “adulterous natural father” 185 and a child such as Victoria as a “child adulterously conceived” 186 and “adulterously begotten.” 187 He refers to Carole, Michael and Victoria as “a married woman, her lover, and their child.” 188

While Justice Scalia may simply be using the terms “adultery” and “adulterous” for the sake of accuracy, he appears to be fixated on the sexual morality of Michael and Carole. This fixation leads, at least, to the possibility that Justice Scalia is weighing the relative morality of the parties rather than focusing on the issue of the parent-child relationship. If this is true that Justice Scalia is weighing the morality of the parties he is to say the least misguided. Certainly in terms of moral values Michael and Carole are on the same moral plane. 189 Justice Scalia appears to assume that Gerald is innocent, although the facts say little about his conduct other than that he left Carole to live in New York prior to Carole cohabiting with Michael. 190 We do know,

184 Id.
185 Id. at 120, 127 n.6, 130 n.7.
186 Id. at 127 n.6.
187 Id. at 130.
188 Id. at 124 n.3.
189 Both committed adultery, although Carole may have committed with another man, Scott, as well. Michael is I think to be praised moral for attempting to assert his paternity with its accompanying duty of support. He is as they say “stepping up to the plate.” And, Carole, is also to be praised in her efforts to forge a family unit with Gerald. Id. at 110.
190 Justice Scalia says, “In October 1981, Gerald moved to New York City to pursue his business interests, but Carole chose to remain in California.” Unless one subscribes to the outmoted notion that says that, if a wife refuses to move with her husband, then she has abandoned him, one might interpret this conduct as Gerald, justifiably or not, abandoning Carole. Perhaps I am reading something into the case, but in reading the opinion I always feel that Justice
however, that Victoria’s moral position and values are impeccable. Nevertheless, Justice Scalia’s language opens the door to the inference that he is denying the unwed father, who has a functioning relationship with his child, constitutional status because he has flaunted traditional sexual values. See Mary Kay Kisthardt, Of Fatherhood, Families and Fantasy: The Legacy of Michael H. v. Gerald D., 65 TUL. L. REV. 585, 634 (1991).

As the California Supreme Court has observed:
Based solely on the mother’s wishes, a model father can be denied presumed father status, whereas a father of dubious ability and intent can achieve such status by the fortuitous circumstance of the mother allowing him to come into her home, even if only briefly—perhaps a single day. . . . A child may have a wholly acceptable father who wants to nurture it, but whose parental rights can be terminated under the best-interest standard because the mother has precluded the father from attaining presumed father status. Conversely, if a presumed father is highly questionable in every respect, he is nevertheless allowed to withhold consent absent proof by clear and convincing evidence that he is unfit. Adoption of Kelsey S., 823 P.2d 1216, 1235-36 (Cal. 1992).

The plurality opinion provides the following explanation as to why Victoria does not have a valid equal protection claim:
Victoria... claims that her equal protection rights have been violated because, unlike her mother and presumed father, she had no opportunity to rebut the presumption of her legitimacy. We find this argument wholly without merit. We reject, at the outset, Victoria’s suggestion that her equal protection challenge
Justice Scalia, borrowing from earlier California cases, frames the constitutional issue exclusively in terms of substantive due process. He quotes from Vincent B. v. Joan R.: 194

“[t]he conclusive presumption is actually a substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy, that given a certain relationship between the husband and wife, the husband is to be held responsible for the child, and that the integrity of the family unit should not be impugned.” 195

While Justice Scalia is correct in adopting the view that this is a substantive rule of law, he either misses or ignores the blatant error in this statement as to the rationale for the presumption. At the time Justice Scalia wrote this plurality opinion, the history of the conclusive presumption was such that the policy could not be one of holding the husband responsible for the protection of the child, simply because for the first two years after the child’s birth the husband had an absolute right to disavow the child through the use of blood test evidence. While at one time the

must be assessed under a standard of strict scrutiny because, in denying her the right to maintain a filial relationship with Michael, the State is discriminating against her on the basis of her illegitimacy. See Gomez v. Perez, 409 U.S. 555, 538 (1973). Illegitimacy is a legal construct, not a natural trait. Under California law, Victoria is not illegitimate, and she is treated in the same manner as all other legitimate children: she is entitled to maintain a filial relationship with her legal parents.

We apply, therefore, the ordinary "rational relationship" test to Victoria’s equal protection challenge. The primary rationale underlying § 621's limitation on those who may rebut the presumption of legitimacy is a concern that allowing persons other than the husband or wife to do so may undermine the integrity of the marital union. When the husband or wife contests the legitimacy of their child, the stability of the marriage has already been shaken. In contrast, allowing a claim of illegitimacy to be pressed by the child—or, more accurately, by a court-appointed guardian ad litem—may well disrupt an otherwise peaceful union. Since it pursues a legitimate end by rational means, California’s decision to treat Victoria differently from her parents is not a denial of equal protection.

Michael H., 491 U.S. at 131-32.


195 Michael H., 491 U.S. at 119-20 (quoting Vincent B., 179 Cal. Rptr. at 10).
The historical citations presented by Justice Scalia merely stand for the point that at one time the presumption provided for greater protection for family and children:

The presumption of legitimacy was a fundamental principle of the common law. H. Nicholas, Adulturine Bastardy 1 (1836). Traditionally, that presumption could be rebutted only by proof that a husband was incapable of procreation or had had no access to his wife during the relevant period. Id., at 9-10 (citing Bracton, De Legibus et Consuetudinibus Angliae, bk. i, ch. 9, p. 6; bk. ii, ch. 29, p. 63, ch. 32, p. 70 (1569)). As explained by Blackstone, nonaccess could only be proved "if the husband be out of the kingdom of England (or, as the law somewhat loosely phrases it, extra quatuor maria [beyond the four seas] ) for above nine months...." 1 Blackstone's Commentaries 456 (J. Chitty ed. 1826). And, under the common law both in England and here, "neither husband nor wife [could] be a witness to prove access or nonaccess." J. Schouler, Law of the Domestic Relations § 225, p. 306 (3d ed. 1882); R. Graveson & F. Crane, A Century of Family Law: 1857- 1957, p. 158 (1957). The primary policy rationale underlying the common law's severe restrictions on rebuttal of the presumption appears to have been an aversion to declaring children illegitimate, see Schouler, supra, § 225, at 306-307; M. Grossberg, Governing the Hearth 201 (1985), thereby depriving them of rights of inheritance and succession, 2 J. Kent, Commentaries on American Law* 175, and likely making them wards of the state. A secondary policy concern was the interest in promoting the "peace and tranquillity of States and families," Schouler, supra, § 225, at 304, quoting Boullenois, Traite des Status, bk. 1, p. 62, a goal that is obviously impaired by facilitating suits against husband and wife asserting that their children are illegitimate. Even though, as bastardy laws became less harsh, "[j]udges in both [England and the United States] gradually widened the acceptable range of evidence that could be offered by spouses, and placed restraints on the 'four seas rule' ... [,] the law retained a strong bias against ruling the children of married women illegitimate." Grossberg, supra, at 202.

Id. at 124-25.

Impotence and non-access were always exceptions. The existence of these two exceptions point to completely different rationale for the presumption. In ages when it was impossible to know the biological paternity of a child, the law used presumptions as a substitute for this determination. If the law was not concerned with the issue of who was the actual biological father of the child, why else would the law care about whether or not the husband was
opinion was written, the conclusive presumption merely allowed the patriarch to have control of the situation. He could either step in to assert his paternity by invoking the presumption, or he could attempt to avoid any responsibility by requesting blood tests. Even the right of the mother, who may know the identity of the real father, to challenge her husband’s control was limited. She was required to get an affidavit from the natural father before she could challenge the patriarch’s paternity.¹⁹⁸

Nevertheless, I think Justice Scalia is correct when he concludes that the conclusive

¹⁹⁸ CAL. EVID. CODE § 621(d) (West Supp.1989) (repealed 1992). The section stated: “[t]he notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.” Id. This provision currently corresponds with Family Code Section 7541(c). CAL. FAM. CODE § 7541(c) (West 2005).
presumption is substantive, and the analysis is that of substantive due process rather than procedural due process.\textsuperscript{199} California had made a substantive statement; it had, in effect said, that the biological father was not the legal father and that the man married to the mother was. California has not denied Michael the right to a hearing. Instead, it has stated that he has no rightful claim to present at a hearing.

The question is, of course, can the state do this? Up to a point, Justice Scalia uses a very straightforward substantive due process analysis. He says the term “‘liberty’ in the Due Process Clause extends beyond freedom from physical restraint.”\textsuperscript{200} However, the Court “‘comes nearest to illegitimacy’”\textsuperscript{201} when, in the process of determining the rights which are encompassed by the term “liberty,” it strays from the “language” or “design” of the Constitution itself.\textsuperscript{202} The benchmark substantive due process rights is the familiar phrase that such rights must be “‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”\textsuperscript{203}

An examination of our history and tradition reveals that we have never provided protection for the biological father. To Michael’s assertion that \textit{Stanley}, \textit{Quilfoil}, \textit{Caban}, and

\textsuperscript{199} \textit{Michael H.}, 491 U.S. at 121. While Justice Scalia is correct that there is a substantive component of the conclusive presumption, isn’t he wrong to conclude that there is no procedural due process issue? Wouldn’t the natural father confronting the conclusive presumption, have a procedural due process right to be heard on the issue of whether the husband of the mother is impotent or sterile?

\textsuperscript{200} \textit{Id.}

\textsuperscript{201} \textit{Id.} at 122 (quoting Moore v. East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting)).

\textsuperscript{202} \textit{Michael H.}, 491 U.S. at 122 (quoting \textit{Moore}, 431 U.S. at 544).

\textsuperscript{203} \textit{Michael H.}, 491 U.S. at 122 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105, (1934)).
Lehr, found that “biological fatherhood plus an established parental relationship—factors that exist in the present case” create such a liberty interest,204 Justice Scalia responds with an alternate reading of these cases. He says the results in these four cases “rest . . . upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family.”205

While there is support for Justice Scalia’s statement in that the opinions of Stanley, Quilloin, Caban, and Lehr each mention the family frequently, these cases also stand for much more—specifically, that the biological relationship, plus either the assumption of parental responsibility or the development of a parental relationship, are also protected by the Constitution. Justice Scalia does not explain why he chooses to interpret these four cases as he does, or why he chooses to ignore the statements in these cases regarding parental participation in the child’s life. In support of his narrow view, Justice Scalia does not quote from Stanley, Quilloin, Caban, and Lehr but rather from Moore v. East Cleveland: “‘[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.’”206 He ignores statements that indicate that the Constitution offers protection not only for the family, but also for the individual parent who has established a parent-child relationship and has accepted parental responsibility,

204 Id. at 123.


206 Id. at 123-24 (quoting Moore, 431 U.S. at 503).
207 Stanley contains the following applicable quotations:

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one’s children have been deemed “essential,” . . . “basic civil rights of man,” . . . and “(r)ights far more precious . . . than property rights,” “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 integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, . . . the Equal Protection Clause of the Fourteenth Amendment, . . . and the Ninth Amendment . . . .

The 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. 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.” . . . Stanley, 405 U.S. at 651 (emphasis added).

208 The Quilloon opinion includes the following statements:

If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.’ Smith v. Organization of Foster Families, 431 U.S. 816, 862-863, 97 S.Ct. 2094, 2119, 53 L.Ed.2d 14 (1977) (Stewart, J., concurring in judgment).

We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. “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.” Quilloon, 434 U.S. at 255 (citations omitted) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

209 The Caban opinion includes the following statements:

The present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother. Appellant Caban, appellee Maria Mohammed, and their two children lived together as a natural family for several years. As members of this family, both mother and father participated in the care and support of their children. There is no reason to believe that the Caban children--aged 4 and 6 at the time of the adoption proceedings--had a relationship with their mother unrivaled by the affection and concern of their father. We reject, therefore, the claim that the broad,
and *Lehr.* Justice Scalia simply ignores the fact that these four cases together lead to the conclusion, stated in *Lehr,* that “[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by ‘com[ing] forward to participate in the rearing of his child,’ his interest in personal contact with his child acquires substantial protection under the due process clause.”

As much as he unrealistically views the facts surrounding Victoria’s conception and birth, he is just as out of touch with reality when it comes to the nature of the modern family. Indeed, his view of the family verges on the absurd. In response to Justice Brennan’s charge that he has a

---

gender-based distinction of § 111 is required by any universal difference between maternal and paternal relations at every phase of a child's development.

In rejecting an unmarried father's constitutional claim in Quilloin v. Walcott, . . . we emphasized the importance of the appellant's failure to act as a father toward his children, noting that he “has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities and, indeed, he does not even now seek custody of his child.”

*Caban,* 441 U.S. at 389 (quoting *Quilloin,* 434 U.S. at 256).

*Lehr* also contains the same combination of statements:

“[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in ‘promot[ing] a way of life’ through the instruction of children as well as from the fact of blood relationship.”

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by “com[ing] forward to participate in the rearing of his child,” . . . his interest in personal contact with his child acquires substantial protection under the due process clause. At that point it may be said that he “act[s] as a father toward his children.” . . .

*Lehr,* 463 U.S. at 261 (quoting *Caban,* 441 U.S. at 392).

*Id.* at 263.
“pinched conception of ‘the family,’”212 Justice Scalia replies, “[t]he family unit accorded traditional respect in our society, which we have referred to as the "unitary family," is typified, of course, by the marital family, but also includes the household of unmarried parents and their children.”213

While this statement, placed in a note in response to Justice Brennan’s dissent, is evidently an attempt on Justice Scalia’s part to provide clarification, it actually contains a significant ambiguity. What does the term “unmarried parents” mean? It could mean unmarried couples who have children, an interpretation that would not be unreasonable considering Justice Scalia’s allegiance to the word “unitary.” However, if this is what Justice Scalia means, then he has just excluded millions214 of single unmarried parents from constitutional protection, effectively indicating that he lives in a fairy tale world of 1950's television shows.215 If, on the other hand, the term “unmarried parents” does refer to single parents (an expansion that is justified considering the nature of modern American life), then the question becomes a matter of determining the extent of this expansion. Certainly it would encompass Mr. Stanley and his kids who had lived together until Ms. Stanley died.216 Wouldn’t it also cover parents, married and unmarried, who had lived with their kids, but who were divorced or separated? If so, then

212Michael H., 491 U.S. at 145 (Brennan, J., dissenting).

213Michael H., 491 U.S. at 124.


doesn’t it include Mr. Caban as well? Can we then say that the broad definition of family includes those biological parents who qualify as legal fathers under the Stanley-Quilloin-Caban-Lehr test which affords constitutional rights to genetic participatory parents? So what does Justice Scalia mean by his definition of “family”? Either his meaning is absurdly narrow, meaning only married parents with kids, or it is more expansive, making the line he has drawn vague and unclear. Justice Scalia, in dealing with the “family test” does not resolve the issue of who falls within the definition. In the end, he only appears to be sure that Michael and Victoria are not a family and that Carole, Victoria, and Gerald are.217

Basically Justice Scalia misses the point. The issue is not whether the Constitution protects the family, but rather who the family is. If the state is able to determine the definition of what a family is for the purposes of establishing constitutional protection for its members, then the state is able to withdraw or extend constitutional protections at its will, since the power to define family is the power to determine who gets constitutional protection. Justice Scalia appears to have faith that tradition will determine who a family is, but he only considers legal tradition. He never considers that this legal tradition never provided direct protection of the rights of biological fathers, and he ignores the simple truth that until modern times it simply was impossible to determine who was the biological father of a child. He does not examine the traditions that are

217 Michael H., 491 U.S. at 124. Justice Scalia states,

Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts. Id. (footnote omitted).
embodied in the law before him. He fails to explore the possibility that this law, California’s conclusive presumption of paternity, was actually an indirect method of protecting the rights of the biological father: the man married to a woman was the most likely man to be the father of her child, especially if he had access to his wife, was not impotent or sterile, and was apparently the same race as the child.²¹⁸

For Justice Scalia and the plurality, the concept of a parent is arbitrary and unconnected with the natural world. The state is free to determine who is a parent. In this case, the father is the man who is married to the mother, not the natural father. There is no threshold procedural due process right for the natural father to assert. Nor does the natural father have a substantive due process right. The term “parent” is defined by the state and substantive due process protection will only be afforded to those who have traditionally been defined as a parent. The circularity of this scheme renders substantive due process meaningless. Under it, legislation does not have to meet constitutional standards. Instead, the legislation creates the constitutional standard. Justice Scalia happily ignores the possibility that rights may exist outside legislation, and does not discuss the possibility that such rights may be vested, at least to a small degree, in the natural parent or, at least, in the natural parent who has accepted parental responsibility and established a relationship with his child.

2. The Concurring Opinion of Justices O’Connor

Justice O’Connor’s concurring opinion, joined by Justice Kennedy, is quite brief. While, in its single paragraph, she makes an important statement regarding the substantive due process

analysis, she fails to say anything about the constitutional definition of “parent” or of “family.”

She states that she concurs in “all but footnote 6 of Justice Scalia's opinion.”

Footnote 6 of the plurality opinion outlines Justice Scalia’s “most specific level”

Justice O’Connor criticizes this rule because it neither comports with the past, nor
does it prepare for the future. As to the past, she states that this approach “may be somewhat inconsistent with our past decisions in this area” and that “[o]n occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be "the most specific level" available.” As to the future, she states, “I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.”

Justice O’Connor does a great service in her concurring opinion in she, along with Justice Kennedy, insures that tradition does not become the only test for substantive due process rights.

It is unfortunate, however, that Justice O’Connor does not elaborate on this theme of the “unanticipated,” because it is at the heart of the debate which should have taken place in *Michael H.* Specifically, how should we deal with a possible right which appears fundamental in light of

219 Id. at 132.

220 Id.

221 Id. at 127.

222 *Michael H.*, 491 U.S. at 132 (citing Griswold v. Connecticut, 381 U.S. 479, (1965) (holding that Connecticut’s statutory prohibition of the sale of contraceptives violated a fundamental right of privacy); Eisenstadt v. Baird, 405 U.S. 438, (1972) (holding the a Massachusetts ban on the sale of contraceptives to single people violated the Equal Protection Clause)).


novel scientific or technical information, but which has never been protected by our legal system because historically, the scientific or technical knowledge was unavailable? It is possible to infer from the page which she cites in Poe v. Ullman that she conceives of a more flexible approach to determine what rights are protected under the rubric of substantive due process; specifically, an approach based upon the “balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.” It is a “living tradition,” rather than a formulaic one, which serves as the tether which keeps judges from roaming too far. It is possible to speculate that the term “unanticipated” includes unanticipated scientific or technological discoveries that might impinge on fundamental rights, but in reality Justice O’Connor does not elaborate.

3. The Concurring Opinion of Justice Stevens

Justice Stevens does not ignore the substantive issue of the fundamental rights, and it is apparent that, although he concurs with the result in Michael H., he takes significant issue with the way Justice Scalia regards the rights of the natural parent. Unfortunately, from my point of

225 Poe v. Ullman, 367 U.S. 497, 542 (1961). Specifically, “[d]ue process has not been reduced to any formula; its content cannot be determined by reference to any code.” Id.

226 Id.

227 Id. “If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.” Id.

228 Michael H., 491 U.S. at 133.
view, he does not fully elaborate his position on the substantive rights of parents, but rather chooses to explain why he affirms the result. As to a natural parent’s substantive rights, Justice Stevens says,

I do not agree with Justice SCALIA's analysis. He seems to reject the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married, to and cohabiting with, another man at the time of the child's conception and birth. I think cases like Stanley v. Illinois, . . . and Caban v. Mohammed . . . demonstrate that enduring "family" relationships may develop in unconventional settings. I therefore would not foreclose the possibility that a constitutionally protected relationship between a natural father and his child might exist in a case like this. Indeed, I am willing to assume for the purpose of deciding this case that Michael's relationship with Victoria is strong enough to give him a constitutional right to try to convince a trial judge that Victoria's best interest would be served by granting him visitation rights. 229

Justice Stevens sides with the plurality simply because he believes that the California statutory scheme allowed Michael adequate opportunity to establish that it was in Victoria’s best interest for him to have visitation, and that the trial court which heard the case had validly determined that it was not in the child’s best interest. Nevertheless, the statement by Justice Stevens quoted above is an endorsement of the constitutional scheme created by the line of cases created by Stanley 230 and Caban. 231

If there is anything in common between the two concurring opinions, it is how little effort each Justice was willing to spend on analyzing the issue of parental rights. Justice O’Connor does

229 Id. at 133 (citations omitted).


231 441 U.S. 380 (1979). Justice Stevens does not mention Quilloin and Lehr, presumably because they deny rights rather that extend them.
not discuss them at all, while Justice Stevens offers a paragraph but resists any temptation to enter into a debate on the issue.

4. The Dissenting Opinion of Justices Brennan

The primary difference between Justice Brennan’s dissent and Justice Scalia’s plurality is the status which Justice Brennan is willing to confer on Michael, the natural father. Not only is Justice Brennan willing to confer on Michael the substantive due process rights established in *Stanley*, *Quilloin*, *Caban*, and *Lehr*, but he is also willing to acknowledge procedural rights simply because Michael is a natural father.

Justice Brennan attacks Justice Scalia’s use of tradition as the method of determining what liberties are protected by substantive due process. “The pretense is seductive,” Brennan begins.\(^{232}\) It appears that all one has to do is “search . . . volumes on American history.”\(^{233}\) But this method is also deceptive because tradition is just as malleable and intractable to determine as liberty itself.\(^{234}\) Reasonable people can disagree about the content and importance of tradition as well as about the nature of liberty.\(^{235}\) Moreover, once an important tradition has been found, the decision still must be made as to whether it deserves constitutional protection.\(^{236}\)

At the heart of Justice Brennan’s critique of Justice Scalia’s use of tradition is the view that there may be rights deserving of constitutional protection which have not traditionally been

\(^{232}\) *Michael H.*, 491 U.S. at 137.

\(^{233}\) *Id.*

\(^{234}\) *Id.*

\(^{235}\) *Id.*

\(^{236}\) *Id.* at 138.
protected by the laws of our land.\textsuperscript{237} According to Justice Brennan, the right of a natural parent falls into this category.\textsuperscript{238} The law has not traditionally protected the rights of the genetic parent simply because it could not be determined with certainty who the child’s genetic parent was. Indeed, Justice Brennan notes that the conclusive presumption itself served as a substitute for the determination of biological parenthood.\textsuperscript{239} Once the need for the substitute ceases, the underlying right must be protected.

Not only does Justice Brennan reject this traditional approach as a method of determining substantive due process rights, but he also adopts the approach to substantive due process rights of putative fathers from \textit{Stanley}, \textit{Quilloin}, \textit{Caban}, and \textit{Lehr}. He summarizes this line of cases as follows: “although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so.”\textsuperscript{240} He also quotes one of the most familiar statements of the rule from \textit{Lehr} and \textit{Caban}.\textsuperscript{241} He criticizes the plurality’s substitution of a unitary family as the criterion for constitutional protection and asserts that marriage is the key

\textsuperscript{237} \textit{Id.} at 140. Brennan continues:
Moreover, by describing the decisive question as whether Michael's and Victoria's interest is one that has been “traditionally protected by our society,” rather than one that society traditionally has thought important (with or without protecting it), and by suggesting that our sole function is to “discern the society's views,” the plurality acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States. \textit{Id.} at 140-41 (citations omitted).

\textsuperscript{238} \textit{Id.} at 140.

\textsuperscript{239} \textit{Id.} at 141 n.1.

\textsuperscript{240} \textit{Id.} at 142-43.

\textsuperscript{241} \textit{Id.} at 143. See also supra note 47 and accompanying text.
factor in determining the unitary family as defined by the plurality. It is “undisputed that Michael, Victoria, and Carole did live together as a family; that is, they shared the same household, Victoria called Michael ‘Daddy,’ Michael contributed to Victoria's support, and he is eager to continue his relationship with her.”\textsuperscript{242} This group of parents and child was not a family, however, because the parents were not married. Carole and Gerald were married so they were a family. According to Justice Brennan, Justice Scalia’s reliance on marriage to determine parental rights flies in the face of the \textit{Stanley}, \textit{Quilloin}, \textit{Caban} and \textit{Lehr} line of cases, as well as other cases in which the Court has upheld the rights of those who do not fit the “government’s narrow view of the family.”\textsuperscript{243}

Moreover, according to Justice Brennan, Justice Scalia violates the well-established method of analysis of first determining whether there is a right vested in the party seeking redress and then balancing that right against the state’s interest. In this case, Justice Scalia looks at the relationship which the state has attempted to protect, “the married family,” and determined that the unwed father has no rights because he is not a member of that family.\textsuperscript{244}

\textsuperscript{242} \textit{Id.} at 143-44.


\textsuperscript{244} \textit{Michael H.}, 491 U.S. at 145. Brennan adds: The plurality's focus on the "unitary family" is misdirected for another reason. It conflates the question whether a liberty interest exists with the question what procedures may be used to terminate or curtail it. It is no coincidence that we never before have looked at the relationship that the unwed father seeks to disrupt, rather than the one he seeks to preserve, in determining whether he has a liberty interest in his relationship with his child. To do otherwise is to allow the State's
Even more important than his critique of Justice Scalia’s substantive due process analysis is Justice Brennan’s assertion of the natural father’s procedural due process rights. Justice Brennan would allow Michael a hearing to prove that he is Victoria’s father and, if he does prove his paternity, to attempt to establish under California statutes, which apply the best interest standard to parent-child relationships, that he should be awarded visitation and other parental rights. He concludes that the state’s interest in denying such a hearing is “minute in comparison with a father’s interest in his relationship with his child.”

The significance of this position is that Justice Brennan believes that there is constitutional protection for the mere genetic relationship. In other words, if Michael gets a hearing what will he need to prove in order to prevail? It is clear from Justice Brennan’s language that he believes that Michael should have the opportunity to prove that he is Victoria’s father; and by “father” it is also clear that he means the genetic father. Of course, it must be admitted that, because of Justice Brennan’s extensive discussion of the standard of Stanley, Quilloin, Caban, and Lehr, it is possible that, when he refers to the opportunity to prove paternity, he may indeed be referring to the opportunity to prove the genetic link and participation. Nevertheless, the explicit language of the portion of the dissent in which Justice Brennan deals with procedural due process leads to the conclusion that he is referring to the genetic link between parent and child:

interest in terminating the relationship to play a role in defining the "liberty" that is protected by the Constitution.

Id.

See Id. at 118.

Id. at 148.

See Id. at 142-45.
We must first understand the nature of the [conclusive presumption]: it is a law that stubbornly insists that Gerald is Victoria's father, in the face of evidence showing a 98 percent probability that her father is Michael. What Michael wants is a chance to show that he is Victoria's father.248

In the next to last sentence of the dissent Justice Brennan states, “today's decision lets stand California's pronouncement that Michael—whom blood tests show to a 98 percent probability to be Victoria's father—is not Victoria's father.”249 For Justice Brennan the genetic father is the constitutionally protected father. If Michael can prove he is the genetic father of Victoria, he gets the rights of a parent—which in California meant the right to a hearing and possible visitation if the hearing shows that visitation is in the best interests of Victoria. Justice Brennan may actually go one step farther in the direction of protecting parental rights than the Justices of Stanley, Quilloin, Caban, and Lehr.

5. The Dissenting opinion of Justice White

Justice White agrees with Justice Brennan and, indeed, he is adamant.250 He expresses his conviction that the natural father does have rights and would decide the case based on Stanley, Quilloin, Caban, and Lehr.251 At the outset of his opinion he states directly that “the fact that Michael H. is the biological father of Victoria is to me highly relevant to whether he has rights, as a father or otherwise, with respect to the child. Because I believe that Michael H. has a liberty interest that cannot be denied without due process of the law, I must dissent.”252

248 *Id.* at 148.

249 *Id.* at 157.

250 *See Id.* at 157-58.

251 *Id.* at 159-60.

252 *Id.* at 157.
Justice White recognizes and enunciates the Court’s approach to determining liberty interests of unwed fathers: “an unwed father who has demonstrated a sufficient commitment to his paternity by way of personal, financial, or custodial responsibilities has a protected liberty interest in a relationship with his child.” He applies this criteria to the case at hand and concludes that “Michael more than meets the mark in establishing the constitutionally protected liberty interest [and] therefore has a liberty interest entitled to protection under the Due Process Clause of the Fourteenth Amendment.” Specifically, notes Justice White, Michael had asserted his interest from the child’s birth, supported the child, lived with the child for a period of time, and established a relationship with the child. This begs the question of what more Michael could have done to establish his interest.

Justice White believes that the California statue violates this liberty interest with a countervailing justification. Specifically, the facts of this case bare no relationship to the state’s interest in protecting a child from the stigma of illegitimacy, nor does the law in the present form, where the husband can disavow his paternity, protect the unity of the marriage. It is obvious that Justice White sees the principle of Stanley, Quilloin, Caban, and Lehr as a viable, pragmatic, and well-established criteria to be applied to unwed father cases in general and to this case in

---

253 Id. at 157-58.
254 Id. 160.
255 Id. at 159-60.
256 Id. at 160-61.
257 Id. at 161-62.
particular;\textsuperscript{258} so his dismay is evident when he observes, “[y]et the plurality today recants.”\textsuperscript{259}

F. Conclusion — Where Do the Rights of the Natural Father Stand after Michael H.?

So how do the Justices line up in the complex case of Michael H.? Chief Justice Rehnquist was the only one to fully join in Justice Scalia’s plurality decision.\textsuperscript{260} While Justices O’Connor and Kennedy concurred with the plurality in part, they also wrote separately to express their disagreement with the portion of Justice Scalia’s opinion that deals with the level of analysis when applying tradition as the standard to determine substantive due process rights. Presumably, Justices O’Connor and Kennedy agree with Justice Scalia’s analysis regarding the rights of an unwed father, but neither of them provided discussion or analysis of this view.\textsuperscript{261}

While Justice Stevens also concurred in the judgment, he did not agree with Justice Scalia’s analysis regarding parental rights. Like Justice Brennan, Justice Stevens would afford constitutional protection to the natural father who had accepted parental responsibility and established a relationship with his child.\textsuperscript{262} Justices Marshall and Blackmun joined in Justice Brennan’s dissent. Justice White also dissented concluding that biological relationship was relevant and that the standard of Stanley, Quillioin, Caban, and Lehr should apply.\textsuperscript{263} The end

\textsuperscript{258}Id., at 163. “Michael eagerly grasped the opportunity to have a relationship with his daughter (he lived with her; he declared her to be his child; he provided financial support for her) and still, with today’s opinion, his opportunity has vanished. He has been rendered a stranger to his child.” Id.

\textsuperscript{259}Id.

\textsuperscript{260}Id. at 112.

\textsuperscript{261}Id. at 132.

\textsuperscript{262}Id. at 133 (citing Stanley, 405 U.S. at 645; Caban, 441 U.S. at 380).

\textsuperscript{263}Id. at 157-58 (citations omitted).
result is that, while five Justices concurred in the judgment, only four agreed with Justice Scalia regarding the rights of unwed fathers. Five Justices would have followed the approach in Stanley, Quilloin, Caban, and Lehr and recognized constitutional protection for the unwed natural father who had accepted parental responsibility and had established a paternal relationship with his child. While the result in Michael H. may appear to be a rejection of Stanley, Quilloin, Caban, and Lehr, the majority of the court actually endorsed this approach. In this sense, Michael H. is the culmination of the four earlier cases. These four cases, along with the views of Justices Blackmun, Brennan, Marshall, Stevens, and White in Michael H., stand for the proposition that unwed fathers who have participated in the life of their child have a liberty interest in maintaining that relationship.

IV. REVITALIZATION OF THE GENETIC PARENT STANDARD

As far as the United States Constitution is concerned, the issue of who is a parent is appears to be in chaos. A logical conclusion following the plurality in Michael H. is that each state is free to define parentage however they chose with the result that they are free to extend or deny constitutional rights all most at will. The one fully articulated definition of parent, the one from the Stanley line of cases was ignored in by the plurality in Michael H. Since that time there has been no attempt by the United States Supreme Court to articulate a constitutional definition of parent. It is the position of this paper that when the first opportunity presents itself

the Supreme Court needs to address this issue. In doing so it does not have to arrive at a unitary definition of parenthood. The definition of parent has always been pluralistic in that there has always been a different definition for mother and for father. There already exists a mechanism for sorting out the parental rights of two people who meet the definition of parents and that is if I may put it loosely the best interest of the child standard. More specifically it is the process which is well-developed in every state of sorting out parental rights following divorce. It is also the position of this paper that the position of the genetic parent should be restored to its pre-Michael H. role. The test which stemmed from the collective wisdom of of Stanley, Quilloin, Caban, and Lehr should be reaffirmed and indeed expanded. The genetic parent who has established a relationship with his or her child should be considered a parent for constitutional purposes. In addition there are situations in which the genetic parent should be treated as a parent even though this parent has not had the opportunity to develop a relationship with the child: first, where the parent has been prevented through no fault of her own from establishing a relationship, and second, where new technology is involved and the state has moved to sever the parent child relationship before a relationship has had a chance to be established.

A. The Court must Define Parent

If the state or the federal government, for that matter, has the absolute power to determine the definition of parent for constitutional purposes, then it has the absolute power to determine

\[268\textsuperscript{ }405\text{ U.S. 645 (1972).}\]

\[269\textsuperscript{ }434\text{ U.S. 246 (1978).}\]

\[270\textsuperscript{ }441\text{ U.S. 380 (1979).}\]

\[271\textsuperscript{ }463\text{ U.S. 248 (1983).}\]
who can assert constitutional rights of parents and receive the benefits of the constitutional protections afforded parents. This is what happened in *Michael H*. The state definition of “family” excluded Michael, therefore he was denied the constitutional right to have a relationship with his child. The same was true for Victoria, the child in the *Michael H.* case; while a child may have a right to have a relationship with her father, since Michael did not satisfy the definition of “father,” she was denied her right to have a relationship with him. The plurality even says she was not discriminated against because of illegitimacy. She was not illegitimate according to state’s definition of parent; since Michael was not her father, she could be not be his daughter, legitimately or illegitimately. 272

Prior to *Michael H.* there was at least a workable and accepted constitutional definition of parent in the context of unwed fathers. While it is true that except for this standard there was no other constitutional criteria for determining parenthood, none was needed. Issues regarding the unwed father were, simply speaking, the only game in town. There was conflict between genetic fathers and fathers whose claim was based upon marriage to the mother or a fully developed relationship with the child. Issues of motherhood had not arisen. The mother was always and simply the woman who gave birth, unless adoption had taken place. The situation is not the same today. The application of constitutional rights of parents must take into consideration the vast technological and social changes that have occurred in recent years. Children can be conceived in the time honored way of sexual intercourse, through the relatively old technology of artificial insemination, the relatively new technology of in vitro fertilization, and probably even through the cutting edge technology of cloning. Married people conceive and adopt children, but so do

unmarried people. Heterosexual people conceive and adopt children and so do gay and lesbian people. Mothers and fathers raise children together and, almost as commonly, if not more commonly, separately. Social services struggle to raise children, where parents can’t or don’t. Facing this brave new world, it is easy to understand why the Court in Michael H. fragmented so thoroughly and why Justice Scalia suffered such a profound disconnection from reality. When he says with dismay at the outset of his discussion, “The facts of this case are, we must hope, extraordinary,” 273 he appears to be expressing moral outrage. But, more importantly, he reveals his own lack of understanding or, at least, his lack of acceptance of reality. The facts of Michael H. are not extraordinary, 274 and new technology has made situation which are truly extraordinary, at least in terms of the vast history of human kind—in vitro fertilization for example—everyday occurrences. The rule of Stanley, 275 Quilloin, 276 Caban, 277 and Lehr 278 was at least a start. Then we could say with certainty, that a genetic parent who had fully developed a relationship with his child was a parent within the meaning of the constitution; this definition created at least a starting place for a more universal definition of “parent,” although not necessarily an exclusive definition.

B. Multiple Definitions

273 Id. at 113.

274 Indeed the story of the wife who gets pregnant by a man other than her husband and who leaves her husband to live with that man and her child might even be considered archtypical. See LEO TOLSTOY, ANNA KARENINA (Richard Pevear and Larissa Volokhonsky trans., Allen Lane/Penguin, London 2000)(1873).

275 405 U.S. 645 (1972).


The view that the Court must ultimately decide the definition of a parent for constitutional purposes does not demand a unitary view of parenthood; in other words, the Court does not have to fix on a single definition. Nor, does the fact that the Court may use a pluralistic approach to parenthood diminish the importance of the genetic parental relationship or the genetic test for parenthood. In light of the very nature of parentage, there has always been at least two people who potentially qualify for constitutional protection, the mother and the father, and the interests of these two constitutionally protected individuals in our society often come in conflict. The legal test for parentage has always been different for mothers and for fathers. Traditionally, the mother was the one who gave birth and the father was the one who was married to her. In modern times, the same system applies with the possibility that the father may be established by genetic testing. If the father passes the participation test of Stanley, Quilloin, Caban, and Lehr, he is afforded the same rights as the mother. In other words the same constitutional rights are provided to two different people who have pursued different routes to constitutional status.

While it is not the purpose of this article to provide a complete analysis of the constitutional rights of parents who are in conflict, the analysis is not difficult once we conclude that both parties are parents for the purposes of constitutional analysis. Indeed this conflict is played out on a daily basis. It is very common for divorcing couples to be the parent of a child in every sense of the word: they are genetic parents, the mother is the birth mother, the father is

---

279 405 U.S. 645 (1972).
married to the mother, and both parents have significantly participated in the life of the child and have established a close personal relationship with the child which has included physical, emotional and financial care. The power of the state to grant divorce and order custody are accepted as is the fact that no one’s constitutional rights are being infringed if basic procedural due process rights are observed. The fundamental substantive due process rights of each parent to participate in the child’s life and to exercise, as the court in Troxel puts it, “the fundamental right of parents to make decisions concerning the care, custody, and control of their children” are balanced using the best interests of the child standard. In other words, when there are competing parents both of which have constitutional status, there is a well recognized and established mechanism to resolve the conflict. Moreover, this mechanism is quite flexible in that the court may limit or expand the rights of parents in a wide variety of ways; the court using the best interest standard may even sever, at least for a time, these rights. For example, one parent can be denied custody and visitation and thereby be prevented from exercising the parent’s constitutional right of care, control, and custody. In these situations the constitutional analysis, I think, looks something like this. The parents have fundamental rights, but there is a compelling state interest for the state to act in the best interest of the child and to make decisions which may infringe upon parental rights in certain circumstances. Perhaps the best interest standard is not very narrowly tailored but we accept it as the best we can do. The important point is that the mechanism exists to deal with conflicts between constitutional parents, and, since our system

\[283\text{What the Court in Lehr and Caban call the “interest in personal contact with his child acquires substantial protection under the due process clause” which when protected becomes a right. Lehr. at 261 (citing Caban, 441 U.S. at 392).}\]

\[284\text{Troxel v. Granville, 530 U.S. 57, 66 (2000).}\]
allows for competing parties who have parental rights, a pluralistic approach to the definition of parent can be used to determine who receives this form of constitutional protection.

There are situations where constitutional protection may be extended to functioning parents. The classic example of this would be where babies have been switched in the hospital and have been raised by non-biological functioning parents for a number of years. The functioning parent could have constitutional rights. The same is true where embryos have been switched and implanted in the wrong surrogates. Step-parents and other partners of the mother who have served as functional parents could be afforded parental rights as well as a non-genetic birth mother if she had not waived them. The point is that in a society with a pluralistic view of parenthood, the definition of parent for constitutional purposes can be pluralistic as well. While difficulties remain regarding the determination of who is a parent for non-genetic claimants, the purpose of this article is to insure that the purely genetic parent is not excluded from consideration as the constitutional parent.

---

285 This statement runs counter to the Court’s decision in Smith v. Organization of Foster Families, 431 U.S. 816 (1977) in which the court refused to extend the full panoply of rights to foster parents. However, Smith can be read as saying that in effect foster parents are a creation of the state and therefore subject already to greater control and limitations that other parents even though foster parents are functioning parents.

286 Even in situations in which she had waived these rights, I could imagine scenarios in which she should be allowed the opportunity to make a case that it is in the best interest of the child that she should care for the child. For example, where there the intended parents refuse to accept the child, the birth mother surrogate to my mind has genuine standing to compete under the best interest standard. The genetic parents would as well.

287 This discussion of the pluralistic nature of the constitutional definition of parent also highlights the difference between parental rights and custody rights. Custody and the accepted test for custody—the best interests of the child—are not a means to determine who is the parent of the child, rather a mechanism by which important decisions regarding the care and protection of a child can be made when two competing parents seek to rear a child. There are of course other
C. **The Return to Stanley, Quilloin, Caban and Lehr**

1. **The Failure of *Michael H.* to Overrule the Principle of *Stanley*, *Quilloin*, *Caban*, and *Lehr***

While the general principle of *Stanley*,288 *Quilloin*,289 *Caban*,290 and *Lehr*291 appears to have been eclipsed by *Michael H.*,292 it cannot be said with any certainty that *Michael H.* rejected this principle or overruled these cases. Indeed, a close reading of *Michael H.* indicates that the majority of justices actually supported the rights of the genetic participatory parent. Although Justice Scalia’s plurality opinion, which is definitely hostile to the genetic father, has gained the most notoriety,293 the effect and meaning of this opinion are ambiguous to say the least. As a tests for custody, but the statements made above regarding custody apply to them as well: they do not create a determination of parentage. In a sense, the analysis of who should raise a child consists of two steps. First, who fits the constitutional definition of a parent and may assert the constitutional right to have a relationship with the child; and, second, how, if the parents cannot agree, should the responsibility of rearing the child be delegated. This two step analysis is of great practical importance: this approach or some version of it decides the fates of parents and children many times over each day. However, on a conceptional level it is also important to remember that the individual steps should not be confused. The best interest test should not be used to determine who is a parent in the first place. A third step in the process can be added. When a parent, one who conforms to the constitutional definition, is found to be unfit, the rights of that person can be terminated once procedural due process has been observed. The point is, of course, that granting that there may be a multiplicity of persons who can claim constitutional rights as the parent of a particular child, there is, of course, a mechanism which will sort competing claims to the right to raise the child by determining what is best for the child.

288 405 U.S. 645 (1972).


293 *Id.* at 124. See supra text accompanying note 191.
plurality opinion, it has no weight at all other than to decide the case. Even assuming that this
decision represented the majority, it is easy to determine the result this opinion supports, but it is
very difficult to find a useful rule to apply in other cases. The case states that Michael has no
substantive due process right to assert his paternal relationship with Victoria. But what useful
rule of general application is stated? If the rule is that the state can determine who is a parent for
constitutional purposes, then the case undermines all protections for parents afforded by the
Constitution. If the plurality opinion stands for the principle stated by Justice Scalia that “our
traditions [and, therefore, the Constitution] have protected the marital family (Gerald, Carole, and
the child they acknowledge to be theirs) against the sort of claim Michael asserts,” then the rule
of the rule of Michael H. is absurdly narrow. If the rule is broader—that the constitution protects
the family rather than the parent-child relationship—then the rule is vague and ambiguous to the
point of being useless for the case does not state any standard to establish who qualifies for the
status of family. While Justice Scalia intimates his definition of family may be broader than just
mother and father, who are married to each other, and child, no guidance is provided other that to
tell us that this definition does not include Michael and Victoria.

Of course, the majority of Justices in Michael H. do not support the plurality decision, and
more importantly the majority does not even reject the principle of Stanley, Quilloin.

---

294 Id. at 127.


With Justice White's definite agreement with Justices Brennan, Marshall, and Blackmun, all of whom stand firmly against the rejection of the rights of the genetic participatory parent, and with Justice Stevens also appearing to agree with them although less definitely, the majority of Justices in Michael H. actually support the view of Stanley.

---

299 This I do not accept, for the fact that Michael is the biological father of Victoria is to me highly relevant to whether he has rights, as a father or otherwise, with respect to the child. Because I believe that Michael has a liberty interest that cannot be denied without due process of the law, I must dissent... Like Justices Brennan, Marshall, Blackmun, and Stevens, I do not agree with the plurality opinion's conclusion that a natural father can never have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child's conception and birth.’ Ante, at 132 (Stevens, J., concurring in judgment). Prior cases here have recognized the liberty interest of a father in his relationship with his child. In none of these cases did we indicate that the father's rights were dependent on the marital status of the mother or biological father. The basic principle enunciated in the Court's unwed father cases is that an unwed father who has demonstrated a sufficient commitment to his paternity by way of personal, financial, or custodial responsibilities has a protected liberty interest in a relationship with his child.” Michael H. v. Gerald D., 491 U.S. 110, 157-58 (1989).

300 See text and quotation at n.210 [“On the second issue I do not agree with Justice SCALIA’s analysis. He seems to reject the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married, to and cohabiting with, another man at the time of the child's conception and birth. I think cases like Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), and Caban v. Mohammed, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979), demonstrate that enduring "family" relationships may develop in unconventional settings. I therefore would not foreclose the possibility that a constitutionally protected relationship between a natural father and his child might exist in a case like this. Indeed, I am willing to assume for the purpose of deciding this case that Michael's relationship with Victoria is strong enough to give him a constitutional right to try to convince a trial judge that Victoria's best interest would be served by granting him visitation rights. I am satisfied, however, that the California statute, as applied in this case, gave him that opportunity.” Michael H. v. Gerald D., 491 U.S. 110, 157-58 (1989).]

301 Stanley, 405 U.S. 645.
\textit{Quilloin},\textsuperscript{302} \textit{Caban},\textsuperscript{303} and \textit{Lehr}.\textsuperscript{304} The principle of these cases, so widely accepted before \textit{Michael H.}, is still good law. Not only does this rule create substantive due process rights for the participatory father, it also creates procedural due process rights for genetic fathers entitling them to a hearing as to whether or not they have participated in the lives of their children.

2. The Rights of the Genetic Participatory Parents Under Contemporary Substantive Due Process Analysis

If the substantive due process analysis of the rights of participatory genetic parents were to be revisited today, the substantive due process argument in their favor would be more compelling than it was in earlier times. While it is probably true that this line of cases from \textit{Stanley} through \textit{Michael H.} actually contributed to the revitalization of substantive due process following its almost complete demise after \textit{Lochner}, the substantive due process analysis in these cases is incomplete and unsystematic. Compared to most Supreme Court written opinions, these cases are relatively short.\textsuperscript{305} While the opinions, when viewed chronologically (at least until \textit{Michael H.}), do build upon each other, there is no consistent theoretical basis for the Courts’ decisions. In 1972, \textit{Stanley} was decided on equal protection grounds; due process was mentioned but not developed and the court seems to be contemplating procedural due process grounds. Nevertheless, the equal protection argument is based upon the existence of a fundamental right
rather than a suspect classification. 306 The Court in Quilloin three years later invokes both the Equal Protection Clause and the Due Process Clause. Although the Court does not use the term substantive due process, it does speak in terms of the substantive rights of the unwed father concluding that “substantive rights were not violated by application of a ‘best interests of the child’ standard.” 307 This conclusion reaffirms that it was substantive rights that were at issue. 308 Although Caban, in 1979, applies a well-recognized equal protection approach to gender-based discrimination using the test established, by this time, in Craig v. Boren 309 and Reed v. Reed, 310 the Court did mention the term “substantive due process” and acknowledged the father’s argument under this theory; but, in the end, the Court concluded that it was not necessary to reach this issue because it had already decided that the father’s equal protection rights had been violated. 311 Finally, in 1983, by peremptorily concluding that the non-participatory father’s rights were sufficiently protected by the New York registry statute, the Court in Lehr had no need to delve into a substantive due process analysis. Nevertheless it reaffirmed the basic fundamental right of the participatory parent: there is “substantial protection under the due process clause” for the unwed father (genetic parent) who “demonstrates a full commitment to the responsibilities of  

---

306 See supra Part III.A.

307 Quillion, 434 U.S. at 254.

308 See supra Part III.B.

309 429 U.S. 190 (1976). The court in Caban stated, “Gender-based distinctions ‘must serve important governmental objectives and must be substantially related to achievement of those objectives’ in order to withstand judicial scrutiny under the Equal Protection Clause. . . .” Caban, 441 U.S. at 388 (citing Craig v. Boren, 429 U.S. 190, 197 (1976)).


311 Caban, 441 U.S. at 394; see section III C supra.
parenthood by ‘com[ing] forward to participate in the rearing of his child.”  

Although the substantive due process right of the participatory parent was restated, the substantive due process analysis had still not been filled out.

*Michael H.* provided the perfect set piece to fully state the substantive due process analysis. Michael was the biological/genetic father of his daughter Victoria, he had supported her, he had lived with her in his household, and he had even held her out to the world as his child. He and Victoria and Victoria's mother had all lived together as a family.  

This was the perfect case for the up or down vote as to the participatory unwed father based upon based upon a thorough discussion of substantive due process. In the end though the only thing that happened was that the case got decided. The Court fragmented and the substantive due process discussion was side-tracked on the issue of “the most specific level.”

The missing part of the discussion can be simply stated. Are there fundamental rights which deserve substantive protection which have not expressly been protected in our legal tradition? In other words, is there a test for substantive due process rights other than the tradition used by Justice Scalia.

---

312 *Lehr*, 463 U.S. at 261; see section III D *supra*.

313 *Michael H.*, 491 U.S. at 114-115; see section III E *supra*.

314 *Michael H.*, 491 U.S. at 127.

315 An interesting subset of this question is whether or not rights can be based on facts which were previously scientifically unknowable. It is true that our legal approach to the parent-child relationship did not protect the genetic parent. It is also true that until recent times the genetic parent was scientifically unknowable. It was not until the 1980's, when DNA testing became available, that a valid means existed to determine the biological or genetic parent. JOHN BUTLER, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS (2nd ed. 2005), *as cited at* President’s DNA Initiative: History of Forensic DNA Analysis, http://www.dna.gov/basics/analysis/history.
Based upon the most recent statement of the rules governing substantive due process, the answer to both of the questions above is, I believe, yes. In 1997, Justice Rehnquist made a much more complete statement of the substantive due process and fundamental rights analysis than is found in *Michael H.* In *Washington v. Glucksburg*, Justice Rehnquist, speaking for the majority stated,

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation's history and tradition,” . . . (“so rooted in the traditions and conscience of our people as to be ranked as fundamental”), and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed,” . . . Second, we have required in substantive-due-process cases a “careful description” of the asserted fundamental liberty interest. . . . Our Nation's history, legal traditions, and practices thus provide the crucial “guideposts for responsible decision making,” . . . that direct and restrain our exposition of the Due Process Clause. As we stated recently . . . the Fourteenth Amendment “forbids the government to infringe . . . ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”

Justice Rehnquist and the majority in *Washington v. Glucksburg* expand the test for a fundamental right beyond the narrow realm of tradition by including and elaborating on the language originally from *Palko v. Connecticut*: “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” Justice Scalia mentions this

---


318 *Id.* at 721.
test in *Michael H.* at the end of a long footnote, and he seems to equate it with the tradition test.\(^{319}\)

What he does not appear to realize is that this test, especially as stated by Justice Rehnquist opens the door to a different form of analysis, one which partially frees the Court from tradition. In determining whether there is a fundamental right, this aspect of the test allows the Court to be forward looking. Rather than look at the way our society did things in the past, the Court can examine the nature of our society and our system without a proposed right. This test also liberates the Court from the limitations on human knowledge that existed in the past.

Of course, our laws and traditions for most of history did not protect the genetic parent; we simply did not have the scientific know-how to determine the genetic parent. One of the reasons for presuming the paternity of the husband of the birth mother was the simple fact that it was impossible to determine with certainty the genetic father. The five cases which are the subject of this article were all decided at the dawn of the scientific revolution in genetics and biotechnology. Although these technologies have gone far beyond the threshold step of the ability to determine paternity, that step was taken not so long ago.\(^{320}\) *Michael H.* could have been the case to tackle the tough issue of how modern scientific knowledge affects our understanding of fundamental rights; however, the exclusive use of the tradition test preempted this discussion.\(^{321}\) The use of the tradition test exclusively simply puts the Court in the position of being able take into account the implications of contemporary scientific discoveries.

If the “ordered liberty test” had been used the result might have been different. Under this

\(^{319}\) *Michael H.*, 491 U.S. at 126 n.6.

\(^{320}\) *See supra* note 314.

\(^{321}\) Justice Scalia does mention the test by he appears to equate it with the tradition test.
forward looking test, the Court can examine the very structure of our society as it is now and with the present state of human knowledge. Is the broad rule of *Stanley*, [*322*](#322) *Quilloin*, [*323*](#323) *Caban*, [*324*](#324) and *Lehr* [*325*](#325)—that genetic parents who have participated in their child’s life should have a constitutional right to have a relationship with that child—implicit in our concept of ordered liberty? If genetic parents who had nurtured their child, supported their child, established a bond with their child were deprived of the right to continue to rear their child without the assertion of the state’s highest interest, would not a portion of what we call liberty cease to exist? The answer to both of these questions is yes. It is fundamental to our society that parents raise their children, and in the vast majority of families the term “parent” means genetic parents who have established a bond with their child. Even if historically the law said parents were the birth mother and her husband, the truth was that these parents were the genetic parents. The birth mother, until recent times, was always the genetic mother, and her husband was man the most likely to be the genetic father [*326*](#326). If we look forward and envision a society in which the state has decreed that children must be raised in some manner other than by genetic participatory parents (the only real possibility which comes to mind is children raised is some sort of state run institution), that society begins to look dystopic and indeed looks that way simply because it involves an extreme deprivation of liberty. On the individual level, if a child were to be yanked from the home of its genetic parents by the state

---

[*322*](*Stanley*, 405 U.S. 645).

[*323*](*Quilloin*, 434 U.S. 246).

[*324*](*Caban*, 441 U.S. 380).

[*325*](*Lehr*, 463 U.S. 248).

[*326*]Indeed the laws dealing with fornication and adultery and the mores involving chastity and virginity all worked to insure that husbands were also genetic fathers.
arbitrarily or even where there was a rational basis it would certainly be an unjust deprivation. It much easier to envision a future society in which marriage is abolished than one in which genetic participatory parents are denied the right to have a relationship with their children and the right to raise those children. Abolishing marriage would merely require changes in the law of ownership of property. A right to receive support might be afforded to someone other than a spouse. The description of who has an automatic right to inherit might have to change. The tax law would have to be restructured. But the point is that people could go on living pretty much as they do now. Indeed these changes are to some degree taking place now. However, removing children from the care of genetic participatory parents would be a wholesale restructuring of our society as we know it. Indeed, most of us would consider such a society nightmarish. The right to marry is of course a fundamental right, and so should be the rights of the genetic participatory parents to have a relationship with their children.

While it is not the purpose of this paper to assert natural rights, it does seem that if there ever was a right which stems from the natural order of things, it is that genetic-biological parents raise their children. If one takes a more positivist approach, it must be admitted that the role of genetic-biological parents as the primary caretaker of children is self evident even if it is culturally determined. Stated another way, the simple truth is that our society is organized around groups--families--in which the young are genetically related to those who raise them. While this statement is not an absolute, it is at least the rule by which the exceptions are measured. And this right of genetic biological parents to raise their children is fundamental and should be protected by the Due Process Clause. This view, of course, does not mean genetic parents cannot waive their rights. Nor does it mean that the state cannot sever the ties between genetic parents and their
children, but it does mean that the state cannot do so without asserting the highest form of state interest, a compelling interest, such as abuse, unfitness, abandonment, or neglect. 327

V. CONCLUSION: STANLEY V. ILLINOIS, QUILLOIN V. WOOLCOTT, CABAN V. MOHAMED, LEHR V. ROBERTSON REDUX

Stanley, 328 Quilloin, 329 Caban, 330 and Lehr 331 collectively established that an unwed father who has established a relationship with his child by participating psychologically and financially in the child’s life has a constitutional right to maintain that relationship with the child. While the United States Supreme Court has established other Constitutional rights for parents, no other case or group of cases have determined definitively who qualifies as parents for the purposes of determining parental rights under the Constitution. While the plurality decision of Michael H. declined to apply this principle, there is no evidence that the majority of the court overruled the cases establishing this principle. Indeed four of the justices in Michael H. actually approved of the principle and, after a careful reading of the opinion of a fifth Justice, it is clear he also approved of this principle. Moreover, if courts are to consider this principle today, modern substantive due process also dictates that the genetic participatory parent has a liberty interest which rises to the level of a fundamental right to enjoy the full panoply of parental rights. Additionally, because of the effect of modern technology on the process of conception and birth,

327 When genetic parents cannot live together with the child as in divorce, the goal of doing that which is the best interest of the child is also compelling.

328 Stanley, 405 U.S. 645.

329 Quillion, 434 U.S. 246.

330 Caban, 441 U.S. 380.

331 Lehr, 463 U.S. 248.
the principle of *Stanley* through *Lehr* no longer should be limited to unwed fathers; a claim of a mother may now have to be based on her status as a genetic participatory parent. The principle that the genetic participatory parent has a fundamental right to the constitutional rights afforded parents, does not preclude the possibility that there are other constitutional parents and the rights of constitutional parents may have to be balanced; however, balancing the right of constitutional parents is a common situation especially at the time of divorce using the best interest standard. As to the factual scenarios which began this article, the mother and father in the hypothetical and the donor mother in *K.M. v. E.G.*[^332] are all genetic participatory parents whose rights under the United States Constitution are protected under *Stanley*,[^333] *Quilloin*,[^334] *Caban*,[^335] and *Lehr*.[^336]

[^332]: 117 P.3d 673 (Cal. 2005).