FINAL VERSION: The Case For The Genetic Parent: Stanley, Quilloin, Caban, Lehr, and Michael H. Revisited

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

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Does a genetic parent\(^1\) have a right to exercise the fundamental rights afforded parents under the United States Constitution? Two scenarios—one hypothetical and the other real—illustrate the importance of this question. First, consider the following hypothetical, which with the rapid development of reproductive technology may not be as far-fetched as it first seems.\(^2\) In the future, medical scientists have created an artificial womb, something like that envisioned in the novel *Brave...

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1 The term “genetic parent” is used throughout this article to describe one who has contributed semen or an ovum naturally or artificially to the creation of a child rather than “biological parent” or “natural parent,” which refers to a mother who has no genetic connection with her child but who gives birth to the child. A “genetic parent” may or may not have other indicia of parentage. In addition to genetic parents, there are birth parents, presumed parents, intended parents, functioning parents, participatory parents, step-parents, and, of course, adoptive parents. As such, a genetic parent may in some circumstances (and perhaps in most) be a biological or natural parent as well. The unwed fathers discussed in Part III are all genetic participatory parents, and, indeed, the overall subject of this article concerns genetic parents who have participated in their children’s lives. The term “purely genetic parent,” should be used for one who has a genetic relationship with his or her child, but who has neither participated in his or her child’s life nor has any other indicia of parentage. Despite the use of these specific distinctions in this article, quotations from other sources have obviously retained the terms “natural” and “biological” as used by the authors of those sources. Additionally, those terms have been retained for purposes of paraphrasing an outside source that utilized them in a different context from those of the present article.

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New World, 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 has decided to have a child using their own genetic material and the new reproductive technology of the artificial womb. In this hypothetical, most of the technology is


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 marriage, which has been the traditional way that fathers acquire parental rights vis-à-vis their children.

Nonetheless, even married genetic parents might experience the same problems presented in this hypothetical. Further, 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 utilizing 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 are not an issue. Since the woman is single in the hypothetical, issues regarding marriage and family are to a large degree 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. See, e.g., Renee Stutzman, Surrogacy Case Delivers Fight over Custody, ORLANDO SENTINEL, Sept. 16, 2007, at B1. Constitutional rights are usually not an issue in situations involving these techniques because, in most cases, one potential mother (the surrogate) has waived any rights to develop a relationship with the 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. However, 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 and 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 would not raise this issue of the purely genetic parent because married couples, as demonstrated in Justice Scalia’s plurality opinion in Michael H. v. Gerald D., might obtain constitutional protection from their classification as a traditional “unitary family.” 491 U.S. 110, 123 (1989) (noting the parental rights “traditionally accorded to the relationships that develop within the unitary family”). See infra text accompanying notes 247-49 for discussion of Justice Scalia’s plurality opinion in Michael H.
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 would be born. The parents would then take the child home to raise as their own, despite the fact that their unmarried status would preclude their designation as a “family” in the traditional sense of the word.

The second scenario involves the facts in the California case of K.M. v. E.G. and illustrates the problem posed by the question in the first line of this article. 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 ovum, which was fertilized by sperm from an anonymous donor, and implanted in the other woman. The woman successfully gave birth to twins, and both women and the children lived together for five years before 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, a version of the Uniform Parentage Act without reference to the United States Constitution or to the cases that are the subject of this article.

The point is, of course, that the mother and the father in the hypothetical, as well as the donor mother in the facts presented by K.M. v. E.G. are connected to their children only by their genetic bond and by their relationship. While this is not an

5. 117 P.3d 673 (Cal. 2005).
6. Id. at 675-77.
7. Id.
8. K.M., 117 P.3d at 676.
9. Id. at 675.
10. Id. at 679-80 (holding that the California legislature intended to afford parental rights to unmarried women who utilize artificial insemination, since § 7005 of the California Family Code, which adopted a similar section from the Uniform Parentage Act, deleted the word “married” from the parallel section in the uniform act).
12. 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 that woman to relinquish her parental rights.”).
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uncommon situation for fathers, mothers may also find themselves in this situation due to new reproductive technology. The question posed is whether 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 traditional 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. Would this rule apply to the unmarried woman in the hypothetical and the donor mother of K.M. v. E.G.?

While the United States Supreme Court has established that the Constitution protects many parental rights, the Court has essentially left unresolved the issue of who qualifies as a parent. 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 states, then the state legislatures, by defining the word parent, would be able to dictate who has a constitutional right. The nearest attempts by the Court to resolve this issue have been in those cases that treat the rights of unwed fathers: the line of cases including Stanley v. Illinois, Quilfoil v. Walcott, Caban v. Mohammed, and Lehr v. Robertson (“the Stanley-Lehr line of cases”), as well as the case of Michael H. v. Gerald D. The Stanley-Lehr line of cases is very important because it establishes that genetic parents (in this case unwed fathers) who have participated in their child’s upbringing do have a substantive fundamental right to a relationship with their child and a concomitant procedural right to establish their genetic and personal relationship with the child.

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13. The author uses the term “traditional” as shorthand—perhaps as a euphemism—for a child born via procreation.
15. 405 U.S. 645 (1972).
20. See, e.g., Stanley, 405 U.S. at 647-49 (holding that Illinois statute requiring that children of unwed father become wards of the state violated natural father’s due process rights by infringing his fundamental parental rights after the death of his wife rendered him an unwed father).
However, these cases have, to some degree, been disregarded in recent times in the wake of the *Michael H.* decision,\(^1\) which appears to severely limit the rights of unwed fathers specifically, and all genetic parents by extension. For example, the case of *K.M. v. E.G.* does not mention any of the five cases that are the subject of this article.\(^2\) Unfortunately, the effect of *Michael H.* has been much too broad despite the fact that the result in that case is so narrow that it should not be applied beyond the constricted facts of that case. The case produced no clear majority opinion that can be used to resolve the issue of who is a parent; indeed a careful reading of all the opinions in *Michael H.* suggests that the majority of justices in that case actually favored the principle that genetic participatory parents should have constitutional rights as parents.\(^3\)

It is the thesis of this article that the combined effect of the *Stanley-Lehr* line of cases should still be considered good law; and 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 a society facing new reproductive technology—to mean genetic parents who have, to some degree, participated in the lives of their children. Although the four cases mentioned above all deal with fathers, the definition of “parent” provided by these cases should include mothers as well. 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.

Part II of this article summarizes the basic parental rights that the Supreme Court has afforded under the Constitution. Part III examines in depth the *Stanley-Lehr* line of cases involving unwed fathers, and notes the rationales that apply not only to fathers but to all genetic parents, such as surrogate mothers and ova donors. Finally, Part IV discusses the reasons why the principles derived from the *Stanley-Lehr* line of cases should still be considered viable, and why the United States Supreme Court, if confronted with the issue of parental rights again, should

\(^{1}\) 491 U.S. 110 at 131-32.
\(^{2}\) 117 P.3d 673 (Cal. 2005).
\(^{3}\) *Michael H.*, 410 U.S. at 136-37 (Brennan, J., dissenting) (noting that five Justices would afford constitutional parental rights to the genetic father Michael H.). See discussion *infra* at Part III.F.
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II. THE RIGHTS OF PARENTS

Throughout the last century, the United States Supreme Court has repeatedly protected fundamental rights related to parenting and family. The Court decided the earliest of these cases, *Meyer v. Nebraska*,\(^24\) in 1923 and the most recent, *Troxel v. Granville*,\(^25\) in 2000. In these cases, and those decided by the Court in the intervening seventy-seven years,\(^26\) the Court’s

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26. See, e.g., M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (invalidating Mississippi statutes requiring indigent mother to pay fees for appeal of termination of her parental rights on the grounds that the statutes violated her equal protection and due process rights, and noting that “[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked “as of basic importance in our society”); *Michael H.*, 491 U.S. at 110 (denying parental rights to unmarried genetic father, who had a child with a woman married to another man, based on a California statutory provision providing presumption that a child born of the marriage is the husband’s child); *Lehr v. Robertson*, 463 U.S. 248, 267 (1983) (denying genetic father parental rights, despite equal protection and due process claims, based on his failure to establish relationship with his child); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (reversing New York court’s termination of parental rights on grounds that “preponderance” standard for showing of neglect, in lieu of the higher “clear and convincing” standard, violated genetic parents due process rights in the “fundamental liberty interest . . . in the care, custody, and management of their child”); *Little v. Streater*, 452 U.S. 1, 14-16 (1981) (overturning on due process grounds a Connecticut statute requiring the party requesting blood tests in a paternity and support action to pay costs of test when applied to deny such tests to an indigent defendant); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981) (holding that failure to appoint counsel to indigent mother in termination of parental rights proceeding did not violate due process); *Parham v. J. R.*, 442 U.S. 584, 602-03 (1979) (invalidating on due process grounds a Georgia statute allowing voluntary parental admission of children to mental hospitals, but noting that “[o]ur jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children”); *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (invalidating on equal protection grounds a New York statute that allowed unwed mothers, but not unwed fathers, to block adoption of their children by simply withholding consent); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (denying genetic father’s claim that Georgia’s “best interests of the child” standard for adoption denied his due process and equal protection rights by awarding adoption to the children’s stepfather, based on genetic father’s eleven-year failure to legitimize the children, while recognizing “that the relationship between parent and child is constitutionally protected”); *Smith v. Org. of Foster Families*, 431 U.S. 817, 855-56 (1977) (upholding New York’s procedure for removal of foster children from foster homes despite foster family groups claims of due process violations, based in part on distinctions between the foster family and the constitutionally protected family); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499-500 (1977) (invalidating municipal housing ordinance on due process grounds for its intrusion into the
primary function has been to decide important and difficult issues about parental rights. Nevertheless, these cases constitute a remarkably clear and coherent statement of the basic rights of parenthood.

The vehicle for the protection of these rights has been the Fourteenth Amendment of the United States Constitution, specifically the Due Process and Equal Protection Clauses. The largest and most important group of cases, at least for the present discussion, comes under the rubric of substantive due process. This discussion of the substantive due process cases includes some cases that never mention due process expressly,

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but which nonetheless uphold substantive due process rights.\textsuperscript{30} The Equal Protection Clause has also been used to protect parental rights, although the most important of these cases, *Skinner v. Oklahoma*,\textsuperscript{31} was resolved at a time when substantive due process was still anathema.\textsuperscript{32} Indeed, all of the decisions based on equal protection may have utilized that theory as a conceptual substitute for substantive due process.\textsuperscript{33} Finally, several parental rights cases have been resolved under a procedural due process analysis.\textsuperscript{34} The amazing thing about most of these cases, regardless of the constitutional theory applied, is their delineation of parental rights without the additional and perhaps more crucial determination of who qualifies as a parent. The only cases which have tackled the definition of a parent are the five cases dealing with unwed fathers, which are the subject of Part III of this article.

\section*{A. SUBSTANTIVE DUE PROCESS}

While this article does not intend to chronicle the ebb and flow of constitutional theories of substantive due process, it is worthwhile to define the term and to give some historical background to its evolution. When the Fourteenth Amendment says “nor shall any State deprive any person of life, liberty, or property, without due process of law . . . [,” the amendment refers not only to the manner (process) in which the state may act but also to what the state may or may not do at all (substance) even if the proper procedures are followed.\textsuperscript{35} Lawrence Tribe has

\begin{footnotesize}
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\item 30. See, e.g., *Pierce*, 268 U.S. at 510; *Meyer*, 262 U.S. at 390.
\item 31. 316 U.S. 535 (1942).
\item 32. See, e.g., Jersey Cent. Power & Light Co. v. F.E.R.C., 769 F.2d 1500, 1504 (D.C. Cir. 1985), vacated by 776 F.2d 364 (D.C. Cir. 1985) (noting in the majority opinion that the dissent “[pronounced] anathema” on the majority by accusations of reverting to *Lochner*-type due process analysis in the majority opinion).
\item 33. Moreover, *Skinner* and the other cases in this category all apply that form of equal protection analysis which deals not with suspect classifications but rather with classifications which infringe upon a fundamental right. This form of equal protection seems to be very close to substantive due process. See, e.g., *Skinner*, 316 U.S. at 541 (noting that “marriage and procreation are fundamental to the very existence and survival of the race” in what was ostensibly an equal protection case).
\item 34. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 755-56 (1982) (noting parents' procedural right to have the state prove their unfitness by clear and convincing evidence rather than by a preponderance); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981) (holding that the procedural protection of appointed counsel was not routinely required to assure a fair adjudication in cases concerning parental rights); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).
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presented a good working definition: substantive due process is "the doctrine that certain government deprivations of life, liberty, or property might be condemned as violative of 'due process of law' because of the substantive content of the rule the government is applying, and regardless of the procedures by which the rule is applied to particular persons." 36 Historically, from about the turn of the Twentieth Century to the late 1930's, the theory of substantive due process was used to strike down economic and social legislation because "[f]reedom of the marketplace and freedom to contract were viewed as liberties protected by the due process clause." 37 For example, the famous case of *Lochner v. New York* struck down a law governing the number of hours that bakers could work because the law violated the freedom to contract of both the bakers and their employers. 38 This approach continued until 1937 when the Court, with pressure from the Roosevelt Administration and new justices appointed by Roosevelt, discarded its so-called *laissez faire* substantive due process approach. 39 The theory of substantive due process then fell into a period of disuse until it began to be revived in the area of procreational rights; and it would not be unfair to say that *Griswold v. Connecticut* 40 marked the beginning of the revitalization of substantive due process in 1968, a process that was probably not completed until *Planned Parenthood v. Casey*. 41

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40. 381 U.S. 479 (1965) (Goldberg, J., concurring). See also David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. Rev. 1125, 1126 (2001) (“By 1944, however, after Lochner’s protection of economic liberties had been discarded, the Court recast the [familial rights] cases [decided during the *Lochner* era] as carving out a ‘private realm of family life which the state cannot enter’.”).
41. 505 U.S. 833 (1992) (plurality opinion).
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Meyer v. Nebraska and Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, both decided prior to the demise of Lochnerian substantive due process, stand today as the foundation of parental rights and of the much more limited, but revivified, substantive due process rights that surround procreation, family, and parenting. Later cases have expanded the doctrine, provided theoretical support, and expressly labeled the doctrine as substantive due process. In 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.” The statute was struck down, and 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. However, the actual right as stated by the Court in Meyer is couched in somewhat broader terms:

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 to the orderly pursuit of happiness by free men.

Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary stands for exactly the same proposition as Meyer, but the Court in 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, Pierce

42. 262 U.S. 390 (1923).
43. 268 U.S. 510 (1925).
44. See Carolene Prods., 304 U.S. at 144; W. Coast Hotel Corp., 300 U.S. at 79.
46. Id. at 400.
47. Id. at 399.
upheld the rights of parents to send their children to parochial schools. The free exercise of religion, however, did not play a role in Pierce as it later would in Prince v. Massachusetts\textsuperscript{50} and Wisconsin v. Yoder.\textsuperscript{51} The Court in Pierce stated that “[u]nder the doctrine of Meyer v. Nebraska . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”\textsuperscript{52} Interestingly, in both Meyer and Pierce, the liberty interest of the parent was deemed so strong that it could be asserted by someone other than the parent: in Meyer, it was asserted by the German language teacher\textsuperscript{53} and in Pierce by the schools involved.\textsuperscript{54} Eventually, the Court in Prince v. Massachusetts fully articulated this right:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and

\textsuperscript{49} Id. at 535.  
\textsuperscript{50} 321 U.S. 158 (1944).  
\textsuperscript{51} 406 U.S. 205 (1972).  
\textsuperscript{52} Pierce, 268 U.S. at 534 (citations omitted). The Act of 1922 required public school attendance for children from the ages of eight to sixteen. See Compulsory Education Act of 1922, ch. 1, 1923 Or. Laws 9 (repealed 1951) (requiring public school attendance for children ages eight to sixteen).  
\textsuperscript{53} The issue was originally framed in terms of the right of the teacher who had 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 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 . . . . 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, 262 U.S. at 396-99 (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.” Id. at 401.  
\textsuperscript{54} In Pierce, the right was 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 that lost enrollment because of the requirement of public school attendance. Pierce, 268 U.S. at 531. The only explanation of this application is that the Society and the Academy had both suffered a loss:

> Appellees are corporations, and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees . . . . 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.  
Id. at 535.
freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.\textsuperscript{55}

Later cases, specifically \textit{Stanley v. Illinois}\textsuperscript{56} and \textit{Quillioin v. Walcott},\textsuperscript{57} expanded this fundamental right beyond the right to care for and control the upbringing of the child to include the right of a genetic parent to continue a relationship with his or her child once that relationship has been initiated.\textsuperscript{58} However, the Court in its post-Lochnerian backlash still refused to refer to this as a substantive due process right.\textsuperscript{59} More time had to pass before the Court fully articulated the new non-economic theory of substantive due process in the cases dealing with contraception and abortion. While the majority in \textit{Griswold v. Connecticut} experimented with the penumbra theory,\textsuperscript{60} 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
Later, Justice O'Connor, in Planned Parenthood of Southeastern Pennsylvania v. Casey, fully articulated modern non-economic substantive due process:

Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. 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.

The view that these cases involved truly substantive due process also gained support even more recently from Washington v. Glucksberg, which tackled the difficult issue of “whether the ‘liberty’ specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.” 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 firmly fixed this right in the liberty interest of the Due Process Clause. He stated:

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, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion . . . . We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment.

In particular, Justice Rehnquist emphasized the two criteria for determining which rights are fundamental. The first criterion was the tradition test: “We have regularly observed that the Due

64. Id. at 728.
65. Id. at 720.
66. Glucksberg, 521 U.S. at 720 (internal citations omitted).
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Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition.”67 The second criterion ignored tradition and ranked rights as fundamental when they were “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”68

The most recent statement of the fundamental right of parents appeared in Troxel v. Granville,69 in which the Court struck down a Washington state statute providing that “[a]ny person may petition the court for visitation rights at any time[,]”70 which, in effect, allowed grandparents71 to petition for visitation against the wishes of the parent. After a lengthy summary of the case law, the Court concluded that “[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.”72 Appropriately, the Court traced this right all the way back to Meyer: “More 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.’”73

Accordingly, the vehicle for the constitutional expression of

67. Id. at 721 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977); citing Snyder v. Massachusetts, 291 U.S. 97, 105, (1934)) (internal citations omitted). Snyder contains what the author believes to be the most common statement of fundamental rights as rights “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Snyder, 291 U.S. at 105.
68. Id. (citing Palko v. Connecticut, 302 U.S. 319 (1937)).
70. Id. at 61 (quoting WASH. REV. CODE § 26.10.160(3) (Thomson/West 2007)) (internal quotation marks omitted).
71. 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, which struck down a city ordinance that 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.” Moore, 431 U.S. at 505.
72. Troxel, 530 U.S. at 66.
73. Id. at 65 (citing Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923)) (internal citation omitted).
parental rights is essentially Substantive Due Process under the Fourteenth Amendment. Yet, regardless of the applicable constitutional theory, the Supreme Court has clearly protected fundamental parenting rights throughout the Twentieth Century,\textsuperscript{74} and has done so without resort to the Equal Protection Clause.\textsuperscript{75} 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, who authored the plurality opinion in \textit{Michael H.}, has acknowledged the substantive component of familial rights as protected by the Due Process Clause and stated: “It is an established part of our constitutional jurisprudence that the term ‘liberty’ in the Due Process Clause extends beyond freedom from physical restraint.”\textsuperscript{76}

74. The only concerted refusal to protect parental rights were those cases involving unwed fathers, which are the main subject of this article, Michael H. v. Gerald D., 491 U.S. 110 (1989); Lehr v. Robertson, 463 U.S. 248 (1983); Quilloin v. Walcott, 434 U.S. 246 (1978). \textit{See infra} Parts III.B, D, E (providing detailed discussions of each case).

75. In the arena of procreative rights, the most preeminent early case claims to be an equal protection case. \textit{See} Skinner v. Oklahoma, 316 U.S. 535 (1942). However, that form of equal protection prohibits invidious discrimination not when a suspect classification is involved but when a fundamental right is infringed, and thus the \textit{Skinner} decision effectively utilized a due process analysis. \textit{Id}.

76. \textit{Michael H.}, 491 U.S. at 121 (citing Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925)); \textit{Meyer}, 262 U.S. 390 (providing examples of cases in which both directly enforce this liberty interest without resorting to an equal protection analysis).

Justice Scalia articulates these rights in terms of the family and, in \textit{Michael H.}, was primarily concerned with limiting the extension and application of the familial liberty interest. It must be admitted that these modern non-economic rights do protect the family. As the Court stated in \textit{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,” \textit{Meyer v. Nebraska}, basic civil rights of man,’ \textit{Skinner v. Oklahoma}, and ‘(rights) far more precious . . . than property rights,’ \textit{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.’ \textit{Prince v. Massachusetts}. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, \textit{Meyer v. Nebraska}, the Equal Protection Clause of the Fourteenth Amendment, \textit{Skinner v. Oklahoma}, and the Ninth Amendment, \textit{Griswold v. Connecticut}.

405 U.S. 645, 651 (1972) (internal citations omitted).

But even Justice Scalia acknowledges that these rights are not just family rights, but also parental rights when he states that “[t]he 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.” \textit{Michael H.}, 491 U.S. at 123. Moreover, there is a great deal of additional evidence that these rights attach to individuals. Procreational rights, that is the rights of individuals to have
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B. EQUAL PROTECTION

Even when the Equal Protection Clause has been used to protect parental rights, it has been that form of equal protection that prohibits invidious discrimination not when a suspect classification is involved, but rather when a fundamental right has been infringed.\(^\text{77}\) Roughly two decades after *Meyer* and *Pierce*, the Supreme Court decided *Skinner v. Oklahoma*.\(^\text{78}\) *Skinner* established that an individual has a right to procreate, including the right to be free from sterilization, and that this right is undoubtedly 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.

children as opposed to the rights of people who have had children to have a relationship with their children, most prominently attach to individuals. The existence of a fundamental right to procreate at least leads to an inference of 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 those 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*, 405 U.S. at 645; *Caban v. Mohammed*, 441 U.S. 380 (1979); *Moore*, 431 U.S. at 494 (holding that an ordinance under which it was a crime for a homeowner to live with her son and two grandchildren violated due process); *Smith v. Org. of Foster Families*, 431 U.S. 816 (1977) (recognizing rights of foster families); *Little v. Streater*, 452 U.S. 1 (1981) (holding unconstitutional a statute which required the cost of blood grouping tests in a paternity action to be born by the party who requested them); *Santosky v. Kramer*, 455 U.S. 745 (1982) (holding that before a state may irrevocably sever the rights of parents to their natural child, due process requires the state to support the allegations with clear and convincing evidence); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding a statute which terminated a mother’s parental rights unconstitutional).

Finally, almost all of the cases in this area that involve the child rearing right and what this article characterizes as the right to have a relationship, include language that suggests that these cases establish a parental right, not just a family right.

77. This approach was used in *M.L.B.*, 519 U.S. at 102, which is discussed infra at Part II.C. This article treats that case as a procedural due process case. Most of the cases involving equal protection were decided in the post-*Lochner* period and do not examine substantive procreative rights or the rights of parents. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that indigents have a right to a waiver of fees when filing for divorce); *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); *Reynolds v. Sims*, 377 U.S. 533 (1964) (establishing the famous one person, one vote standard); *Douglas v. California*, 372 U.S. 353 (1963) (holding that indigents have the right to counsel for criminal appeals); *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that indigents have the right to free transcripts for criminal appeals).

78. 316 U.S. 535 (1942).
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.\(^7^9\)

Unlike *Griswold v. Connecticut*, which involved negative procreative rights (the right not to procreate),\(^8^0\) there was no struggle and debate in *Skinner* as to the source of this right.\(^8^1\) The Court in *Skinner* established this right without citing any specific language in the Constitution or any previous case. The fundamental nature of this right to procreate was self evident. The Court’s failure or refusal to cite both *Meyer* and *Pierce* suggests that the Court in *Skinner* was dealing with an entirely separate right from the one established in *Meyer* and *Pierce*.

Nevertheless, the rules of *Meyer*, *Pierce* and *Skinner* have apparently blended together over time, resulting in one fundamental right to procreate and rear children. The three cases are often cited together,\(^8^2\) however, *Meyer* 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 in *Skinner*, characterized the right at issue as the fundamental right to procreate in order to

\(^7^9\) Id. at 541. This language is remarkably similar to that 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 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.


\(^8^0\) *Griswold*, 381 U.S. at 481-84 (outlining the “penumbra” theory of familial fundamental rights).

\(^8^1\) *Skinner*, 316 U.S. at 542-43 (noting clear equal protection basis for invalidating three-time felony sterilization statute for infringement of right to procreation). *Skinner* does not reference the penumbra of other rights, the Ninth Amendment, the term “liberty” in the Due Process Clause of the Fourteenth Amendment, nor Justice Harlan’s “basic values ‘implicit in the concept of ordered liberty.’” *Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), overruled on other grounds by *Benton v. Maryland*, 395 U.S. 784 (1969)).

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elevate the level of review to a strict scrutiny test, rather than a rational basis test.\textsuperscript{83} Thus, the Court found that the Oklahoma law authorizing sterilization violated the Equal Protection Clause by treating different classes of felons differently without showing a compelling government interest.\textsuperscript{84} Such a result reveals, “a clear, pointed, unmistakable discrimination.”\textsuperscript{85} Justice Stone’s concurring opinion dealt with the form of procedural due process that truly protects a substantive right.\textsuperscript{86} In other words, he found the hearing procedure inadequate for its failure to give the prisoner a chance to prove that he was not a member of the class of criminals who will pass on their criminal traits to their offspring.\textsuperscript{87} It seems obvious that both Justice Douglas and Justice Stone were working in the vacuum created by the post-\textit{Lochner} taboo of substantive due process and were using equal protection as a semantic substitute.\textsuperscript{88}

\begin{itemize}
  \item \textsuperscript{83} \textit{Skinner}, 316 U.S. at 541.
  \item \textsuperscript{84} \textit{Id.} at 539. For instance, someone who was “thrice” convicted of stealing a chicken could be sterilized, but someone “thrice” convicted of embezzlement could not. \textit{Id}.
  \item \textsuperscript{85} \textit{Id.} at 541.
  \item \textsuperscript{86} \textit{Id.} at 543-47 (Stone, J., concurring).
  \item \textsuperscript{87} \textit{Id.} at 544 (noting “the limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned 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,” and further pointing out that although a state may:

\begin{quotation}
  after appropriate inquiry, constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies [the Court had] 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
\end{quotation}

\begin{itemize}
  \item \textit{Id.} (internal citations omitted).
 \end{itemize}

88. Continuing in chronological order, the Court continued to treat parental rights in contexts other than substantive due process. The next United States Supreme Court case dealing with parental rights after \textit{Skinner} was \textit{May v. Anderson}, a procedural due process case, which held that in an habeas corpus proceeding brought by the father in the mother’s domiciliary state, the court was not required 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. 345 U.S. 528 (1953). While the case contains very little discussion of theory regarding parental rights, it does state that:

\begin{quotation}
  [W]here a mother is neither domiciled, resident nor present, [a court] may 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.
\end{quotation}

\textit{Id.} at 533.

Also, \textit{Wisconsin v. Yoder} has overtones of parental rights, but perhaps the
The better 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 to mention that cases which are the converse of *Skinner*, such as those holding that individuals have the right not to procreate through the use of birth control, whether married or not and, for women to terminate a pregnancy at least prior to the time the fetus is viable, are all recognized as 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. Second, these procedural rights unequivocally attach to individual parents. These are not family rights, and in fact most of these rights exist after the family unit has 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 established elevated procedural safeguards in termination cases.

The earliest case, *Lassiter v. Dep't of Social Services* is in a sense the one hold out case, in which the Court did not elevate 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.


*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.

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procedural safeguards for parents whose rights had been terminated. Nevertheless, in Lassiter, the Court was not insensitive to the special rights of parents. Although the Court did not extend a blanket right to counsel for indigent parents, it did indicate that procedural fairness required trial courts to make a case-by-case determination of the need for counsel and order counsel for indigent parents when counsel is needed.94

However, the next two cases examining termination of rights, Santosky v. Kramer and M.L.B. v. S.L.J., went beyond Lassiter and firmly established elevated procedural safeguards. Indeed, no case made a stronger statement than Santosky v. Kramer.95 In Santosky, the Court stated that a preponderance of the evidence is not enough to terminate a parent’s rights, and that the Due Process Clause demands “at least clear and convincing evidence” that the statutory criteria for termination of parental rights have been met.96 The rationale of the Court was straightforward and touching; due process protections are not lost simply because a person has been less than a good parent and, by inference, not 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, 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.97

Likewise, in M.L.B. v. S.L.J., the Court held based on a similar rationale 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.”98 Such a

94. Lassiter, 452 U.S. at 31.
95. 455 U.S. 745 (1982).
96. Santosky, 455 U.S. at 768-70.
97. Id. at 753-54 (emphasis added).
98. 519 U.S. at 102.
condition effectively blocks the right of the indigent parent to appeal the “sufficiency of the evidence” and the law as applied in the trial court’s determination that the appellant was an unfit parent. 99

D. ADDITIONAL CASES SUPPORTING THE RIGHTS OF PARENTS

The final group of cases completing the Court’s framework for parental rights comprise those that do not treat parental rights directly, but rather address other fundamental rights and discuss parental rights as dicta. These cases are important because they make strong and eloquent statements regarding parental rights. For instance, Moore v. City of East Cleveland, to some degree extended the rights of parents to other biological caretakers: “Decisions 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.” 100

99. Id. The same procedural protection that was afforded parents in termination of rights cases is not extended to men in paternity cases. In Rivera v. Minnich, the Court decided that the preponderance of the evidence standard was sufficient proof in a termination proceeding, and that the higher clear and convincing standard did not apply. 483 U.S. 574 (1987) (holding the preponderance standard “constitutionally permissive”). 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.

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 Little v. Streeter, decided on the same day as 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. 452 U.S. 1, 12 (1981) (holding that the Connecticut law requiring the moving party to pay for blood tests essentially “foreclose[d] . . . a conclusive means for an indigent defendant to surmount that disparity and exonerate himself”). In Little, the putative father, who was in prison at the time of the paternity action, was judicially determined to be the father even though blood tests had been ordered but never performed because the putative father could not pay for them. Id. at 2. As one might expect, this rationale is based on procedural fairness rather than parental rights. Id. at 9-13 for discussion of historical disparity between the parties, extensive state intervention, and criminal overtones of Connecticut paternity suits.

100. 431 U.S. 494, 505 (1977).
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In Smith v. Organization of Foster Families, the Court declined to extend the rights of parents to foster parents, although the Court did state that foster parents were not without some due process protection. The foster parent-child relationship stems from state action, and, while constitutional interests can be created from positive law, they cannot stand up to the constitutional right of natural parents: “[T]he usual understanding of ‘family’ implies biological relationships, and most decisions treating the relation between parent and child have stressed this element.”

In Parham v. J.R., which dealt with the commitment of a minor to a mental facility, the Court held that parental rights to care for and control their children outweighed the child’s due process right to a hearing prior to involuntary commitment. The Court balanced the liberty interest of the child against the parents’ right to control and make medical decisions for the child and concluded that:

102. 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 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 844-46 (internal citations omitted).

103. 442 U.S. at 601-04 (determining that “our precedents permit the parents to retain a substantial, if not the dominant, role in the decision . . . and that the traditional presumption that the parents act in the best interests of their child should apply”) (emphasis added).
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.\textsuperscript{104}

\section*{III. THE CASES INVOLVING UNWED FATHERS}

Five Supreme Court cases have examined the constitutional rights of unwed fathers: \textit{Stanley v. Illinois},\textsuperscript{105} \textit{Quilloin v. Walcott},\textsuperscript{106} \textit{Caban v. Mohammed},\textsuperscript{107} \textit{Lehr v. Robertson}\textsuperscript{108} and \textit{Michael H. v. Gerald D.}\textsuperscript{109} The first four cases combine to present a coherent statement of the rights of unwed fathers, and as such imply a constitutional definition of a parent. While it is evident in these four cases that the Supreme Court focused on resolving issues of fact rather than developing a systematic theoretical scheme,\textsuperscript{110} each case clearly builds on its predecessor so that, collectively, they present an integrated articulation of the parental rights of unwed fathers. The four cases stand for a proposition of general applicability—that a father who has

\textsuperscript{104} Id. at 602 (citing Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535 (1925)). The \textit{Parham} Court also relied on the following authorities to support its conclusion: Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

\textsuperscript{105} 405 U.S. 645 (1972).

\textsuperscript{106} 434 U.S. 246 (1978).

\textsuperscript{107} 441 U.S. 380 (1979).

\textsuperscript{108} 463 U.S. 248 (1983).

\textsuperscript{109} 491 U.S. 110 (1989).

\textsuperscript{110} \textit{Caban} is the only possible exception to this statement in that it applied a well-recognized equal protection approach to gender-based discrimination using the test established in \textit{Craig v. Boren}, 429 U.S. 190 (1976), and \textit{Reed v. Reed}, 404 U.S. 71 (1971). The Court in \textit{Caban} stated that “[g]ender-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.” \textit{Caban}, 441 U.S. at 388 (citing Craig v. Boren, 429 U.S. 190, 197 (1976)). The rest of the cases mentioned utilized a substantive due process approach. In the plurality opinion of \textit{Michael H.}, Justice Scalia acknowledges that the underlying theory is substantive due process, but he attempts to limit substantive due process when he unveils his “most specific level” approach. \textit{Michael H.}, 491 U.S. at 120-27. \textit{See infra} Part III.E.1 for an in-depth discussion of Justice Scalia’s approach.
participated in his child’s life enjoys a constitutional right to have a relationship with his child regardless of whether or not he is married to the mother.\textsuperscript{111} This proposition is strongly supported by \textit{Caban}, which actually upholds the rights of the unwed participatory father;\textsuperscript{112} and both \textit{Lehr} and \textit{Quilloin}, even though they refused to enforce the rights of the unwed fathers because they had not participated in their child’s lives, still acknowledged substantial rights for an unwed participatory father.\textsuperscript{113} Since the unwed fathers in these cases did not meet any of the other criteria for establishing parenthood, the most dispositive of which has traditionally required marriage to the mother, the strong implication is that by “father” the Court in these cases was referring to the natural or biological father: ultimately, the person this article designates as the “genetic father.”\textsuperscript{114} The rule can be restated as: the genetic father who has participated in his child’s life has a constitutional right to have a relationship with his child.

The question is, of course, to what degree this proposition has been rejected by \textit{Michael H.}, the most recent of the unwed father cases.\textsuperscript{115} If nothing else, \textit{Michael H.} reveals the Court’s own confusion: the case produced no majority opinion, and the

\begin{enumerate}
\item See \textit{Lehr}, 463 U.S. 248, 261 (noting 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”) (internal citations omitted);
\item See \textit{Caban}, 441 U.S. at 392 (noting that “where the father has established a substantial relationship with the child and has admitted his paternity” due process requires that unwed father be treated the same as unwed mothers in terms of child custody);
\item See \textit{Quilloin}, 434 U.S. at 255 (noting that the Court has “recognized on numerous occasions that the relationship between parent and child is constitutionally protected”);
\item See \textit{Lehr}, 463 U.S. at 260-61 (finding that the unwed father’s “interest in personal contact with his child acquires substantial protection under the Due Process Clause” when he participates in the rearing of his child).
\item See \textit{Lehr}, 463 U.S. at 255 (distinguishing \textit{Quilloin} from “a case in which the unwed father had, or sought, actual or legal custody of his child”); \textit{Lehr}, 463 U.S. at 260-61 (finding that the unwed father’s “interest in personal contact with his child acquires substantial protection under the Due Process Clause” when he participates in the rearing of his child).
\item See supra note 1.
\item See \textit{Michael H.}, 491 U.S. at 143 (Brennan, J., dissenting) (suggesting that the plurality in \textit{Michael H.} “wave[d] \textit{Stanley, Quilloin, Caban, and Lehr aside}”).
\end{enumerate}
exact positions of the Justices are difficult to pinpoint.\textsuperscript{116} Accordingly, it is almost impossible to develop a constitutional rule of broad application from \textit{Michael H}. However, although the result in \textit{Michael H} may be a rejection of the rule set forth in the \textit{Stanley-Lehr} line of cases, five Justices still accepted the validity of the rule from these cases.\textsuperscript{117} 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.\textsuperscript{118} The genetic mother was always connected by birth to the child. However, with recent technological advances in fertility treatments and surrogacy, this is no longer true.\textsuperscript{119}

\textbf{A. \textit{STANLEY v. ILLINOIS}}

Of all the Supreme Court opinions dealing with the rights of unwed fathers, \textit{Stanley v. Illinois} showed the most sympathy for the unwed father, to a degree that is uncharacteristic of the Court. Justice White set the stage in the opening lines of the 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.”\textsuperscript{120} Stanley lost his children because of an Illinois

\begin{itemize}
  \item \textsuperscript{116} Id. at 113 (Scalia, J., plurality opinion), 132 (O’Connor, J., concurring), 136 (Stevens, J., concurring), 157 (White, J., dissenting).
  \item \textsuperscript{117} See \textit{Michael H}, 491 U.S. at 136 (Brennan, J., dissenting) (describing the common ground shared by a majority of the Justices); see also \textit{id.} at 133 (Stevens, J., concurring) (relying on \textit{Stanley} and \textit{Caban} to show that “enduring ‘family’ relationships may develop in unconventional settings”).
  \item \textsuperscript{118} The unwed father was genetically the parent, but he obviously was not the birth parent, nor was he 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 sometimes this lack of participation in the child’s life was through no fault of the unwed father).
  \item \textsuperscript{120} \textit{Stanley v. Illinois}, 405 U.S. 645, 646 (1972) (internal footnote omitted).
\end{itemize}
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statute which stated that “the children of unwed fathers become wards of the State upon the death of the mother.” The Court reviewed the application of this statute to the Stanley family and concluded that the statute could not stand because Mr. Stanley and “all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody.” If the State denied Mr. Stanley and other unwed fathers a hearing, but granted a hearing to unwed and married mothers, the State’s action was “inescapably contrary to the Equal Protection Clause.”

Although the result was couched in terms of equal protection, and although the case established the requirements of a hearing (which seems similar to procedural due process), there was a substantive due process component to the Stanley opinion. For example, the requirement of a hearing suggests the Court’s concerns over procedural due process. The Court mentioned, but did not expand on, the exact nature of the due process violation. This lack of elaboration was likely due to the fact that modern non-economic substantive due process had not been fully articulated at the time of this case. In fact, modern substantive due process would only begin to be fully recognized in the cases following Stanley. Although the Court called it a “private interest,” the substantive right involved here was “that of a man in the children he has sired and raised,” and the Court held that this right or interest “undeniably warrants deference

121. Id.
122. Stanley, 405 U.S. at 658.
123. Id.
124. See id. at 649-50.
125. Planned Parenthood of Pa. v. Casey, 505 U.S. 833, 849 (1992) (noting that the Court did not apply substantive due process to familial fundamental rights until the Griswold v. Connecticut decision); Griswold v. Connecticut, 381 U.S. 479 (1965) (Goldberg, J., concurring) (agreeing with the majority that “the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights”).
126. See, e.g., Planned Parenthood, 505 U.S. at 849. In addressing the weight of this right, the Stanley Court stated: “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 (citing Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)). This comment could be viewed as a foundation for modern substantive due process—the non-economic substantive due process that governs parental rights and decisions to procreate.
and, absent a powerful countervailing interest, protection.” 127  As to the weight of this interest, the Court stated that the “authorities make it clear that, at the least, Stanley’s interest in retaining custody of his children is cognizable and substantial.” 128

In the end, the Court established the right to a hearing on fitness because of the protectable interest of Stanley and other unwed fathers. The Illinois statute violated Equal Protection not because unwed fathers were a suspect class, but because the classification, as in *Skinner*, 129 encroached on a fundamental right. 130

**B. Quilloin v. Walcott**

In *Quilloin v. Walcott*, the Court refused to find a constitutionally protected interest for an unwed father who had never legitimized his child, had custody, nor “shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child.” 131 Although Georgia law required only the consent of the mother to the adoption of an illegitimate child, the child’s father attempted to block his eleven-year-old son’s stepfather from adopting the boy by filing a petition

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128. Id. (citing *Griswold*, 381 U.S. at 496 (Goldberg, J., concurring)) (identifying the integrity of the family unit as protected under the Ninth Amendment); *May v. Anderson*, 345 U.S. 528, 533 (1953) (identifying the right to conceive and raise a child as “far more precious . . . than property rights”); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (explaining that parents, not the state, are in a better position to provide for the “custody, care and nurture of the child”); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (confirming the right to conceive and raise a child is a “basic civil right[] of man” protected by the Equal Protection Clause of the Fourteenth Amendment); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (identifying the rights to conceive and to raise one’s children as “essential” and the integrity of the family unit as protected in the Due Process Clause of the Fourteenth Amendment).
129. *Skinner*, 316 U.S. at 541 (deeming the rights of marriage as “basic civil rights of man”).
130. This protectable interest seems to be the same one that the court found in *Santosky v. Kramer*. See 455 U.S. 745 (1982). Interestingly, in addressing the weight of this right, the *Stanley* Court added a comment that could possibly be viewed as a foundation for modern substantive due process—the non-economic substantive due process which surrounds parental rights and decisions to procreate: “It is plain that the interest of a parent in 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 (citing *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).
for habeas corpus and a petition to legitimize the child. After a full hearing:

[T]he trial court found that, although the child had never been abandoned or deprived, [the father] had provided support only on an irregular basis. Moreover, while the child previously had visited with [the father] on “many occasions,” and had been given toys and gifts by [the father] “from time to time,” the mother had recently concluded that these contacts were having a disruptive effect on the child and on [the mother’s] entire family.

The trial court concluded that it was not in the child’s best interest to grant the petition, and that the genetic father lacked standing to veto the adoption.

The Supreme Court analyzed Quilloin on both substantive due process and equal protection grounds. Although the Court did not use the term “substantive due process,” it spoke in terms of a violation of the Due Process Clause, and concluded that the father’s “substantive rights were not violated by application of a ‘best interests of the child’ standard.” The Court acknowledged that “the relationship between parent and child is constitutionally protected” and “the custody, care and nurture of the child reside first in the parents.” In addition, the Court stated:

[T]he 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.’

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132. Id. at 248-50.
133. Id. at 251 (footnote omitted).
134. Id. at 251-52.
135. Quilloin, 434 U.S. at 254.
136. Id. 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)).
137. Id. (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).
138. 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 have been chosen specifically to mean more than merely the married family. In particular, the Smith Court noted that a married family has rights based on “state law and contractual arrangements,” while the natural (or genetic) family derives its privacy interest from intrinsic human rights. Smith, 431 U.S. at 845.

Noting differences between the foster family and natural family, the Smith
However, the Court concluded that because the natural father had never sought custody and because the adoption would give full recognition to an existing family unit, 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.”

Additionally, the genetic father asserted that the Equal Protection Clause mandated that his right should be determined “by the same standard that would have been applied to a married father.” In other words, the distinction between unwed fathers and married fathers, particularly those who are “separated or divorced,” constituted the alleged discriminatory classification. The Court, however, declined to give any constitutional weight to the disparate treatment of these two classes based on its belief that an unwed father’s “interests are readily distinguishable from those of a separated or divorced father, and accordingly . . . the State could permissibly give [the unwed father] less veto authority than it provides to a married father.” The Court’s explanation was that the father in this case never had custody, or perhaps more importantly, never “shouldered” daily responsibility.

By modern standards, the Court’s due process and equal protection analyses in Quilloin were incomplete and dismissive.

Court provided the following analysis:

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.

Id. (internal citations omitted). In addition, the Smith opinion 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, 405 U.S. at 651) (internal quotations omitted). Thus the Smith decision suggests that mere genetic relationship, separate from the traditional hierarchical family relationship, also garners constitutional protections.

139. Quilloin, 434 U.S. at 255 (internal quotations omitted).
140. Quilloin, 434 U.S. at 255-56.
141. Id. at 256.
142. Id.
143. Id.
The discussions of due process and equal protection comprise only three paragraphs each, and included none of the normal due process and equal protection terminology. The Court did not discuss fundamental rights, strict scrutiny, or any rational basis analyses. Further, even though the challenged statute discriminated on its face, the Court did not discuss gender discrimination. The *Quilloin* Court may have been swayed by either the moral fault or at least the irresponsibility of the genetic father, but it is difficult to determine which of these factors, if not both, influenced the Court.

Finally, while the *Quilloin* Court drew a line between constitutionally protected fathers and fathers without parental rights, the decision leaves unclear the exact nature and location of that line and speaks in terms of both custody and significant responsibility as criteria for full parental rights without clearly delineating the degree required of each. Must an unwed father have had custody in order to seek constitutional protection or will it be sufficient if he has shouldered significant responsibility? If significant responsibility is the test, how much responsibility is sufficient? *Quilloin* informs us that constitutional protection does not arise when the genetic father merely provided gifts and visited the child on “many occasions.” Would it be enough if the father had paid regular child support, or would he have had to pay support and have had summer-long visitation rights? The question remains: What must a genetic father do to achieve significant constitutional protection?

This uncertainty is deceptive. Although the line drawn is vague, a line has been drawn. If the unwed father does not have a right to assert 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, the amount of participation by an unwed father in his child’s life

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144. *Id.* at 254-56.

145. The Court declined to consider the father’s claim that the statute violated his equal protection on the basis of gender because it “was not presented in [his] jurisdictional statement.” *Id.* at 253 n.13. The Court also refused to discuss a procedural due process issue because the father received a “full hearing” by the trial court. *Id.* at 253. However, if *Quilloin* stands for the proposition that the “best interests” standard sufficiently protects the interest of an unwed father who has never had custody and has not shouldered significant responsibility regarding the child, then the father should nonetheless have a procedural due process right to have a hearing regarding the application of the best interest standard.

146. *Quilloin*, 434 U.S at 251.
will be sufficient for him to assert his parental rights. While the case does not say exactly when parental rights mature, it does not deny that they may mature and become enforceable. Stanley established that unwed fathers had rights, and Quilloin began to delineate those rights.

C. CABAN V. MOHAMMED

Caban v. Mohammed presented the Court with the opportunity to clarify the line that had been sketched in the previous cases. Specifically, the Court reinforced the distinction drawn in Quilloin: “In 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.”

147. 441 U.S. 380, 392 (1979). There is no doubt that Caban 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 mother an absolute right to veto or consent to the adoption. Id. at 382-83. 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, which requires that “[g]ender-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.” Id. at 388 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)). The issue presented was “whether the distinction in [the New York statute] between unmarried mothers and unmarried fathers bears a substantial relation to some important state interest.” Id. The Court rejected the notion that the New York law’s distinction was justified by a “universal difference between maternal and paternal relations,” since such a difference would be reflected by mothers having a closer relationship with their children, which is not always the case. Id. at 389. The Court further stated that “[t]he present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother.” Id. Additionally, the Court declined to find that “the State’s interest in promoting the adoption of illegitimate children” was sufficient to justify the distinction. Id. at 389-92. More specifically, regarding the state’s claimed interest in promoting adoption, the Caban Court stated:

We find that the distinction in [the New York statute] between unmarried mothers and unmarried fathers, as illustrated by this case, does not bear a substantial relation to the State’s interest in providing adoptive homes for its illegitimate children. It may be that, given the opportunity, some unwed fathers would prevent the adoption of their illegitimate children. This impediment to adoption usually is the result of a natural parental interest shared by both genders alike; it is not a manifestation of any profound difference between the affection and concern of mothers and fathers for their children. Neither the
Accordingly, the New York statute was invalid as applied to a father who had “established a substantial relationship with the child and . . . admitted his paternity.”148 Although the result was different from that of *Quilloin*, the cases were consistent,149 and both concluded that the genetic relationship alone was not enough.

The most striking aspect of *Caban* is the implied rationale for drawing the distinction between the participatory and non-participatory genetic parent. As in *Quilloin*, the Court did not fully explain this distinction, but two statements by Justice Powell in the majority opinion gave some insight into his reasoning, and perhaps that of the entire majority. Justice Powell pointed 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.”150 He immediately followed this statement with a footnote in which he elaborated 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.”151 The key term in both statements is “abandoned.” Justice Powell expressed the universally accepted notion that the state may, at some point, terminate the rights of parents who have abandoned their children. While Justice Powell did not elaborate further on this concept, he appears to affirm that a father who has never developed a relationship with his child is the equivalent of the father who has State nor the appellees have argued that unwed fathers are more likely to object to the adoption of their children than are unwed mothers; nor is there any self-evident reason why as a class they would be.

*Id.* at 391-92.

148. *Id.* at 393 (footnote omitted). The relationship that creates the constitutional right does not have to be a custodial one. Because the statute involved in *Caban* required the consent of an unwed father, or anyone else for that matter, who was the lawful custodian of the child, the inference is that the case only applies to situations in which the unwed father does not have any type of custody. It would also seem possible for a father to have a substantial relationship with a child and to act fatherly without having custody or even without ever having had custody. *Id.* at 387 n.4.

149. *Id.* at 389 n.7 (citing *Quilloin*, 434 U.S. at 256) (noting the *Caban* Court’s extension of the *Quilloin* analysis and emphasizing “the importance of the [natural father’s] failure to act as a father toward his children”).

150. *Id.* at 392.

151. *Id.* at 392-93 n.13.
abandoned his child.

Indeed, by equating these two concepts, Justice Powell implies a crucial conclusion: both the father who abandons a child and the father who fails to form a relationship have lost their parental rights. The Court was 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 was that abandonment constitutes affirmative conduct rather than the passive inability to have a relationship. Therefore, what should happen if a genetic parent is deprived, through no fault of his own, of the opportunity to participate in the upbringing of and develop a relationship with his child? This was the question that the Court could have answered in *Lehr v. Robertson*.

**D. LEHR V. ROBERTSON**

Unfortunately, the holding of *Lehr v. Robertson* was quite narrow. The issue as stated by the Court was “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.” The Court concluded that the maintenance of the New York “putative father registry” provided sufficient due process protection of the genetic father’s rights. This case would appear to be straightforward and simple if it were not for two very interesting and important aspects. First, a truly remarkable disconnect exists between the majority’s presentation of the facts and that of the dissent. The majority viewed the facts almost as a generalized hypothetical that was designed to prove a point. The dissenting Justices, however, stated the facts in great detail for the purpose of showing what they believed to be a significant injustice. Second

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152. For example, a father who had not cared for or even communicated with his child for a period of years would not be said to have 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.


154. *Id.* at 249-50.

155. *Id.* at 250-51, 265. The registry allows a man to indicate his intent to claim an illegitimate child and entitles him to notice of any subsequent adoption proceeding. *Id.* at 250-51.

156. *See Lehr*, 463 U.S. at 275.
is the extensive, and perhaps gratuitous, discussion that sets out the majority’s argument against greater rights for the genetic father. The majority’s portrayal of the facts and its ultimate conclusion regarding the non-participatory father were intimately connected, allowing the majority to dodge a key question in determining the rights of genetic parents: what are the rights of a genetic parent who has been deprived through no fault of his own of the opportunity to become a participatory parent?

The majority’s view of the facts in Lehr was remarkably simplistic. The trial court terminated the parental rights of a putative father without notice or an opportunity to be heard when it allowed the child to be adopted at age two by her stepfather.\textsuperscript{157} Although the trial court knew about the paternity action that the putative father filed in a different county from the court of the adoption, the trial court refused to find an 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 registry.\textsuperscript{158}

The evolution of this state of affairs was, of course, much more complex than the above summary indicates; and the dissent, based upon the allegations of the petition, set forth facts of a chaotic two-year period beginning with the birth of the baby girl, Jessica.\textsuperscript{159} The dissenters viewed these two years as a time

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\textsuperscript{157} Lehr, 463 U.S. at 252-53. Lehr, referred to in the case as the putative father, did admit his paternity. \textit{Id}. 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. \textit{Id}. at 267 n.1 (White, J., concurring) (noting that the majority “correctly assume[d] that Lehr [was] in fact Jessica’s father”).

\textsuperscript{158} \textit{Id}. at 252-54, 264.

\textsuperscript{159} \textit{Id}. at 268-69. The facts of the case are best understood when viewed chronologically:

1. November 9, 1976: Jessica born out of wedlock. \textit{Id}.
2. August 1978: Jessica’s mother had already married Robertson. \textit{Id}.
3. August 1978: Lehr, the putative father, found location of mother and Jessica, offered support and trust fund for Jessica, and asked for visitation. \textit{Id}.
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. \textit{Id}. at 269, 252-53.
6. Feb. 22, 1979: Notice of paternity proceeding is served on mother. \textit{Id}.
8. March 3, 1979: Lehr receives notice of the motion to change venue and
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 evasive efforts of the child's mother, who among other things concealed the child's whereabouts from him for long periods of time. On the other hand, the majority was completely silent as to the alleged attempts of the putative father to find the child and establish a relationship and apparently viewed 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

learns of adoption for the first time. Id. at 253.
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. Id.

10. 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 two 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 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 268-69 (White, J., dissenting) (footnote omitted).

161. 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 (footnote omitted).

162. Id. at 262.
The Case for the Genetic Parent

genetic parent, the Lehr majority acknowledged both the substantive due process and, to a lesser degree, the equal protection arguments made on behalf of genetic fathers in previous cases. Nevertheless, unlike the Courts in Quilloon and Caban, the majority in Lehr treated the genetic father’s claim as merely a denial of notice and hearing, and thus, as a true procedural due process case. The Court then rather summarily concluded that no hearing was necessary because the New York registry statute adequately protected whatever procedural due process right or interest the appellant had. The Court applied 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 and gender-based discrimination, the Court again focused on the status of the putative father. If the father’s situation was similar to the mother’s, the statute would invidiously discriminate against him; however, a mere genetic father is not similarly situated. The genetic father must elevate his status to achieve the same level as the mother “by com[ing] forward to participate in the rearing of his child.”

The bulk of the majority’s discussion concerned a determination of the status of the genetic parent, and the Court concluded that the biological or genetic relationship counts for very little by itself. In order to reach this conclusion, the Court relied upon three a priori statements, the sources of which were largely unrevealed and the truth of which was unquestioned by the majority. First, “[t]he significance of the biological connection is that it offers the natural father an opportunity that no other

164. Lehr, 463 U.S. at 264-65.
165. Id. at 265.
166. Lehr, 463 U.S. at 264.
167. Id. at 261.
168. Id. (quoting Caban, 441 U.S. at 392) (internal quotations omitted).
169. Id. (”[T]he mere existence of a biological link does not merit equivalent constitutional protection.”).
male possesses to develop a relationship with his offspring."\textsuperscript{170} Thus, the genetic relationship amounts to no more than potential. Second, “[p]arental rights do not spring full-blown from the biological connection between parent and child [but] require relationships more enduring.”\textsuperscript{171} Therefore, legal rights do not flow from the mere fact of a genetic relationship; rather, they must come from some other source, such as a developed parent-child relationship. Third, “[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.”\textsuperscript{172} When 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.\textsuperscript{173}

With these statements, the Court drew a definitive constitutional line. However, although the Court also made statements about the nature of parenthood and the parent-child relationship,\textsuperscript{174} it critically failed to question the validity of these statements. Not only did the Court generally fail to reveal the source of these statements, it also did not pretend that these statements were empirical or anything more than normative judgments about unwed fathers. More importantly, the \textit{Lehr} majority appears to have transposed the view of the parental relationship implicit in \textit{Caban}. The biological relationship is not the basis for the parent-child relationship that, as Justice Powell suggested in \textit{Caban},\textsuperscript{175} can be lost if the parent abandons the child. Rather, the \textit{Lehr} majority found a genetic relationship to be a mere starting point of parenthood which must then be perfected by some affirmative action.\textsuperscript{176} Based on this view, it is apparent why the \textit{Lehr} majority chose not to address the question of the status of the genetic parent who, through no fault of his own, has been denied the opportunity to perfect his parent-child relationship.

\textsuperscript{170} \textit{Id.} at 262.
\textsuperscript{171} \textit{Id.} at 260 (quoting \textit{Caban}, 441 U.S. at 397) (Stewart, J., dissenting) (internal quotations omitted) (emphasis omitted).
\textsuperscript{172} \textit{Id.} at 263. The Court recognized 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. \textit{Id.}
\textsuperscript{173} \textit{Id.} at 261 (citing \textit{Caban}, 441 U.S. at 392).
\textsuperscript{174} See \textit{id.} at 261-62.
\textsuperscript{175} \textit{Caban}, 441 U.S. at 393 n.13.
\textsuperscript{176} \textit{Lehr}, 463 U.S. at 262.
The vigorous dissent in *Lehr* did tackle this difficult question, however. The dissent began by pointing out that, in the minds of most people, the biological or genetic connection counts for much more than just the potential of having a relationship. Justice White, the author of the dissenting opinion in *Lehr*, quoted *Smith v. Org. of Foster Families*: “the usual understanding of family implies biological relationships, and most decisions treating the relation between parent and child have stressed this element.” While in today’s society we recognize many types of “families”, including those with no biological relationship, the plain and ordinary meaning of this term denotes a “blood” relationship; rather, it is the non-biological meaning of “family” that requires further explanation. The *Lehr* dissenters concluded 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 that interest.

The dissent in *Lehr* viewed the putative father as the type of genetic father who, through no fault of his own, and despite his best efforts, has been unsuccessful, even thwarted, in his attempts to establish a relationship with his child. Justice White was undoubtedly dismayed that the majority so callously disregarded Lehr’s attempts to establish a relationship with his child. Because the biological relationship should have been a factor in the decision, and because the biological father attempted to establish a relationship and made his presence known to the trial court, the dissent found it grossly unfair that the trial court and the majority of the Supreme Court took such a “grudging and crabbed approach to due process.” The dissent recognized that a biological relationship, plus an attempt to shoulder parental responsibilities, invokes basic due process protections of notice and an opportunity to be heard.

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177. *Id.* at 270 (White, J., dissenting).
178. *Id.* at 272 (quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 843 (1977)) (internal quotations omitted).
179. *Id.*
180. *Id.* at 273.
181. *Id.* at 274 (noting that “[i]t makes little sense . . . to deny notice and hearing to a father who has not placed his name in the register but who has unmistakably identified himself by filing suit to establish his paternity and has notified the adoption court of his action and his interest”).
182. *Id.* at 275.
183. See *id.* at 272-73 (noting that “because there is no established factual basis on which to proceed, it is quite untenable to conclude that a putative father’s interest in
In the end, the majority view in *Lehr*, though hostile to the mere biological relationship of the unwed father, did make the case for the unwed father who has participated sufficiently in his child’s upbringing. Indeed, the majority made the definitive statement of the status of the unwed father—a statement which ultimately summarized the four cases discussed herein:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming 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 acts as a father toward his children.\textsuperscript{184}

However, the *Lehr* Court’s synthesis of Supreme Court precedent treating the rights of unwed fathers would be soon be fractured by the Court’s decision in *Michael H. v. Gerald D.*\textsuperscript{185}

### E. *MICHAEL H. V. GERALD D.*

*Michael H. v. Gerald D.* is a deeply fragmented decision, which makes its precedential value difficult to determine.\textsuperscript{186} Nevertheless, this case could have been quite simple. It could have been the culmination of the four cases, from *Stanley to Lehr*, which had set forth a workable, if incomplete, rule for dealing with the constitutional rights of unwed fathers: the unwed genetic father who accepts parental responsibility and develops a relationship with his child has a fundamental liberty interest in a

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\textsuperscript{184} *Id.* at 261 (quoting *Caban*, 441 U.S. at 389, 392 (1979)) (internal quotations omitted).


\textsuperscript{186} *Michael H.* includes a plurality opinion written by Justice Scalia, and joined by Justices Rehnquist, O’Connor, Justice Kennedy. *Id.* at 113. Justice O’Connor and Justice Kennedy also wrote a concurring opinion, in which they express their disagreement with Justice Scalia’s method as it was explained in the plurality decision. *See id.* at 131-33, 136, 158. Justice Stevens, although he voted in favor of the outcome in the case, significantly disagreed with the plurality in his concurring opinion as to the legal principle involved. *Id.* at 132. Justices Brennan, Marshall, and Blackmun dissented, along with Justice White, who wrote a separate opinion also joined by Justice Brennan. *See id.* at 136 (Brennan, Marshall, Blackmun, JJ., dissenting), 157 (White, Brennan, J.J., dissenting). 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. *See infra* discussion at Part III.F.
continuing relationship with his child.\textsuperscript{187} This rule could have been affirmed, and the law would have been settled, and the facts themselves of \textit{Michael H.} would have justified this straightforward application of this rule. It was undisputed that Michael was the genetic, natural father of the child Victoria, and that he had significantly participated in Victoria’s life.\textsuperscript{188} He and the child’s mother, Carole, had lived together in a family unit with Victoria for perhaps as many as eleven months.\textsuperscript{189} Further, he held Victoria out as his child and signed a stipulation that he was the father.\textsuperscript{190}

The Court could have simply found that the unwed father, Michael, had significantly participated in Victoria’s life, and thus, for constitutional purposes was the child’s father. Presumably, as the father, he would have had the right to 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. In fact, this series of events is exactly what happened before the constitutional issue was raised.\textsuperscript{191} 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{192}

After the Superior Court had issued a visitation order, Gerald intervened and asserted his rights under what was known

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\textsuperscript{187} See, e.g., Lehr v. Robertson, 463 U.S. 248, 267-68 (1983) (finding that a parent who has “abandoned or never established a relationship” can be accorded different legal rights from the other parent). \\
\textsuperscript{188} Michael H., 491 U.S. at 114. \\
\textsuperscript{189} As Michael and Carole lived together over two separate periods of time, it is difficult to calculate the exact amount of time they lived together as a family unit. In summarizing the facts, 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 . . . . In August, however, she returned to California, [and] became involved once again with Michael . . . . For the ensuing eight months, when Michael was not in St. Thomas he lived with Carole and Victoria in Carole’s apartment in Los Angeles and held Victoria out as his daughter. In April 1984, Carole and Michael 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 two other children since born into the marriage. \\
\textsuperscript{190} Id. at 114-15. \\
\textsuperscript{191} Id. at 114. \\
\textsuperscript{192} Michael H., 491 U.S. at 115. 
\end{flushright}
at the time as the “conclusive presumption of paternity.” Under this presumption, “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.” At the time of the *Michael H.* decision, the statute provided 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, at least by modern standards, the mother could only challenge the presumption if she had a signed affidavit by the genetic father acknowledging his paternity. Under the statute at the time of *Michael H.*, the genetic father had no statutory right to rebut the presumption.

193. *Id.*
194. CAL. EVID. CODE § 621 (West 1989) (repealed 1992). Although the statute used the term “conclusive,” and at one time truly was conclusive in the sense that there was no opportunity to rebut the presumption, it had been modified to allow limited rebuttal. When applied in *Michael H. v. Gerald D.*, the code section regarding this conclusive presumption stated:

§ 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.
(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.

196. *Michael H.*, 491 U.S. at 115 (quoting CAL. EVID. CODE § 621(c)).
197. CAL. EVID. CODE § 621(d) (West 1989) (repealed 1992). The rationale for this could have been to ensure that there would always be a man to support the child. However, such a rationale does not make sense in light of a husband’s absolute right to disprove his paternity and avoid responsibility for support of the child. See CAL. EVID. CODE § 621 (West 1989) (repealed 1992) (providing a father with a two-year window to disprove paternity).
Gerald asserted facts which gave rise to the presumption of his paternity under California’s conclusive presumption. Carole had conceived and given birth to Victoria while cohabiting with Gerald, who was not impotent or sterile. 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 rights. 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, and the California Supreme Court “denied discretionary review.” Simply put, if Gerald was the father and not Michael, Michael had no right to visitation. Thus, Michael’s parental rights were left in the hands of the United States Supreme Court—which was faced with the constitutionality of California’s conclusive paternity presumption.

1. JUSTICE SCALIA’S PLURALITY OPINION

Even though Justice Scalia was joined by three other justices, his plurality opinion appears to be a highly personal document. He approached the facts somewhat naively and was appalled by the conduct of the parties. He framed the issue as one of substantive due process rather than procedural due process and concluded that the unwed father of a child born to a

the mother of the child or her husband, no other parties were granted the right to rebut. 

199. Michael H., 491 U.S. at 115.
200. 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 cohabitation at the time of birth for the conclusive presumption to arise. Id. at 115-16.
201. Id. at 115.
202. Id.
205. Id. (citing Vincent B. v. Joan R., 179 Cal. Rptr. 9, 13 (Ct. Ct. App. 1981), appeal dism’d, 459 U.S. 807 (1982)) (providing an example of an earlier California case that 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”).
206. Michael H., 491 U.S at 113 (Scalia delivering the opinion of the Court, joined by Chief Justice Rhenquist, and Justices O’Connor and Kennedy)
207. Id. at 113-15.
woman who was married to another man had no fundamental liberty interest in his relationship with his child.\textsuperscript{208}

This conclusion was based on Justice Scalia’s view that fundamental rights are determined by historical traditions viewed at “the most specific level.”\textsuperscript{209} Under this specific inquiry, Justice Scalia narrowly characterized the rights sought by Michael as those of an adulterous man who has impregnated another man’s wife, and unequivocally found that no such rights exist in the historical traditions of America.\textsuperscript{210} Despite his stated allegiance to constitutional specificity, Justice Scalia nonetheless subscribed to a generalized idea that the Constitution did not really protect the parent-child relationship, but rather protected the “unitary family,”\textsuperscript{211} although he grudgingly acknowledged that there may be other legitimate types of family units besides the traditional nuclear family which may garner constitutional protection.\textsuperscript{212}

Justice Scalia began the plurality opinion with the somewhat naïve statement that “[t]he facts of this case are, we must hope, extraordinary.”\textsuperscript{213} On the contrary, the facts when stated in their simplest form are common. A woman, Carole, who was married to one man, Gerald, became pregnant by another man, Michael, and bore a child, Victoria. The question is, of course, who is Victoria’s father? But Justice Scalia was not just surprised by the facts—he was apparently appalled by the sexual mores of the parties. He referred to the relationship between Carole and Michael as the “adulterous affair.”\textsuperscript{214} He referred to Michael several times as the “adulterous natural father”\textsuperscript{215} and to a child such as Victoria as a “child adulterously conceived”\textsuperscript{216} and “adulterously begotten.”\textsuperscript{217} He referred to Carole, Michael, and Victoria as “a married woman, her lover, and their child.”\textsuperscript{218}

\textsuperscript{208} Id. at 120.
\textsuperscript{209} Id. at 127 n.6.
\textsuperscript{210} Michael H., 491 U.S at 127 n.6.
\textsuperscript{211} Id. at 123.
\textsuperscript{212} Id. at 124 n.3.
\textsuperscript{213} Id. at 113.
\textsuperscript{214} Id.
\textsuperscript{215} Id. at 120, 127 n.6, 130 n.7.
\textsuperscript{216} Id. at 127 n.6.
\textsuperscript{217} Id. at 130.
\textsuperscript{218} Id. at 124 n.3.
The Case for the Genetic Parent

While Justice Scalia may have been simply using the terms “adultery” and “adulterous” for the sake of accuracy, he appears to have fixated on the sexual morality of Michael and Carole. This fixation leads to the possibility that Justice Scalia, rather than focusing on the issue of the parent-child relationship, was weighing the relative morality of the parties, with Carole and Gerald occupying the moral high ground. But, certainly in terms of values, Michael and Carole were on the same moral plane.\textsuperscript{219} Justice Scalia appears to assume that Gerald is innocent, although the facts say little about his conduct other than that he moved to New York without Carole, prior to Carole cohabiting with Michael.\textsuperscript{220} However, Victoria’s moral position and values as an innocent child are unimpeachable. Nevertheless, Justice Scalia’s discussion opens the door to the inference that he would deny the unwed father who has a functioning relationship with his child constitutional status because he has flaunted traditional family values.\textsuperscript{221} While Justice Scalia’s view showed great reverence for the marital relationship, however fractured, it exhibited little respect for the parent-child relationship. It ignored the immorality of taking a child from a genetic parent, who wants to nurture and rear the child, in favor of placing the child with someone who may or may not be a good parent, but is simply married to the child’s mother.\textsuperscript{222} This lack of respect for

\textsuperscript{219} Both committed adultery, although Carole may have committed adultery with another man, Scott, as well. \textit{Id.} at 114. Michael arguably deserves moral praise for attempting to assert his paternity with its accompanying duty of support. Likewise, Carole, should perhaps be praised in her efforts to forge a family unit with Gerald. \textit{Id.} at 110.

\textsuperscript{220} Justice Scalia describes how “[i]n October 1981, Gerald moved to New York City to pursue his business interests, but Carole chose to remain in California.” \textit{Michael H.}, 491 U.S at 114. Unless one subscribes to the outmoded notion that, if a wife refuses to move with her husband, she has abandoned him, one might interpret this conduct as Gerald, justifiably or not, abandoning Carole. Regardless, undertones of a vicarious rage by Justice Scalia on behalf of Gerald run throughout the plurality opinion. Additionally, Justice Scalia noted rather sarcastically:

[While] the concept [of the family unit] can be expanded . . . it will bear no resemblance to traditionally respected relationships—and will thus cease to have any constitutional significance—if it is stretched so far as to include the relationship established between a married woman, her lover, and their child, during a 3-month sojourn in St. Thomas, or during a subsequent 8-month period when, if he happened to be in Los Angeles, he stayed with her and the child.

\textit{See id.} at 123 n.3.


\textsuperscript{222} As the California Supreme Court has observed:

Based solely on the mother’s wishes, a model father can be denied presumed
the parent-child relationship also appears in Justice Scalia’s summary dismissal of Victoria’s equal protection claim.\textsuperscript{223}

Accordingly, Justice Scalia, quoting from the earlier California case of \textit{Vincent B. v. Joan R.}, framed the constitutional issue exclusively in terms of substantive due process:

\begin{quote}
[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.\textsuperscript{224}
\end{quote}

While Justice Scalia was correct in adopting the view that the conclusive presumption was a substantive rule of law, he either missed or ignored the blatant error in this statement as to the rationale for the presumption. At the time Justice Scalia wrote his opinion in \textit{Michael H.}, 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

\begin{quote}
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.
\end{quote}


\textsuperscript{223} The plurality opinion provides the following explanation as to why Victoria did not have a valid equal protection claim:

We reject, at the outset, Victoria’s suggestion that her equal protection challenge must be assessed under a standard of strict scrutiny because, in denying her the right to maintain a filial relationship with Michael, the State is discriminating against her on the basis of her illegitimacy. 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. . . . 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.

\textit{Michael H.}, 491 U.S. at 131-32 (internal citations omitted).

\textsuperscript{224} \textit{Id.} at 119-20 (quoting \textit{Vincent B.}, 179 Cal. Rptr. 9, 10 (Ct. App. 1981)).
had an absolute right to disavow the child through the use of blood test evidence. While at one time the presumption, as developed in the common law, did bind the husband to a greater degree, thus offering greater protection for the child, it was never completely binding on the husband. More importantly,

226. The myriad of historical citations presented by Justice Scalia merely stand for the point that at one time the presumption provided greater protection for family and children. Id. at 124. Scalia notes that historically “[t]he presumption of legitimacy was a fundamental principle of the common law . . . rebuttable only by proof that a husband was incapable of procreation or had had no access to his wife during the relevant period,” and that such proof required factual absence from the kingdom of England. Id. at 124-25 (internal citations omitted). Accordingly, “[t]he 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 . . . and likely making them wards of the state . . . [while a] secondary policy concern was the interest in promoting the ‘peace and tranquility of States and families.’” Id. at 125 (internal citations omitted).
227. Impotence and non-access were always exceptions. See, e.g., Miscovich v. Miscovich, 688 A.2d 726, 729 (Pa. Super. Ct. 1997) (noting that proof of a husband’s sterility or impotence could overcome the traditional common law presumption of a husband’s paternity of a child born of the marriage). The existence of these two exceptions point to a completely different rationale for the presumption. In ages when it was impossible to know the genetic 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 genetic father of the child, why else would the law care about whether or not the husband was impotent or sterile? Along these lines of thought, it is worthwhile to note that at one time there was a third judicial exception for race. See, e.g., Watkins v. Carlton, 37 Va. (10 Leigh) 560 (1840) (holding that the presumption of the husband’s paternity of children born during the marriage may be rebutted on proof that the child’s race is different from that of the father). In other words the presumption was not applied when the evidence showed that the child had different racial traits from the mother and her husband. In regard to this situation, the California Supreme Court actually made the following statement:

There is one class of cases where it is recognized in this country at least, that the husband is not to be taken as the father of the child, even though he had intercourse with his wife during the normal period of conception. That instance is where the husband and wife are of the same race, as for instance, white, and it appears that the wife has had intercourse with a man of another race, as, for instance, a negro, and the child is of mixed blood. [See, e.g., Bullock v. Knox, 11 So. 539 (Ala. 1892); Wright v. Hicks, 12 Ga. 155, 161 (1852); Watkins, 37 Va. at 560; Cross v. Cross, 3 Paige Ch. 139 (N.Y. Ch. 1833)]. The reason why the conclusive presumption is not applied in such instances is that the element of indeterminability which is the reason for the presumption in the ordinary case is absent. It is clear that the husband is not the father. The actual fact, in other words, is capable of definite determination, and for this reason the conclusive presumption which is a substitute for such determination is not properly applicable.

by the time the Michael H. 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 attempt to avoid any responsibility by requesting blood tests.\textsuperscript{228} Even the mother’s right to challenge her husband’s control was severely limited, despite the fact that she might know the identity of the real father: she was required to procure an affidavit from the natural father before she could challenge the patriarch’s paternity.\textsuperscript{229}

Nevertheless, Justice Scalia correctly held that the conclusive presumption as provided by then-current California law was substantive, and thus the analysis should focus on substantive due process rather than procedural due process.\textsuperscript{230} California had made a substantive statement: the biological father was not the legal father and the man married to the mother was. As such, California had not denied Michael the right to a hearing; instead, the state had simply stated that he had no right which would justify a hearing.

The question was, of course, can the state do this, or in other words, does this definition of father violate substantive due process? Up to a point, Justice Scalia used a very straightforward substantive due process analysis, arguing that “liberty” in the Due Process Clause extends beyond freedom from physical restraint.\textsuperscript{231} However, Justice Scalia noted that the Court “comes nearest to illegitimacy” when it strays from the “language” or “design” of the Constitution itself in the process of determining which rights are encompassed by the term “liberty.”\textsuperscript{232} As such, the benchmark for substantive due process

\textsuperscript{228} See CAL. EVID. CODE § 621 (c) (West 1989) (repealed 1992).

\textsuperscript{229} See id. § 621(d) (West Supp. 1989) (repealed 1992). The section stated: “The notice of motion for blood tests under subdivision (b) may be filed 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). See CAL. FAM. CODE § 7541(c) (West 2005).

\textsuperscript{230} Michael H., 491 U.S. at 121. While Justice Scalia correctly notes the substantive component of the conclusive presumption, there is some question as to whether the genetic father confronting the conclusive presumption would also have a procedural due process right to be heard on the issue of the mother’s husband’s impotence and/or sterility.

\textsuperscript{231} Michael H., 491 U.S. at 121.

\textsuperscript{232} Id. at 122 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 544 (1977)
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.”

Justice Scalia’s examination of the history and tradition of the United States revealed a lack of protection for the genetic father. To Michael’s assertion that the Stanley-Lehr line of cases had established that “biological fatherhood plus an established parental relationship—factors that exist in the present case[—created]” such a liberty interest, Justice Scalia responded with an alternate reading of these cases. He argued that 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.”

While there is support for Justice Scalia’s statement in that the opinions of the Stanley-Lehr line of cases each mention the family frequently, these cases also stand for much more—specifically, that the genetic relationship, plus either the assumption of parental responsibility or the development of a parental relationship, are also protected by the Constitution. Justice Scalia did not explain why he chose to interpret these four cases in the restrictive scope of the “unitary family,” nor why he chose to ignore the statements in these cases regarding parental participation in the child’s life. In support of his narrow view, Justice Scalia quoted from neither Stanley, Quilloin, Caban, nor Lehr, but rather from Moore v. City of East Cleveland: “Our 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.” Justice Scalia ignored statements indicating 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, even though these statements

(White, J., dissenting) (internal quotations omitted).

233. Id. (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)) (internal quotations omitted).

234. Id. at 123.


exist on the very pages he cited from *Stanley*, *Quilloin*, *Caban*, and *Lehr*. Justice Scalia simply ignored the fact that these four cases together lead to the conclusion, stated explicitly in *Lehr*, that “[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by ‘com[ing]”

237. *Stanley* contains the following applicable quotations:

*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. 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.’ . . . We have little doubt 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.’ ”

*Stanley*, 405 U.S. at 651-52 (internal citations omitted) (emphasis added).

238. The *Quilloin* opinion includes the following statements:

*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. . . . We have little doubt 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.’ ”

*Quilloin*, 434 U.S. at 255 (internal citations omitted) (emphasis added).

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

*Caban*, 441 U.S. at 389.

240. *Lehr* also contains the same combination of statements:

*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. . . . [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.*

*Lehr*, 463 U.S. at 261 (quoting *Caban*, 441 U.S. at 392) (internal quotations and citations omitted).
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 [sic].”

As much as Justice Scalia unrealistically considered the facts surrounding Victoria’s conception and birth, he was just as out of touch with reality in regard to the nature of the modern family. Indeed, his view of the family in *Michael H.* verges on the absurd. In response to Justice Brennan’s charge that he has a “pinched conception of ‘the family,’” Justice Scalia replied that “[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.”

While this statement, which was placed in a note in response to Justice Brennan’s dissent, was 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 excluded millions of single unmarried parents from constitutional protection of their fundamental parental rights. If, on the other hand, the term “unmarried parents” refers to single parents (an expansion that is justified considering the nature of modern American life), the question becomes a matter of determining the extent of this expansion. Certainly, the term “unmarried parents” would encompass the family in *Stanley*, which consisted of Mr. Stanley

243. Id. at 124 n.3 (majority opinion).
245. See Jack M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1623 (1990) (noting that Justice Scalia’s opinion in *Michael H.* ignores the reality in American society that many children are born into untraditional, non-married families, and thus the Justice’s “acknowledgment of one story about family relations is at the expense and exclusion of other, less ‘respectable’ but no less extant versions”).
and his children who had lived together until Ms. Stanley’s death.\textsuperscript{246} It is also possible that it would cover parents, married and unmarried, who have lived with their children, but who were divorced or separated, such as the father in \textit{Caban}.\textsuperscript{247} Does the broad definition of family include those genetic parents who qualify as legal fathers under the \textit{Stanley-Lehr} line of cases, 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, including only married parents with children, or it is more expansive, making the line he has drawn vague and unclear. Justice Scalia’s “unitary family” test does not resolve the issue of who falls within the definition of such a family. In the end, he only appears to be sure that Michael and Victoria are not a family but that Carole, Victoria, and Gerald are.\textsuperscript{248}

In this conclusion, Justice Scalia misses the point. The issue is not whether the Constitution protects the family, but rather who makes up a family. If the state is able to determine the definition of “family” for the purposes of establishing constitutional protection for its members, then the state is able to withdraw or extend fundamental constitutional protections at its will. The power to define “family” is the power to determine who obtains the constitutional protection afforded a family. Also, Justice Scalia appears to have faith that tradition will determine family structures, but he only considers \textit{legal} tradition. He does not contemplate that this legal tradition never provided direct

\textsuperscript{246} Stanley v. Illinois, 405 U.S. 645, 659 (1972) (recognizing a father’s right to retain custody of his children after the death of their mother and his wife, and thus overturning the Illinois statute mandating that children of unwed fathers become wards of the state).

\textsuperscript{247} Caban v. Mohammed, 441 U.S. 380, 389 (1979) (granting parental rights to unwed father of two children who cohabited with the childrens’ mother until she left and remarried, and continued to see the children after their mother and he parted ways).

\textsuperscript{248} \textit{Michael H.}, 491 U.S. at 124. Justice Scalia states:

\textit{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.}

\textit{Id. (footnote omitted)}.
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protection of the rights of genetic fathers because until modern times it simply was impossible to determine with certainty the identity of the genetic father of a child. He neglects to explore the possibility that California’s conclusive presumption of paternity was actually an indirect method of protecting the rights of the genetic 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.\(^{249}\)

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 *Michael H.*, the father was the man who married the mother, rather than the genetic father. There is no threshold procedural due process right for the genetic father to assert, nor does the genetic father have a substantive due process right to assert his relationship with the child. 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 parents. The circularity of this scheme renders substantive due process meaningless. Under such a framework, legislation does not have to meet constitutional standards. Instead, the legislation *creates* the constitutional standard from whole cloth. Justice Scalia happily ignores the possibility that rights may exist outside of legislation. Further, he does not discuss the possibility that such rights may be vested, at least to a small degree, in the genetic parent or, at least, in the genetic parent who has accepted parental responsibility and established a relationship with his child.

2. **The Concurring Opinion of Justice O’Connor**

Justice O’Connor’s concurring opinion, in which Justice Kennedy joined, is quite brief.\(^{250}\) While, its single paragraph, made an important statement regarding the substantive due process analysis, Justice O’Connor’s concurrence failed to address the constitutional definitions of the terms “parent” or “family.”\(^{251}\) Justice O’Connor concurred in “all but footnote 6 of Justice Scalia’s opinion,”\(^{252}\) which outlined Justice Scalia’s “most specific

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249. See *supra* text accompanying notes 226-27 (discussing the various means of overcoming the presumption of paternity for children born of the marriage).
251. *Id.* at 132.
252. *Id.*
Justice O'Connor criticized this rule because it neither comports with the past, nor prepares for the future. As to the past, she stated that this approach “may be somewhat inconsistent with our past decisions in this area” and that “on 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, Justice O'Connor refused to “foreclose the unanticipated by the prior imposition of a single mode of historical analysis.”

Justice O'Connor, along with Justice Kennedy, did a great service in her concurring opinion by asserting that tradition should not become the only test for substantive due process rights. It is unfortunate, however, that Justice O'Connor did not elaborate on this theme of the “unanticipated,” which lies at the heart of the debate that should have taken place in *Michael H.* Specifically, how should we deal with a possible right that appears fundamental in light of novel scientific or technical information, but that 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 Justice O'Connor 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, as originally stated by Justice Harlan in his dissent in *Ullman*, 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.”

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253. *Id.* at 127 (plurality opinion).
254. *Id.* at 132 (O'Connor, J., concurring in part).
255. *Id.* (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that a Massachusetts ban on the sale of contraceptives to single people violated the Equal Protection Clause); *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)).
258. *Id.* (citing *Poe v. Ullman*, 367 U.S. 497, 542, 544 (1961) (Harlan, J., dissenting)).
259. Justice Harlan in his *Ullman* dissent noted that “[d]ue process has not been reduced to any formula; its content cannot be determined by reference to any code.” *Ullman*, 367 U.S. at 542 (Harlan, J., dissenting).
260. *Id.*
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O’Connor, like Justice Harlan, understands substantive due process as a “living tradition” rather than a formulaic one, which serves as the tether that 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 unfortunately, Justice O’Connor did not elaborate.

3. THE CONCURRING OPINION OF JUSTICE STEVENS

Unlike Justice O’Connor, Justice Stevens did not ignore the substantive issue of fundamental rights in Michael H. Although he concurred with the result in Michael H., he took significant issue with the way Justice Scalia regarded the rights of the genetic participatory parent. Justice Stevens explicitly stated his position:

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.

Justice Stevens sided with the plurality simply because he

261. Id. Elaborating, Justice Harlan stated:

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.

262. Michael H., 491 U.S. at 133 (Stevens, J., concurring).

263. Id. (internal citations omitted).
believed that the California statutory scheme allowed Michael adequate opportunity to establish that awarding visitation rights to him would be in Victoria’s best interest, and that the trial court had validly determined that visitation would not be in Victoria’s best interest. Nevertheless, the above-quoted statement by Justice Stevens endorses the constitutional scheme created by the Stanley and Caban cases. Because of this pivotal statement, it is apparent that a majority of the Court in Michael H.—Justices Brennan, Blackmun, Marshall, White, the four dissenters, along with Justice Stevens—favored constitutional protection for the genetic participatory parent.

4. The Dissenting Opinion of Justice Brennan

The primary difference between Justice Brennan’s dissent and Justice Scalia’s plurality involves the status that Justice Brennan was willing to confer on Michael, the genetic father. Not only was Justice Brennan willing to acknowledge Michael’s substantive due process rights under the Stanley-Lehr line of cases, but he also recognized the procedural rights owed to Michael as Victoria’s genetic father. Justice Brennan attacked the plurality for using tradition as the method to determine which liberties are protected by substantive due process. “The pretense is seductive,” Justice Brennan began; it appears that all one has to do is “search through dusty volumes on American history” to determine what constitutes tradition. This method, however, is also deceptive according to Justice Brennan because traditions are just as malleable and difficult to determine as the concept of liberty. Reasonable people can disagree about the content and importance of traditions as well as about the nature of liberty. Moreover, once an important tradition has been found, the Court must still decide whether it deserves

264. Id. at 135-36.
265. See supra Sections III.A, C (providing further discussions of Stanley and Caban). Justice Stevens did not mention Quilloin and Lehr, presumably because those cases deny rights rather than extend them.
266. See Michael H., 491 U.S. at 136 (Brennan, J., dissenting). See also discussion infra at Section III.F.
267. See Michael H., 491 U.S. at 136 (Brennan, J., dissenting).
268. Id. at 137.
269. Id.
270. Id.
271. Id.
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272 Constitutional protection.

Central to Justice Brennan's critique of Justice Scalia's use of tradition is the argument that some rights deserving of constitutional protection may not have been traditionally protected by the laws of our land. According to Justice Brennan, the right of a natural parent falls into this category. The law did not traditionally protect the rights of the genetic parent simply because the child's genetic parent could not be determined with certainty. Indeed, Justice Brennan noted that the conclusive presumption itself served as a substitute for the determination of genetic parenthood before the advent of reliable paternity tests. Because there is no longer need for this fiction, the underlying right of parenthood must be protected.

Not only did Justice Brennan reject the traditional approach as a method of determining substantive due process rights, but he also adopted the approach to substantive due process rights of putative fathers from the Stanley-Lehr line of cases. Quoting one of the most familiar statements of the rule from Lehr and Caban, Justice Brennan summarized the “unifying theme” of 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 . . . [if he] 'act[s] as a father toward his children.'”

272. Id. at 138.
273. Id. at 139-40. Justice 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. Id. at 140-41 (internal citations omitted) (emphasis in original). Thus in Justice Brennan's opinion, the plurality’s approach turns the Fourteenth Amendment into a “redundancy.” Id. at 141.
274. Id. at 139-40.
275. Id. at 140.
276. Id. at 141 n.1.
277. Id. at 140.
278. Michael H., 491 U.S. at 142-43.
279. Id.
parental participation, and showed some sympathy for the unitary family established for a time by Carole, Michael, and Victoria.\textsuperscript{280} Justice Brennan then criticized the plurality for using marriage as the key factor in determining whether a “unitary family” exists.\textsuperscript{281} According to Justice Brennan, Justice Scalia’s reliance on marriage to determine parental rights flies in the face of the \textit{Stanley-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{282}

Moreover, according to Justice Brennan, Justice Scalia violated the well-established rule of Due Process analysis of first determining whether the party seeking redress has a right vested and then balancing that right against the state’s interest.\textsuperscript{283} In this case, Justice Scalia looked at the “unitary family” relationship that the state had attempted to protect and determined that the unwed father had no rights because he was not married to the mother of Victoria’s family.\textsuperscript{284}

Even more important than his critique of Justice Scalia’s substantive due process analysis was Justice Brennan’s assertion of the genetic father’s procedural due process rights. Justice

\textsuperscript{280} Justice Brennan suggested that the evidence was “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.” Id. at 143-44.

\textsuperscript{281} See id. (explaining the plurality’s recognition that Michael, Carole, and Victoria were not a unitary family because Michael and Carole were not married, while Carole and Gerald constituted a unitary family because they were married).

\textsuperscript{282} Id. at 144-45 (citing Moore v. City of E. Cleveland, 431 U.S. 494, 506 (1977) (protecting households comprised of atypical relatives); Gomez v. Perez, 409 U.S. 535, 538 (1973) (providing illegitimate children with the same support rights as legitimate children); Loving v. Virginia, 388 U.S. 1, 2 (1967) (rejecting the state’s attempt to limit marriage to those relationships where the parties are of the same race)). See also Levy v. Louisiana, 391 U.S. 68, 71-72 (1968); Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73, 73-75 (1968) (illustrating cases where both protected children born out of wedlock).

\textsuperscript{283} Id. at 145-46.

\textsuperscript{284} Id. at 145. Justice Brennan criticized Justice Scalia’s approach:

The plurality’s focus on the “unitary family” is misdirected . . . [because 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 interest in terminating the relationship to play a role in defining the “liberty” that is protected by the Constitution.

\textit{Michael H.}, 491 U.S. at 145.
Brennan would have allowed Michael a hearing to prove that he was Victoria’s father, and if so, 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. Justice Brennan concluded 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 supported constitutional protection based merely on a genetic relationship. It is clear from Justice Brennan’s language that he believes that Michael should have had the opportunity to prove that he was Victoria’s father, and specifically her genetic father. Of course, it must be admitted that, because of Justice Brennan’s extensive discussion of the standard from the Stanley-Lehr line of cases, 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 in addition to family participation. Nevertheless, Justice Brennan’s explicit language from the portion of the dissent dealing with procedural due process leads to the conclusion that the crucial factor for him is the genetic link between parent and child:

We must first understand the nature of the [conclusive presumption of parenthood created by marriage]: 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.

At the conclusion of his dissent, Justice Brennan laments that “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.” For Justice Brennan, the genetic father should be the constitutionally

285. See id. at 148.
286. Id.
287. See id.
288. See id. at 142-43 (noting in the context of the Stanley-Lehr line of decisions that “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”).
289. Id. at 148.
protected father. If Michael could prove he was Victoria’s genetic father, he should be vested with the rights of a parent—which in California constituted the right to a hearing to determine whether visitation would be in Victoria’s best interests. Thus, Justice Brennan may actually go one step further in the direction of protecting genetic parental rights than the Court did in the Stanley-Lehr line of cases, which all emphasized the importance of the parent-child relationship over genetics.

5. THE DISSenting OPINION OF JUSTICE WHITE

Justice White fervently agreed with Justice Brennan. He expressed his conviction that the genetic father did have rights and explained that he would have unequivocally decided the case based on the Stanley-Lehr line of cases. At the outset of his opinion, Justice White emphasized the importance of a genetic connection by stating 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 [and] because I believe that Michael H. has a liberty interest that cannot be denied without due process of the law, I must dissent.”

Justice White next explained the Court’s previously established approach to determining the liberty interests of unwed fathers: “[A]n 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.” Justice White applied these criteria to the case at hand and concluded 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, Justice White noted that Michael had asserted his interest since the child’s birth,

291. Id. at 148.
292. Id.
293. See id. at 142-43.
294. See id. at 157 (White, J., dissenting).
295. Id. at 159–60.
296. Id. at 157.
297. Id. at 158.
298. Id. at 160.
supported the child, lived with the child for a period of time, and estab-
lished a close relationship with the child.\footnote{Id. at 159–60.} This raises the
question of what more Michael could have done to establish his
interest in parenting Victoria.

Justice White believed that the California statute violated
this liberty interest without a suitable countervailing
justification.\footnote{Michael H., 491 U.S. at 160–61.} Specifically, the facts of this case bore no
relationship to the state’s interest in protecting a child from the
stigma of illegitimacy, nor did the law in its then-current form—
which allowed a husband to disavow his paternity—protect the
marital unit.\footnote{Id. at 162 n.4.} Justice White saw the principles of the Stanley-
Lehr line of cases as viable, pragmatic, and well-established
criteria to be applied to unwed father cases in general, and to this
case in particular;\footnote{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 hasvanished [and he] has been rendered a stranger to his child.”).} his dismay was evident when he observed,
“[y]et the plurality today recants.”\footnote{Id. at 112.}

\section*{F. CONCLUSION – WHERE DO THE RIGHTS OF THE GENETIC
FATHER STAND AFTER MICHAEL H.?}

The divergent opinions in Michael H. mask the real
importance of the case. While Justice Scalia appears to have a
firm majority behind his rejection of the unwed father’s parental
rights, the truth is that he merely garnered a majority in favor of the
result. Only Chief Justice Rehnquist fully joined in Justice
Scalia’s plurality decision.\footnote{Id. at 132.} 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 dealt with the level of analysis when
applying tradition as the standard to determine substantive due
process rights. Nevertheless, although Justices O’Connor and
Kennedy presumably agreed with Justice Scalia’s analysis
regarding the rights of an unwed father, neither provided a
developed discussion or analysis of this view.\footnote{Id. at 132.}
While Justice Stevens also concurred in the judgment, he expressly did not agree with Justice Scalia’s analysis regarding parental rights. Like Justice Brennan, Justice Stevens would have afforded constitutional protection to the genetic father who accepts parental responsibility and establishes a relationship with his child. Justices Marshall and Blackmun joined in Justice Brennan’s dissent, and Justice White also dissented, concluding that biological relationship is relevant and that the standard of *Stanley-Lehr* line of cases should apply.

The end result is that, while five Justices concurred in the judgment, only four agreed regarding the proper approach to adjudicating the rights of unwed fathers. Five Justices would follow the approach in the *Stanley-Lehr* line of cases and recognize constitutional protection for the unwed genetic participatory father. Thus, while the result in *Michael H.* may appear to be a rejection of *Stanley-Lehr* line of cases, the majority of the court—with Stevens joining the four dissenters—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 qualifies as parent appears to be in chaos. Following the plurality in *Michael H.*, a logical conclusion is that each state is free to define parentage however it chooses, and thus, to extend or deny constitutional parental rights almost at will. The one fully articulated definition of the term “parent” taken from the *Stanley-Lehr* line of cases was ignored in by the plurality in

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306. *Id.* at 133 (citing Caban v. Mohammed, 441 U.S. 380, 380 (1979); Stanley v. Illinois, 405 U.S. 645, 645 (1972)).
309. *See id.* at 136 (Brennan, J., dissenting).
310. *Id.* at 132. Justice Stevens parted company with Scalia, Rehnquist, O’Connor, and Kennedy.
311. *See id.* at 136 (Brennan, J., dissenting).
312. *See supra* discussion at Part III.E.3.
Since that time, the United States Supreme Court has yet to articulate a constitutional definition of parent.

Thus, when the opportunity presents itself, the Supreme Court should address the constitutional definition of a parent. In doing so, the Court need not arrive at a unitary definition of parenthood. The definition of a parent has always been pluralistic in that there have always been different definitions for mother and for father. Additionally, a method already exists for sorting out the parental rights between two people who both meet the definition of parents—the “best interests of the child” standard.

Accordingly, the position of the genetic parent should be restored to its pre-

Michael H. role, and the test derived from the collective wisdom of the Stanley-Lehr line of cases should be reaffirmed and expanded. The genetic parent who has established a relationship with his or her child should be considered a parent for constitutional purposes. Finally, the genetic parent should be treated as a parent, even when this parent has not had the opportunity to develop a relationship with the child, in two distinct situations: first, where the parent has been prevented through no fault of his or her own from establishing a relationship; and second, where new parents utilize cutting edge reproductive technology and the state has moved to sever the parent-child relationship before the opportunity to develop such a relationship has arisen.

### A. THE COURT MUST DEFINE PARENT

If the state or the federal government has the absolute power to determine the definition of “parent” for constitutional purposes, then it also has the absolute power to determine who can assert constitutional rights of parents and receive the benefits of the constitutional protections afforded parents. This exact scenario unfolded in Michael H. The state-created definition of “family” excluded Michael, and 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 a relationship with her father, Michael did not satisfy the definition of “father;” and therefore, Victoria was denied her right to have a relationship

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313. Michael H., 491 U.S. at 112.
with him. The plurality even stated that Victoria was not discriminated against because of illegitimacy.\textsuperscript{314} She was not illegitimate according to the state’s definition of parent; rather, since Michael was not her father, she could be not be his daughter, legitimately or illegitimately.\textsuperscript{315}

Prior to \textit{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 no other constitutional criteria existed for determining parenthood except for the standard set forth in the \textit{Stanley-Lehr} line of cases, none was needed. Issues regarding the unwed father were, simply speaking, the only game in town. Conflicts arose 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 because the mother was always and simply the woman who gave birth, except in cases of adoption.

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 perhaps eventually 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 cannot or will not.

Facing this brave new world, it is easy to understand why the Court in \textit{Michael H.} fragmented so thoroughly and why Justice Scalia suffered such a profound disconnect from reality. When he says with dismay at the outset of his discussion, “[t]he facts of this case are, we must hope, extraordinary,”\textsuperscript{316} he appears to be expressing moral outrage. But, more importantly, Justice Scalia reveals his own lack of understanding, or, at least, his lack of acceptance of reality. The facts of \textit{Michael H.} are not

\textsuperscript{314} \textit{Michael H.}, 491 U.S. at 131.
\textsuperscript{315} \textit{Id.}
\textsuperscript{316} \textit{Michael H.}, 491 U.S. at 113.
extraordinary, and new technology has made situations which are truly extraordinary, at least in terms of the vast history of human kind, everyday occurrences. The rule of the Stanley-Lehr line of cases provides with certainty that a genetic parent who has fully developed a relationship with his child is a parent within the meaning of the Constitution. This definition creates at least a starting point for a more universal definition of “parent,” although not necessarily an exclusive definition.

B. MULTIPLE DEFINITIONS

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 definition of parenthood diminish the importance of the genetic parental relationship or the genetic test for parenthood. In light of the very nature of parentage, there have always been at least two people, the mother and the father, who potentially qualify for constitutional protection; and the interests of these two constitutionally protected individuals often conflict in terms of judicial proceedings. 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, but with the added possibility that the father may be established by genetic testing. As such, if the genetic father passes the participation test of the Stanley-Lehr line of cases, he should be 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 parental status.

317. 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 archetypal. See LEO TOLSTOY, ANNA KARENINA (Richard Pevear & Larissa Volokhonsky trans., London, Penguin Books 2000) (1873).

318. According to the Center for Disease Control, Assisted Reproductive Technology (ART) procedures were reported nationwide in 2003, resulting in the birth of 48,756 infants, or approximately 1% of all U.S. infants born during that year. VICTORIA CLAY WRIGHT ET AL., DIV. OF REPRODUCTIVE HEALTH, NAT’L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, ASSISTED REPRODUCTIVE TECHNOLOGY SURVEILLANCE—UNITED STATES, 2003, at 11 (2006), available at http://www.cdc.gov/mmwr/preview/mmwrhtml/00043504.htm (last visited Jan. 4, 2008). In Vitro Fertilization (IVF) was the most frequently used ART procedure during this time. Id.
While it is not the purpose of this article to provide a complete analysis of the conflicting constitutional rights of parents, the analysis is not difficult under the proposition that both parties are parents for the purposes of constitutional analysis. Indeed this conflict is played out on a daily basis. Divorcing couples commonly qualify as the parents of a child in every sense of the word: they are genetic parents, the mother is the birth mother, the father is married to the mother, and both parents have significantly participated in the life of the child and established a close personal relationship with the child, including physical, emotional and financial care. The powers of the state to grant divorce and order custody are accepted without concern for infringement of constitutional rights as long as 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 put 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 competing parents both have constitutional status, the “best interests of the child” standard 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 interests” standard may even sever these rights, at least for a time. For example, one parent can be denied custody and visitation and thereby be prevented from exercising his or her constitutional right of care, control, and custody. In these situations the constitutional analysis recognizes the parents’ fundamental rights, but also notes the 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

319. What the Court in Lehr and Caban call the “interest in personal contact with his child acquires substantial protection under the due process clause” that, when protected, becomes a right. Lehr v. Robertson, 463 U.S. 248, 261 (1983) (citing Caban v. Mohammed, 441 U.S. 380, 392 (1979)).


321. Steven N. Peskind, Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect but Necessary Guidepost to Determine Child Custody, 25 N. ILL. L. REV. 449, 471 (2005) (“On balance, the literature suggests that there simply is no better alternative to the existing best interest standard relied on by virtually all jurisdictions in this country. While each jurisdiction has different ways of determining best interests, the standard remains the substantive formula courts nationwide rely on in determining contested custody disputes.”).
circumstances. Perhaps the “best interests of the child” standard is not narrowly tailored, but it nonetheless has been widely, and for the most part, successfully applied. The important point is that an effective mechanism exists to deal with conflicts between constitutional parents, and since our system allows for competing parties to have parental rights, a pluralistic approach to the definition of the term “parent” should be used to determine who receives this form of constitutional protection.

Additionally, situations may arise where constitutional protection may be extended to functioning parents, as opposed to genetic parents. The classic example of this would be a situation in which babies have been switched in the hospital and have been raised by non-biological functioning parents for a number of years. In this scenario, the functioning parent should have constitutional rights. The same should be true if 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, assuming she had not waived her parental rights. The point is that in a society with a pluralistic view of parenthood, the definition of parent for constitutional purposes can and, indeed, should be pluralistic as well. While difficulties may 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.

322. Peskind, supra note 321, at 471.

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

324. Even in situations in which she had waived these rights, scenarios may exist in which she should be allowed the opportunity to make a case that the best interests of the child require that she should care for the child. For example, where the intended parents refuse to accept the child, the surrogate birth mother, along with the genetic parents, should have genuine standing to compete under the “best interests of the child” standard.

325. 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, it is a mechanism by which important decisions regarding the care and protection of a child can be made when two previously determined competing parents seek to rear a child. There are
C. The Return to the Stanley-Lehr Line of Cases

1. The Failure of Michael H. to Overrule the Principle of the Stanley-Lehr Line of Cases

While the general principle of the Stanley-Lehr line of cases appears to have been eclipsed by Michael H., it is uncertain whether 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 as established in the Stanley-Lehr line of cases.\footnote{326} Although Justice Scalia's plurality opinion, which is definitely hostile to the genetic father, has gained the most notoriety,\footnote{327} the effect and meaning of this opinion are ambiguous to say the least. As a plurality opinion, binding only on the parties as to the result of the decision, it has no precedential effect at all.

Even if the Michael H. decision had resulted in a majority, it

other 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, a court determines who fits the constitutional definition of a parent and may assert the constitutional right to have a relationship with the child; and, second, if the parents cannot agree, the court determines how the responsibility of rearing the child should 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 conceptual level it is also important to remember that the individual steps should not be confused. The “best interests of the child” test should not be used to determine who is a parent in the first place. Further, a third step in the process may be added when a constitutional parent is deemed unfit. In these situations, the rights of that person can be terminated once procedural due process has been observed. See, e.g., Quillon v. Walcott, 494 U.S. 246, 248 (1978) (noting that parental rights may be terminated consistent with due process on a hearing and particularized finding of unfitness of a parent). While a multiplicity of persons may claim constitutional rights as the parent of a particular child, the “best interests of the child” standard is the mechanism for sorting these competing claims to the right to raise the child.

326. Michael H. v. Gerald D., 491 U.S. 110, 136 (1989) (Brennan, J., dissenting) (noting that “[f]our Members of the Court agree that Michael H. has a liberty interest in his relationship with Victoria” along with Justice Stevens, who “assumes for purposes of this case that he does”). See also supra discussion at Part III.F.

327. See Kisthardt, supra note 221, at 585 (noting the importance of the Michael H. decision in the realm of family law). See also Patricia Cohen, Judicial Reasoning Is All Too Human, N.Y. TIMES, June 30, 2001, at B7 (suggesting that “[t]he real inspiration behind Supreme Court Justice Antonin Scalia’s vote to deny the child of an adulterous affair any contact with her natural father was the legend of King Arthur, Guinevere and Lancelot”).
would still remain very difficult to find a useful rule to apply in other cases despite the clear result in the case. If the rule is that the state can define 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 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 that his definition of family may be broader than just a married mother and father and their child, he provides no guidance as to the intricacies of a broader definition other than to conclude that this definition does not include Michael and Victoria.

As discussed above, the majority of Justices in Michael H. actually supported the application of the Stanley-Lehr line of cases to the situation of Michael and Victoria. As such, the principle of these cases, so widely accepted before Michael H., should still be considered good law. Not only does the rationale of the Stanley-Lehr line of cases 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. More importantly, the Stanley-Lehr line of cases provided the most functional and consistent definition of “parent” for constitutional purposes. Michael H. did not reject that definition.

328. Michael H., 491 U.S. at 127.
329. Id.
330. See id. at 136 (Brennan, J., dissenting). See also supra discussions at Part III.E.2 (discussing Justice O’Connor’s concurrence in Michael H., which was joined by Justice Kennedy), Part III.E.3 (discussing Justice Stevens’ concurrence in Michael H.), Part III.E.4 (discussing Justice Brennan’s dissent in Michael H., which was joined by Justices Marshall and Blackmun); Part III.F.
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 revisited today, the substantive due process argument in their favor would be more compelling than it was in earlier times. While it may be true that this line of cases from *Stanley* through *Michael H.* actually contributed to the revitalization of substantive due process following the almost complete demise after *Lochner*, the substantive due process analysis in these cases is incomplete and unsystematic. While the opinions, when viewed chronologically (at least until *Michael H.*), do build upon each other, they provide no consistent theoretical basis for the Courts’ decisions.

In 1972, *Stanley v. Illinois* was decided on equal protection grounds, but the Court mentioned substantive due process without developing its analysis, and also seemed to contemplate procedural due process grounds for its decision. Nevertheless, the equal protection argument is based upon the existence of a fundamental right rather than a suspect classification.

Three years later, the Court in *Quilloin v. Walcott* invoked both the Equal Protection Clause and the Due Process Clauses in adjudicating parental rights. Although the Court did not use the term substantive due process, it spoke in terms of the substantive rights of the unwed father, and concluded that “substantive rights were not violated by application of a ‘best interests of the child’ standard.”

In 1979, *Caban v. Mohammed* applied a well-recognized equal protection approach to gender-based discrimination using

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331. David D. Meyer, *Lochner Redeemed: Family Privacy after Troxel and Carhart*, 48 UCLA L. REV. 1125, 1126 (2001) (“Although the Court has repudiated the interventionism of the Lochner era, it has clung to the narrow sliver of its Lochner-era precedents relating to parents and children.”).

332. *Stanley v. Illinois*, 405 U.S. 645, 657-58 n.10 (1972) (holding “that denying [a fitness] hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause,” but also noting that “the Due Process Clause mandate[d] a fitness hearing for unwed fathers and suggesting a substantive due process basis for the decision based on the fact that ‘[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment’”).

333. See *supra* discussion at Part III.A.

The test established in *Craig v. Boren*. However, the Court did mention the term “substantive due process” and acknowledged the father’s argument under this theory. In the end, the Court concluded that it was not necessary to reach this substantive due process issue, because it had already decided that the father’s equal protection rights had been violated.

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 v. Robertson* had no need to delve into a substantive due process analysis. Nevertheless, it reaffirmed the basic fundamental right of the participatory parent: “substantial protection under the due process clause” is afforded to the unwed father (genetic parent) who “demonstrates a full commitment to the responsibilities of parenthood by ‘com[ing] forward to participate in the rearing of his child.” Although *Lehr* restated the substantive due process right of the participatory parent, the Court still did not set out a definitive substantive due process analysis for that right.

*Michael H. v. Gerald D.* provided the perfect setting for a fully developed analysis of the participatory genetic parent’s substantive due process rights. Michael was the biological/genetic father of his daughter, 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. Michael, Victoria and Victoria’s mother had all actually lived together as a family. These facts presented the perfect case for the Court to make a clear, concise decision with regard to the rights of a participatory unwed genetic father based upon a thorough discussion of substantive due process. However, in the end, the case was simply decided. The Court divided, and the substantive due process discussion

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335. *Caban v. Mohammed*, 441 U.S. 380, 388 (1979) (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)). The Court in *Caban* stated that “[g]ender-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.” *Id.*

336. *Id.* at 394 n.16 (noting that plaintiff’s argument “that he was denied substantive due process when the New York courts terminated his parental rights without first finding him to be unfit to be a parent”).

337. *Id.*; see also supra discussion at Part III.C.


339. *Id.* at 261; see also supra discussion at Part III.D.


341. *Id.*; see also supra discussion at Part III.E.
was side-tracked by the issue of “the most specific level” fundamental rights inquiry. The missing part of the discussion can be simply stated: Are there fundamental rights that deserve substantive protection that have not expressly been protected in our legal tradition? In other words, is there a test for substantive due process rights other than the narrow “tradition” inquiry referred to by Justice Scalia?

Based upon the most recent statement of the rules governing substantive due process, the answer to both of the aforementioned questions is yes. In 1997, Justice Rehnquist made a more complete statement of the substantive due process and fundamental rights analysis than did the Court in *Michael H.* In *Washington v. Glucksburg*, Chief 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,’ 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.’

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343. An interesting subset of this question is whether or not rights can be based on facts that were previously scientifically unknowable. It is true that the 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* (Academic Press 2d ed. 2005), available in excerpt at President’s DNA Initiative, History of Forensic DNA Analysis, http://www.dna.gov/basics/analysishistory (last visited Jan. 4, 2008).
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Chief Justice Rehnquist and the majority in *Glucksberg* expanded the test for a fundamental right beyond the narrow realm of the “history and tradition” analysis first set forth in *Snyder v. Massachusetts*, to a consideration of whether the right is “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” Justice Scalia mentioned this broader test in *Michael H.* at the end of a long footnote, and he seemed to equate it with the tradition test. What he did not appear to realize is that this test, especially as stated by Chief Justice Rehnquist, opens the door to a different form of analysis, one that partially frees the Court from tradition.

In determining the existence of a fundamental right, the “implicit in the concept of ordered liberty” inquiry allows the Court to be prospective. Rather than examining societal mores of the past, the Court can examine whether the current state of society requires that a proposed right be vindicated for the preservation of “ordered liberty.” Importantly, this test also liberates the Court from the limitations on human knowledge that may have existed in the past and that may have skewed prior traditions as they relate to the modern world.

Of course, laws and traditions did not historically protect the genetic parent, due perhaps in large part to the absence of a scientific test to determine the genetic parent’s identity. 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 the genetic father with any real certainty. The five cases treated in 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 merely determining paternity, that step was only recently taken. *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, to the exclusion of the broader “implicit in the concept of ordered liberty” analysis, preempted this

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348. See supra text accompanying note 343.
The exclusive use of the tradition test simply allowed the Court to not take into account the implications of contemporary scientific discoveries.

If the “implicit in the concept of ordered liberty” test had been used, the results of *Michael H.* might have been different. Under this forward-looking test, the Court could have examined the current structure of society in the context of contemporary technology and medical advances. Is the broad rule of the *Stanley-Lehr* line of cases—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 the current concept of ordered liberty? If genetic parents who have nurtured their child, supported their child, and 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 ordered liberty cease to exist?

The answer to both of these questions is yes. It is fundamental to American society and, indeed, to the society of most if not all countries, 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 the law historically prescribed that a child’s parents were the birth mother and her husband, the truth in most cases was that these parents were the genetic parents. The birth mother, until recent times, was always the genetic mother, and her husband was the man most likely to be the genetic father. If one envisions a society in which the state has decreed that children must be raised in some manner other than by genetic participatory parents, that society begins to resemble a dystopia and, indeed, looks that way simply because it involves an extreme deprivation of liberty. On the individual level, if a child were arbitrarily yanked from the home of his or her genetic parents by the state, even when a rational basis supported such an action, it would nonetheless constitute an unjust deprivation. It is, perhaps, easier to envision a future society in which marriage is abolished than to envision 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, the

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349. Justice Scalia mentions the broader test, but appears to merely equate it with the tradition test. *Michael H.*, 491 U.S. at 126 n.6.
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law of support, inheritance hierarchies, and tax laws, among others. However, people could go on living much as they do now. Alternatively, removing children from the care of genetic participatory parents would require a wholesale restructuring of present-day society. Given that the right to marry is a fundamental right, the rights of the genetic participatory parents to have a relationship with their children should likewise be considered fundamental.

While it is not the purpose of this article to analyze the rights of genetic participatory parents from a natural rights perspective, a genetic-biological parent's right to raise his or her children seems to stem from the natural order. If one takes a more positivist approach, it is clear that the role of genetic-biological parents as the primary caretakers of children is self-evident, even if culturally determined. Stated another way, society is organized around groups—families—in which the young are genetically related to those who raise them. While this group structure is not absolute, it is at least the general rule by which the exceptions are measured. Whatever the analytical framework, the 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 suggest that genetic parents cannot waive their rights, nor does it imply that the state cannot sever the ties between genetic parents and their children in some circumstances. However, the state cannot curtail the fundamental parental rights of a genetic participatory parent without asserting the highest form of state interest, a compelling interest, such as the best interest of the child in divorce cases or the safety and welfare of the child in cases of abuse, unfitness, abandonment, or neglect.

V. CONCLUSION: STANLEY, QUILLOIN, CABAN, LEHR—REDUX

The Stanley-Lehr line of cases collectively established that an unwed father who has nurtured a relationship with his child by participating psychologically and financially in the child’s life, has a constitutional right to maintain that relationship. While the United States Supreme Court has established other constitutional rights for parents, no other case or group of cases has determined definitively who qualifies as parents for the purposes of adjudicating parental rights under the Constitution. While the plurality decision of Michael H. declined to apply the
principles set forth in the Stanley-Lehr line of cases, neither the plurality nor the majority of the Justices who wrote separately from Justice Scalia overruled these older cases. Indeed, five Justices—Brennen, Blackmun, Marshall, White and Stevens—in Michael H. actually approved of the principle. Moreover, if courts were to consider this principle today, modern substantive due process should dictate that the genetic participatory parent has a fundamental right to enjoy the full panoply of constitutional parental rights.

Additionally, because of the effect of modern technology on the process of conception and birth, the principles of the Stanley-Lehr line of cases should no longer be limited to unwed fathers; a claim of a mother, such as a surrogate or an ova donor, may now be based on her status as a genetic participatory parent. The principle that the genetic participatory parent has the same fundamental parental rights afforded to traditional, unitary-family parents under the Constitution does not preclude the possibility that there are other constitutional parents, whose rights may have to be balanced against other types of parents. However, balancing the right of constitutional parents occurs in every divorce under the long-established and widely used “best interests of the child” standard. As such, a pluralistic constitutional definition of parenthood should pose no problem in the context of fundamental parental rights, since the definition of parenthood has always included at least two persons. As to the aforementioned factual scenarios which began this article, the mother and father in the hypothetical and the donor mother in K.M. v. E.G. are all genetic participatory parents whose constitutional rights should be protected under the Stanley-Lehr line of cases, even in the wake of Michael H.