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Rethinking Parental Rights: It's Time to Move to Procedural Due Process

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ABSTRACT

Should substantive due process be replaced? Justice Clarence Thomas and others have recently reignited the debate surrounding substantive due process, causing advocates of parental rights to feel uneasy. They are concerned about suggestions to reverse certain Supreme Court decisions relying on substantive due process—like Justice Thomas's suggestion in his concurrence in *Dobbs v. Jackson*—because parental rights cases have traditionally relied on substantive due process. Given the uncertainty arising from Justice Thomas's disparagement of substantive due process, no one should assume that the outcome of a parental rights case will follow the normal ideological divide on the Supreme Court. Accordingly, a parental rights theory that is accurately grounded in constitutional originalism is the need of the hour.

This Article attempts to begin the conversation of how to think about federal constitutional protection for parental rights without reliance upon substantive due process. It identifies two fundamental problems with substantive due process that leave the doctrine open to just criticism. First, the determination of which rights are "liberty interests" protected by an Amendment is far too easily manipulated by judges to match their favored policy outcomes. Second, the standard of "strict judicial scrutiny," which is supposed to follow the conclusion that a particular right is a "fundamental liberty interest," still allows judges a great deal of opportunity to inject their policy preferences into a determination that a certain state interest is or isn't sufficiently "compelling" or "narrowly tailored" to satisfy the "test."

However, this Article acknowledges that it does not intend to solve these much larger problems; instead, it proposes that parental rights cases should

be decided under the framework of procedural due process. It observes that a clear majority of the Supreme Court's parental rights cases (seven of thirteen) have employed procedural due process as the framework for decision and, as a result, parental rights cases fit squarely into this framework. Governments operating under our Constitution may not assert their authority over children until there is first some proof that the parents have breached their responsibilities. As a result, there is no logical, textual, or historical reason why governmental invasions into some component of a parent's custodial decision-making should be decided by a different legal standard from the one employed when the government seeks to remove custodial decision-making authority entirely. We do not need substantive due process to protect parental rights. Instead, give parents a fair trial and make the government first prove harm before it is allowed to intervene.

AUTHOR

Michael Farris has been engaged in constitutional practice since 1976. He has led a variety of non-profit legal organizations which have often focused considerable attention on parental rights. He was the founding President of Home School Legal Defense Association and ParentalRights.Org. He was also the founding President of Patrick Henry College where he taught Constitutional Law and coached the Moot Court team to multiple national championships and one world championship. He served as the President and CEO of Alliance Defending Freedom 2017–2022. He currently serves in a part time capacity as General Counsel for National Religious Broadcasters. He also is a Senior Advisor to the Convention of States Project. Farris has argued and won two First Amendment cases in the US. Supreme Court and has argued other constitutional cases in eight federal circuit courts of appeals and the appellate courts of thirteen states. He and his wife, Vickie, have, as of the date of publication, ten children, thirty grandchildren, and one great-grandchild. Farris earned his JD from Gonzaga University School of Law (with honors) in 1976 and his LLM in Public International Law from the University of London (with honors) in 2011.

ARTICLE

RETHINKING PARENTAL RIGHTS: IT'S TIME TO MOVE TO PROCEDURAL DUE PROCESS

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Should substantive due process be replaced? Justice Clarence Thomas and others have recently reignited the debate surrounding substantive due process, causing advocates of parental rights to feel uneasy. They are concerned about suggestions to reverse certain Supreme Court decisions relying on substantive due process—like Justice Thomas's suggestion in his concurrence in Dobbs v. Jackson*—because parental rights cases have traditionally relied on substantive due process. Given the uncertainty arising from Justice Thomas's disparagement of substantive due process, no one should assume that the outcome of a parental rights case will follow the normal ideological divide on the Supreme Court. Accordingly, a parental rights theory that is accurately grounded in constitutional originalism is the need of the hour.*

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substantive due process that leave the doctrine open to just criticism. First, the determination of which rights are "liberty interests" protected by an Amendment is far too easily manipulated by judges to match their favored policy outcomes. Second, the standard of "strict judicial scrutiny," which is supposed to follow the conclusion that a particular right is a "fundamental liberty interest," still allows judges a great deal of opportunity to inject their policy preferences into a determination that a certain state interest is or isn't sufficiently "compelling" or "narrowly tailored" to satisfy the "test."

However, this Article acknowledges that it does not intend to solve these much larger problems; instead, it proposes that parental rights cases should be decided under the framework of procedural due process. It observes that a clear majority of the Supreme Court's parental rights cases (seven of thirteen) have employed procedural due process as the framework for decision and, as a result, parental rights cases fit squarely into this framework. Governments operating under our Constitution may not assert their authority over children until there is first some proof that the parents have breached their responsibilities. As a result, there is no logical, textual, or historical reason why governmental invasions into some component of a parent's custodial decision-making should be decided by a different legal standard from the one employed when the government seeks to remove custodial decision-making authority entirely. We do not need substantive due process to protect parental rights. Instead, give parents a fair trial and make the government first prove harm before it is allowed to intervene.

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I. INTRODUCTION

Justice Clarence Thomas ignited a firestorm with his concurring opinion in *Dobbs v. Jackson Women's Health Org.*[1] He chose this momentous occasion to reiterate his view that the theory of substantive due process, which, of course, produced the decision of *Roe v. Wade*, was without constitutional foundation.[2] This was certainly not the first time that Justice Thomas had declared his opposition to the theory of substantive due process in a concurring or dissenting opinion.[3]

However, Justice Thomas went even further on this occasion, suggesting that all Supreme Court cases that have relied upon this theory should be "reconsider[ed] . . . [b]ecause any substantive due process decision is 'demonstrably erroneous.'"[4] Justice Thomas cited *Griswold v. Connecticut*,[5] *Lawrence v. Texas*,[6] and *Obergefell v. Hodges*,[7] as examples of cases meriting reconsideration and likely reversal.[8]

While many of the political opponents of the Justice's views used the occasion to launch opportunistic and over-blown political initiatives,[9] many of the Justice's ideological friends breathed a sigh of relief that he did not

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[1] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 330 (2022) (Thomas, J., concurring).

[2] *Id.* at 332 (Thomas, J., concurring) ("Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion.").

[3] *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1424 (2020) (Thomas, J., concurring); Johnson v. United States, 576 U.S. 591, 613 (2015) (Thomas, J., concurring); Obergefell v. Hodges, 576 U.S. 644, 722 (2015) (Thomas, J., dissenting); McDonald v. City of Chicago, 561 U.S. 742, 805 (2010) (Thomas, J., concurring).

[4] *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring) (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1424 (2020)).

[5] Griswold v. Connecticut, 381 U.S. 479 (1965).

[6] Lawrence v. Texas, 539 U.S. 558 (2003).

[7] *Obergefell*, 576 U.S. 644.

[8] *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring).

[9] *See, e.g.*, Mary Clare Jalonick, *Landmark Same-Sex Marriage Bill Wins Senate Passage*, ASSOCIATED PRESS (Nov. 30, 2022, 9:15 AM), https://apnews.com/article/biden-religion-gay-rights-marriage-clarence-thomas-2d09d9213472d04195c64d09644f124c.

cite any parental rights cases, which also rely on substantive due process, as deserving reversal.[10]

Justice Thomas strongly defended parental rights in the last major parental rights case before the Court, *Troxel v. Granville*.[11] He was the only Justice to acknowledge that parental rights were a fundamental liberty interest and then followed that determination by stating that the traditional strict judicial scrutiny standard should apply.[12] Yet, even in this strong pro-parental rights opinion, Justice Thomas opened his concurrence in *Troxel* with this attention-grabbing statement:

> I write separately to note that neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision. As a result, I express no view on the merits of this matter, and I understand the plurality as well to leave the resolution of that issue for another day.[13]

However, in his dissent in *Troxel*, Justice Antonin Scalia went much further in his denunciation of substantive due process as a basis for the protection of parental rights:

> Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children—two of them from an era rich in substantive due process holdings that have since been repudiated. The sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to *stare*

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[10] *See, e.g.*, Ethan Carlson, *Parental Vaccine Refusal as a Fundamental Right: Why* Jacobson v. Massachusetts *Cannot Justify Rational Basis Review for Compulsory Vaccine Mandates Applied to Minor Children*, 17 LIBERTY U. L. REV. 279, 312 (2023).

[11] *See* Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring).

[12] *Id.*

[13] *Id.*

> *decisis* protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.[14]

Justice Thomas is the only current member of the Court to have considered *Troxel*. Accordingly, we do not know with certainty the positions of any other current Justice on this topic. But given these views from Justice Thomas and Justice Scalia, parental rights advocates have an acute need to shore up our arguments and constitutional analysis. In a close case, we simply cannot afford to lose a single vote in a case before the Supreme Court.

Moreover, we live in a day where parental rights are a major source of political conflict.[15] It naturally follows that such disputes will often end up in contentious litigation. Given the uncertainty arising from Justice Thomas' disparagement of substantive due process, no one should assume

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[14] *Id.* at 92 (Scalia, J., dissenting) (first citing Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923); then citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); then citing Wisconsin v. Yoder, 406 U.S. 205, 232–33 (1972); and then citing *Cf.* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling Adkins v. Children's Hospital of D.C., 261 U.S. 525 (1923))).

[15] *See, e.g.*, Emma Brown & Peter Jamison, *The Christian Home-Schooler Who Made 'Parental Rights' a GOP Rallying Cry*, WASH. POST (Aug. 29, 2023, 7:00 AM), https://www.washingtonpost.com/education/2023/08/29/michael-farris-homeschoolers-parents-rights-ziklag/; Kristine Phillips, *Indiana Parents Asking U.S. Supreme Court to Take Case Involving Custody of Trans Teen*, INDYSTAR., https://www.indystar.com/story/news/2023/12/14/indiana-dcs-parental-rights-transgender-rights-supreme-court-petition-indiana-lgbtq-aclu-todd-rokita/71815606007/ (last updated Dec. 14, 2023, 9:20 AM); Jordan B. Darling, *1,000 March in Fontana to Support Parental Notification Policies in Schools*, THE SUN, https://www.sbsun.com/2024/01/13/10000-march-in-fontana-to-support-parental-notification-policies-in-schools/ (last updated Jan. 17, 2024, 2:50 PM); Dana Goldstein, *In School Board Elections, Parental Rights Movement is Dealt Setbacks*, N.Y. TIMES (Nov. 8, 2023), https://www.nytimes.com/2023/11/08/us/parental-rights-school-board-elections.html.

that the outcome of a parental rights case will follow the normal ideological divide on the Supreme Court. Accordingly, a parental rights theory that is accurately grounded in constitutional originalism is the need of the hour.

As a parental rights advocate with over forty years of experience and as a committed originalist, I offer this analysis to at least begin the conversation of how to think about federal constitutional protection for parental rights without reliance upon substantive due process.

Let me say, however, that it is beyond the scope of this Article and maybe beyond the intellectual scope of any living human being to totally "fix" the problems associated with substantive due process.

Professor Erwin Chemerinsky offers what may be the most succinct explanation of the difference between procedural and substantive due process.

> I start briefly with the first question, what is substantive due process, because, strangely enough, if you look through Supreme Court opinions you will never find a definition. Substantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose. Procedural due process, by contrast, asks whether the government has followed the proper procedures when it takes away life, liberty or property. Substantive due process looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation.[16]

Far too much of our law is grounded on substantive due process for it to be plausible to suggest that a majority of the Court will attempt to reverse this entire body of law in the foreseeable future.

For starters, the doctrine of the selective incorporation of the Bill of Rights arises from substantive due process.[17] The idea that the Fourteenth Amendment's Due Process Clause acts to make certain provisions of the Bill of Rights binding upon states began with the 1925 decision of *Gitlow v.*

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[16] Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999).

[17] *Id.* at 1508.

New York.[18] It is not difficult to read and digest the Court's reasoning for its discovery of this new legal doctrine. The entire discussion consists of a single sentence.

> For present purposes, we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.[19]

The decision in *Gitlow* was announced on June 8, 1925[20]—exactly one week after the Court had used the Due Process Clause to uphold the right of parents to choose private education for their children in *Pierce v. Society of Sisters*.[21] Apparently, the Court believed that if parental rights are constitutionally protected against state intrusion, then no explanation or authority was needed to justify extending such protection to freedom of speech.

Even with these misgivings about substantive due process, no current justice appears to have any interest in reversing the ultimate conclusion of the incorporation doctrine. Justice Thomas himself used that doctrine quickly and decisively in *National Institute of Family and Life Advocates v. Becerra*.[22] Chief Justice Roberts, along with Justices Scalia and Kennedy, joined in the opinion by Justice Alito in *McDonald v. Chicago,* which retained the Due Process Clause as the source for incorporating the Second Amendment.[23] However, in M*cDonald,* Justice Thomas wrote separately to

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[18] *See* Gitlow v. New York, 268 U.S. 652, 664 (1925).

[19] *Id.* at 666.

[20] *Id.* at 652.

[21] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[22] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018) ("The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech.").

[23] McDonald v. City of Chicago, 561 U.S. 742, 759–86 (2010).

argue that the incorporation doctrine should be recast as rising from the Privileges and Immunities Clause of the Fourteenth Amendment.[24]

There are two fundamental problems with substantive due process which leave it open to just criticism—and both involve the opportunity for unbridled judicial discretion.

First, the determination of which rights are "liberty interests" protected by the Fourteenth Amendment is far too easily manipulated by judges to match their favored policy outcomes. Second, the standard of "strict judicial scrutiny," which is supposed to follow the conclusion that a particular right is a "fundamental liberty interest," still allows judges a great deal of opportunity to inject their policy preferences into a determination that a certain state interest is or isn't sufficiently "compelling" or "narrowly tailored" to satisfy the requirements of the "test."

Even though I am distrustful of virtually every judicial balancing test because of the prospect of injecting subjective policy preferences into what are supposed to be objective legal decisions, this is not the occasion to solve that much, much larger problem.[25]

II. AN OVERVIEW OF A REVISED APPROACH TO PARENTAL RIGHTS

The solution I propose is actually quite modest. It begins with the observation that a clear majority of the Supreme Court's parental rights cases (seven of thirteen) have employed procedural due process as the framework for decision.[26] Every single Justice serving on the Court for these

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[24] *Id.* at 805–06.

[25] I favor the approach of the Fourth Amendment jurisprudence. The protection against warrantless searches and seizure is essentially absolute, with two historically-grounded exceptions: consent or a search pursuant to exigent circumstances with probable cause. *See, e.g.*, Kentucky v. King, 563 U.S. 452, 462–63 (2011). All rights could be handled in a similar manner. The textually-recognized constitutional rights should be assumed to be absolute unless the government demonstrates the existence and applicability of a historically-grounded exception.

[26] Of the thirteen parental rights cases decided by the Court, seven were decided under the doctrine of procedural due process. *See infra* text accompanying notes 71–72.

seven cases agreed that parental rights are protected by the requirements of procedural due process.[27] This list includes both Justices Thomas and Scalia.

Like all procedural due process cases, the core question in these parental rights cases was: What process is due? To be sure, the Court was not always unanimous on whether a particular procedure was required—such as, the necessity of court-appointed counsel[28] or the required burden of proof in parental deprivation proceedings.[29] But all Justices agreed that the Due Process Clause was applicable and that parental rights are a protected liberty interest meriting a constitutionally appropriate process to justify any deprivation.

All seven of these cases have involved some form of complete termination of a parent's custody. The central contention of this Article is that the procedural due process framework employed for complete removal of parental custodial rights should also be employed when the government seeks to interfere with one element of a parent's custodial rights.

While parental rights have been described by the Court as "[Far] more precious . . . than property rights,"[30] a frequently used metaphor from property rights law provides a helpful analogy.

The rights of a property owner include, *inter alia,* the ability to exclude others from one's property,[31] the rights to the minerals below the land,[32] the timber on the land,[33] the right to use water,[34] and the ability to pass property by descent to one's heirs.[35] An individual element of property rights has often been described as a "stick in the bundle of rights."[36] The constitutional

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[27] *See* discussion *infra* Part III.

[28] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 33–35 (1981).

[29] Santosky v. Kramer, 455 U.S. 745, 769–70 (1982).

[30] *Lassiter,* 452 U.S. at 38 (Blackmun, J., dissenting) (alteration in original) (quoting May v. Anderson, 345 U.S. 528, 533 (1953)).

[31] *See, e.g.*, Aetna v. United States, 444 U.S. 164, 176, 179–80 (1979).

[32] Arizona v. Navajo Nation, 599 U.S. 555, 563 (2023).

[33] *Id.*

[34] *Id.*

[35] *See* Hodel v. Irving, 481 U.S. 704, 716 (1987).

[36] *See, e.g.*, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) (citing Aetna v. United States, 444 U.S. 164, 176, 179–80 (1979)).

standards for a government taking are applicable whether the taking consists of the entire bundle or just one stick.[37]

The "bundle of sticks" metaphor has been discussed in conjunction with other rights that contain distinct elements, including possessing firearms[38] and aspects of trademark rights—although the analogy was unsuccessful in achieving its desired result in the latter case.[39]

Most importantly, for present purposes, the "bundle of sticks" metaphor has been used by the Court to describe the collection of decision-making authority possessed by parents. The Court was required to determine which elements of parental decision-making fell within the ambit of parental custodial rights in the 2010 decision of *Abbott v. Abbott*.[40]

The issue in *Abbott* was whether a father's right to decide the country of the child's residence constituted a custodial right within the meaning of the International Child Abduction Remedies Act,[41] which implements the Hague Convention on the Civil Aspects of International Child Abduction.[42] "The Convention provides that a child abducted in violation of 'rights of custody' must be returned to the child's country of habitual residence . . . ."[43]

The child's mother had legal custody of the child, but the father held a right to consent before their son could be removed from Chile.[44] The ultimate question in the case was whether the father's right of consent was a "right of custody" or a "right of access."[45] The majority held that the determination of the child's country of residence was indeed a right of

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[37] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030–31 (1992).

[38] Henderson v. United States, 575 U.S. 622, 626 (2015).

[39] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999).

[40] *See* Abbott v. Abbott, 560 U.S. 1, 5 (2010).

[41] *Id.*; International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified as amended at 42 U.S.C. § 11601).

[42] *See* Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670.

[43] *Abbott*, 560 U.S. at 5.

[44] *Id.*

[45] *See id.* at 13.

custody—which was critical since the treaty language involved protected only rights of custody and not rights of access to the child.[46]The majority made it clear that "our own legal system has adopted conceptions of custody that accord with the Convention's broad definition"—citing the common practice of joint custody, which regularly parses out various aspects of parental decision-making between divorcing parents.[47]

The mother's rights were described, by the dissent, to include making the following kinds of decisions: "whether h[er] son undergoes a particular medical procedure; whether h[er] son attends a school field trip; whether and in what manner h[er] son has a religious upbringing; or whether h[er] son can play a videogame before he completes his homework."[48] In fact, the dissent rejected the idea that the right of the father to refuse to allow his son to leave the country of residence (Chile) was a right of custody.[49] The dissent claimed that his right to make the decision about the country of residence was *not* "one stick in the bundle" of a parent's custodial rights.[50]

Thus, it has been clearly determined by the Supreme Court that parental decision-making rights are elements of parental custody and that interference with only one of these rights—such as the right to decide the child's country of residence—is sufficient to constitute an interference in custody.

This case lays the rhetorical foundation for the constitutional argument advanced here. The same constitutional standard should be employed when the government seeks to interfere with one element of parental rights as it does when the "entire bundle of sticks" is challenged by government action.

A. The Rights of Parents Are Deeply Grounded in the History of our Nation and Jurisprudence

Since our goal is to seek an originalist approach to re-examine the constitutional foundation for parental rights, it is, of course, more than

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[46] *Id.* at 11–13.

[47] *Id.* at 12.

[48] *See id.* at 23 (Stevens, J., dissenting).

[49] Abbott v. Abbott, 560 U.S. 1, 30 (2010) (Stevens, J., dissenting).

[50] *Id.* (Stevens, J., dissenting).

appropriate to begin with the history of parental rights in Anglo-American jurisprudence.

1. Blackstone and Locke

Since we are looking for a theory of parental rights that is consistent with constitutional originalism, we begin with history.

Blackstone enumerates three categories of rules that govern the relationship of parent and child: "1. The legal duties of parents to their legitimate children. 2. Their power over them. 3. The duties of such children to their parents."[51] The law of England imposed "an obligation on every man to provide for those descended from his loins."[52] This obligation included all the basics of life (food, shelter, clothing, and medical care), and "[t]he last duty of parents to their children is that of giving them an education suitable to their station in life."[53] These rules were followed in early American cases so that parents were understood to be clothed with the presumptive authority to make all necessary decisions touching on such matters, such as the manner of the child's education.[54]

In Britain, the ability of parents to direct the religious education of their children was limited by the general principles of religious intolerance that controlled England during Blackstone's era. Catholic parents were prohibited from withholding needed care and maintenance as a means of compelling their Protestant child "to change his religion."[55] Catholic parents were likewise prohibited from sending their child abroad "to be instructed, persuaded, or strengthened in the popish religion."[56] Catholic schools were not lawful, and thus, foreign education was the only available method for ensuring one's child received such an education.[57] But a

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[51] 2 WILLIAM BLACKSTONE, COMMENTARIES *446.

[52] *Id.* at *448.

[53] *Id.* at *450 (emphasis omitted).

[54] *See, e.g.*, Everett v. Sherfey, 1 Iowa 357, 360 (1855) (describing the right to control education).

[55] BLACKSTONE, *supra* note 51, at *449.

[56] *Id.* at *451.

[57] JOHN MILLER, THE GLORIOUS REVOLUTION 4 (Taylor & Francis Group, 2d ed. 1997).

footnote in a later edition of Blackstone notes that this provision of English law against Catholic education had been repealed as a component of "the statute for the emancipation of the Roman Catholics."[58]

The power of the parent flows logically from the duties owed to one's children. The power of custody was plenary but not absolute.

> The father is in the first instance entitled to the custody of the children; but the courts will exercise a sound discretion for the benefit of the children, and in some cases will order them into the custody of a third person, when both parents are immoral, grossly ignorant, and unfit to be intrusted [sic] with their care and education.[59]

John Locke took a similar, albeit far more egalitarian, approach to parental rights. In his Second Treatise on Government, Locke's Chapter entitled "Of Paternal Power" begins with a critique of the focus on an unbalanced priority of the role of the father.[60] He suggests that some may consider it "an impertinent criticism . . . to find fault with words and names," but the phrase "paternal power" seems "to place the power of parents over their children wholly in the father, as if the mother had no share in it; whereas, if we consult reason or revelation, we shall find, she hath an equal title."[61] Citing verses in both the Old and New Testament, Locke argues that the Bible presents the complementary role of the parents "without distinction, when it commands the obedience of children."[62]

The idea that all people are born into a full state of equality is a central premise of Locke's political philosophy, yet he tempers this concerning children: "Children, I confess, are not born *in* this full state of equality, though they are born *to* it. Their parents have a sort of rule and jurisdiction over them, when they come into the world, and for some time after; but it is

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[58] BLACKSTONE, *supra* note 51, at *451 n.9.

[59] *Id.* at *451 n.10.

[60] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 18 (Project Gutenberg Ebook 2012) (1690).

[61] *Id.*

[62] *Id.*

but a temporary one."[63] Starting with Adam and Eve, Locke argues that "after them all parents were, by the law of nature, under an obligation to preserve, nourish, and educate the children they had begotten; not as their own workmanship, but the workmanship of their own maker, the Almighty, to whom they were to be accountable for them."[64]

Locke then states a timeless principle that dominates Anglo-American thinking about children and parents: "The power, then, that parents have over their children, arises from that duty which is incumbent on them, to take care of their off-spring, during the imperfect state of childhood."[65]

Civil government may not interfere with this governance of the child by his parents, Locke contends:

> [P]arents in societies, where they themselves are subjects, retain a power over their children, and have as much right to their subjection, as those who are in the state of nature. . . . [T]hese two powers, political and paternal, are so perfectly distinct and separate; are built upon so different foundations, and given to so different ends, that every subject that is a father, has as much a paternal power over his children, as the prince has over his . . . .[66]

Like Blackstone, Locke contends that parental authority is not absolute but subject to the natural limitations flowing from a situation where parents fail to perform their duties to care for their children. "[T]he father's power of commanding extends no farther than the minority of his children, and to a degree only fit for the discipline and government of that age . . . ."[67]

The Supreme Court has recognized this common-law heritage of parental rights:

> Thus, the American common-law rule came to be that "the parent stands in court as the real party in interest, upon his

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63 *Id.* at 19 (emphasis added).

64 *Id.*

65 *Id.* at 20.

66 LOCKE, *supra* note 60, at 23.

67 *Id.* at 24.

> natural right of parent; but he is liable to be defeated by his own wrongdoing or unfitness and by the demands and requirements of society that the well-being of the child shall be deemed paramount to the natural rights of an unworthy parent."[68]

The Supreme Court's recognition of the common-law heritage of parental rights encapsulates the preservation of Blackstone and Locke's theories in Anglo-American jurisprudence.

2. The Supreme Court's Broad Affirmation of Parental Rights

The Supreme Court record has unmistakably embraced these principles of common law and transformed them into a nearly universally accepted constitutional right.

Wisconsin v. Yoder:

"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."[69]

Moore v. City of East Cleveland, Ohio:

"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."[70]

Troxel v. Granville:

"The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[71]

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[68] Lehman v. Lycoming Cnty. Child.'s Servs. Agency, 458 U.S. 502, 524 (1982) (Blackmun, J., dissenting) (quoting W.L. Hand, *Habeas Corpus Proceedings for the Release of Infants*, 56 CENT. L. J. 385, 389 (1903)).

[69] Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

[70] Moore v. E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion).

Parham v. J.R.:

> 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."[72]

These broad proclamations are buttressed by the fact, as we demonstrate in detail in the next section, that no Supreme Court Justice has ever dissented from the idea that parental rights are a protected liberty interest subject to the standards of procedural due process when a parent's custodial rights are challenged *in toto*. As we will discover below in our detailed discussion of all thirteen Supreme Court cases which have focused on parental rights, there is considerable debate as to the parameters of the right; but every Justice who has considered a procedural due process claim of parental rights has embraced the conclusion that parents possess a constitutionally protected liberty interest.

III. THE DISTINCTIONS BETWEEN PROCEDURAL AND SUBSTANTIVE DUE PROCESS MASK AN UNDERLYING UNANIMOUS SUPPORT FOR PARENTAL RIGHTS AS A PROTECTED LIBERTY INTEREST

The Supreme Court has decided thirteen cases where some form of due process protection for parental rights has been central to the outcome of the case. These can be divided into three basic groups:

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[71] Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion).

[72] Parham v. J.R., 442 U.S. 584, 602 (1979) (alteration in original) (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925)).

1. Cases involving the termination of parental rights[73]

2. Cases involving parental rights claims of unwed or inactive fathers when their child is being adopted[74]

3. Cases involving governmental interference with a particular area of parental decision-making[75]

The cases in the first two groups have employed the framework of procedural due process.[76] Cases in the third group have, with one exception, been decided on what amounts to a substantive due process claim—although that nomenclature did not yet exist in most of these cases.

The one exception in the third group is *Parham v. J.R.*, which came to the Court primarily as a procedural due process claim for juveniles who were involuntarily committed to mental care institutional care.[77] However, the right of parents to direct the medical care of their child was central to the ultimate holding in this procedural due process case.[78] Thus, the substantive rights of parents were considered in reaching a question about the procedural rights of their children.

But the most fundamental question concerning all three categories is this: Why does the Due Process Clause *ever* protect parental rights? The

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[73] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (concerning the right to counsel in termination proceedings); Santosky v. Kramer, 455 U.S. 745 (1982) (concerning the burden of proof); M.L.B. v. S.L.J., 519 U.S. 102 (1996) (concerning the right to a transcript for appeal).

[74] Armstrong v. Manzo, 380 U.S. 545 (1965); Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978); Lehr v. Robertson, 463 U.S. 248 (1983).

[75] Meyer v. Nebraska, 262 U.S. 390 (1923) (education); *Pierce*, 268 U.S. 510 (education); Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor); Wisconsin v. Yoder, 406 U.S. 205 (1972) (education); *Parham*, 442 U.S. 584 (medical treatment); *Troxel*, 530 U.S. 57 (control of visitation).

[76] *Quilloin* is one case in this grouping that might be classified by some as involving substantive due process. However, a better approach affirms that it is correctly analyzed as a procedural due process case. *See infra* text accompanying notes 116–29.

[77] *Parham,* 442 U.S. at 587.

[78] *Id.* at 602.

Due Process Clause only protects "life, liberty, or property."[79] This is true regardless of whether we are considering procedural due process or substantive due process claims.

Few constitutional theories can claim to have been endorsed by every single Justice who has been required to decide a case using that theory. But as we will see, in every procedural due process case involving parental rights, every single Justice has approved the basic idea that parental rights are a protected liberty interest that cannot be terminated without compliance with the standards of procedural due process.

A. Termination Cases

In the three termination cases (*Lassiter v. Department of Social Services, Santosky v. Kramer*, and *M.L.B. v. S.L.J.*), every opinion (majority, concurring, or dissenting) embraced the idea that a parent's right to custody was a protected liberty interest that necessitated compliance with procedural due process. The differences among these opinions were disagreements concerning over what process was due. No Justice questioned the presence of a constitutionally protected interest.

In *Lassiter*, the Court was asked to decide whether procedural due process requires the appointment of counsel for indigent parents in termination cases. Four separate opinions divided the Court on this question. The answer, "it depends," was adopted by five Justices in the majority opinion authored by Justice Potter Stewart.[80]

The majority held that in more complex cases, due process requires the appointment of counsel; while in simpler cases, including the one before it, procedural due process can be satisfied by other factors without the need for the appointment of counsel.[81] The Court described its task as "Applying the Due Process Clause" to discover whether the parent had received

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[79] U.S. Const. amend. XIV, § 1.

[80] *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31–32 (1981) (joining Justice Stewart were Chief Justice Burger, and Justices White, Powell, and Rehnquist).

[81] *See id.*

"fundamental fairness."[82] The Court only applies the Due Process Clause when a protected liberty interest is present.

Chief Justice Burger's concurring opinion is a brief note focused on the peculiar facts of the case and in no sense undermines his participation in the majority opinion which clearly established the protected nature of the parental interest.[83] Justice Blackmun's dissent, joined by Justices Brennan and Marshall, argues that procedural due process mandates the appointment of counsel in all parental termination cases.[84]

Likewise, Justice Stevens' separate dissenting opinion contrasts two judicial proceedings that were underway for Ms. Lassiter. In addition to this termination proceeding, she was simultaneously being tried for murder.[85] Arguing that due process applied in both proceedings, Justice Stevens wrote, "The plain language of the Fourteenth Amendment commands that both deprivations [of jail time and termination of custody] must be accompanied by due process of law."[86] Justice Stevens contended that procedural due process required appointment of counsel in both cases.[87]

In *Santosky v. Kramer*, the Court concluded that the Due Process Clause requires that the government carry its burden of proving harm by the parent to the child by more than a mere preponderance of the evidence in a termination case.[88] The standard of proof by clear and convincing evidence was adopted by the majority of five Justices (Blackmun, Brennan, Marshall, Powell, and Stevens).[89]

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[82] *Id.* at 24–25.

[83] *See id.* at 34–35 (Burger, C.J., concurring).

[84] *Id.* at 35 (Blackmun, J., dissenting) ("[D]ue process requires the presence of counsel . . . .").

[85] *Id.* at 20–21.

[86] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 59 (1981) (Stevens, J., dissenting).

[87] *Id.* (Stevens, J., dissenting).

[88] Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) ("Today we hold that the Due Process Clause of the Fourteenth Amendment demands more than this. Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.").

[89] *Id.* at 745.

The four dissenters (Rehnquist, Burger, C.J., White, O'Connor) disputed that the Constitution required this level of proof.[90] The dissenters emphasized their view that parental rights were indeed a protected liberty interest by quoting *Stanley v. Illinois*, for the proposition that "a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"[91] They simply contended that the preponderance of the evidence standard was constitutionally sufficient.[92]

The third termination case is similar to *Lassiter* but with an arguably opposite outcome. In *M.L.B. v. S.L.J.*, an indigent mother was unable to appeal the termination of her parental rights because she could not pay for a transcript required for her appeal.[93] Justice Ginsburg wrote the majority opinion which held that procedural due process required the state to waive payment for such a transcript.[94] The majority also relied on the equal protection rights of indigent persons as an additional ground for their conclusion.[95]

Justice Ginsburg was joined by Justices Stevens, O'Connor, Souter, and Breyer.[96] Moreover, Justice Ginsburg buttressed her argument by pointing out that every Justice in both *Lassiter* and *Santosky* endorsed the general principle that parental rights are a protected liberty interest: "Although both *Lassiter* and *Santosky* yielded divided opinions, the Court was unanimously of the view that 'the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty

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[90] *Id.* at 791 (Rehnquist, J., dissenting).

[91] *Id.* at 787 (quoting Lassiter v. Dept. of Soc. Servs., 452 U.S. 18, 27 (1981) (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972))).

[92] *Id.* at 791.

[93] M.L.B. v. S.L.J., 519 U.S. 102, 106 (1996).

[94] *Id.* at 107.

[95] *Id.*

[96] *Id.* at 102.

interests protected by the Fourteenth Amendment.'"[97] Justice Kennedy concurred in the result.[98] His sole point of difference was the use of equal protection as an additional ground for the holding.[99] He contended that the requirements of procedural due process were sufficient.[100]

Chief Justice Rehnquist again dissented very briefly, but joined all but one section of Justice Thomas's opinion.[101] Justice Thomas's dissent (joined by Scalia and Rehnquist, C.J.) quotes the *Lassiter* language to conclude that "on several occasions in this century" the Court has held that "the interest of parents in maintaining their relationships with their children" requires "protection."[102] It is clear that the required "protection" is for government to comply with the standard of due process of law. The dissenters again endorsed the protected nature of parental rights as a liberty interest, but dissented from the holding that procedural due process required a free appellate transcript.[103]

Again, in every termination case decided by the Supreme Court, every single Justice has agreed with the proposition that parental rights are a protected liberty interest that may not be terminated without compliance with procedural due process.

B. The Rights of Biological Fathers

The four cases involving the due process rights of biological fathers in adoption proceedings follow the same pattern.

Armstrong v. Manzo[104] was a unanimous decision holding that a Texas father had been denied procedural due process when he was not given advance notice that his child from a prior marriage was being adopted by

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[97] *Id.* at 119 (Rehnquist, J., dissenting) (quoting Santosky v. Kramer, 455 U.S. 745, 774 (1982)).

[98] *Id.* at 128–29 (Kennedy, J., concurring).

[99] M.L.B. v. S.L.J., 519 U.S. 102, 128–29 (1996) (Kennedy, J., concurring).

[100] *Id.* at 129 (Kennedy, J., concurring).

[101] *Id.* (Rehnquist, C.J., dissenting).

[102] *Id.* at 131 (Thomas, J., dissenting) (quoting Lassiter v. Dep't. of Soc. Servs., 452 U.S. 18, 27 (1981)).

[103] *Id.* at 131, 144 (Thomas, J., dissenting).

[104] Armstrong v. Manzo, 380 U.S. 545 (1965).

her stepfather.[105] Justice Stewart wrote the opinion and was joined by Justices Warren, C.J., Black, Douglas, Clark, Harlan, Brennan, White, and Goldberg.[106]

The leading father's rights case, *Stanley v. Illinois*, reversed a decision of the Illinois Supreme Court which stripped an unwed father of parental rights upon the death of his children's mother.[107] Stanley had intermittently co-habited with the mother, his longtime partner, and was a genuinely active father in the lives of his three children.[108] Illinois law deprived him of any rights as a father upon the death of the children's mother solely on the basis that he had failed to marry her.[109]

Justice Byron White wrote the five to two majority opinion (joined by Justices Douglas, Brennan, Stewart, and Marshall).[110] The majority ruled that the Due Process Clause was violated by removing the father's right to custody without a hearing.[111]

Chief Justice Burger dissented and was joined by Justice Blackmun.[112] The dissenters did not really address the merits of the due process issue. Instead, the entire dissent was focused on the fact that the case had always proceeded on equal protection grounds.[113] Due process claims were not made in the lower court, nor in the briefs or oral argument in the Supreme Court.[114] "Stanley will undoubtedly be surprised to find that he has prevailed on an issue never advanced by him[,]" Chief Justice Burger wrote.[115]

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105 *Id.* at 550.

106 *Id.* at 545.

107 Stanley v. Illinois, 405 U.S. 645, 646–47, 659 (1972).

108 *Id.* at 646, 650 n.4.

109 *Id.* at 646.

110 *Id.* Justices Rehnquist and Powell did not participate. *Id.* at 659.

111 *Id.* at 657–58.

112 *Id.* at 659 (Burger, C.J., dissenting).

113 Stanley v. Illinois, 405 U.S. 645, 659–68 (1972) (Burger, C.J., dissenting).

114 *Id.* at 659.

115 *Id.* at 662 (Burger, C.J., dissenting). This dissent on other grounds does not give any ground to suggest that these two Justices doubt the legitimacy of parental rights as a protectable interest under procedural due process. Both joined several opinions, previously

An unwed father in *Quilloin v. Walcott* sought to extend the holding in *Stanley* to his situation. A unanimous Court rejected his effort.[116]

Unlike the situation in *Stanley*, where the unwed father had played a central and ongoing role in the lives of his children, Quilloin was only minimally involved with his son. He never married or "established a home" with the child's mother.[117] He did not "petition for legitimation of his child at any time during the 11 years between the child's birth" and the step-father's petition for adoption.[118] The child had visited with his father on "'many occasions,' and had been given toys and gifts by [his father] 'from time to time.'"[119] Still, the Court said that Quilloin "had not taken steps to support or legitimate the child" for eleven years.[120]

Quillion's petition for legitimation and visitation was consolidated with the petition for adoption and were tried on the basis of a consolidated record.[121] The trial court held that the father's failure to seek legitimation prior to the petition for adoption denied him standing to object. The trial court did not, however, find that the father was unfit but instead held that the granting of the legitimation and visitation was not in the best interest of the child.[122] The appellees argued that Quilloin had lost all rights by "fail[ing] to petition for legitimation" in the prior 11 years.[123] The Court said that it was "hesita[nt]" to rest its decision on this ground since the father was unaware of the availability of such a proceeding.[124]

Moreover, such a holding would have been contrary to the Court's ruling in *Armstrong* which held that unwed fathers do not have to initiate actions

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discussed, in which they endorsed the general principle that parental rights were a protected liberty interest.

116 *See* Quilloin v. Walcott, 434 U.S. 246, 254 (1978).

117 *Id.* at 247.

118 *Id.* at 249.

119 *Id.* at 251.

120 *Id.* at 253.

121 *Id.* at 250.

122 Quilloin v. Walcott, 434 U.S. 246, 251–52 (1978).

123 *Id.* at 254.

124 *Id.*

to protect their rights.[125] Rather, others must petition and prove adequate grounds to remove a father's rights concerning his children.[126]

The Supreme Court began its analysis with the observation that "appellant does not challenge the sufficiency of the notice he received with respect to the adoption proceeding."[127] Moreover, the Court noted that the trial court had afforded him a full hearing with the "opportunity to offer evidence on any matter he thought relevant, including his fitness as a parent."[128] While this procedural opportunity was clearly substantial, the Court held that it was not a "complete answer" to his constitutional challenge to the process afforded by the Georgia statutes.[129] The core of the father's claim was that absent proof of unfitness, a determination that the legitimation was not in the best interests of the child was a constitutionally insufficient standard.[130]

The Court gave a fact-specific answer to his due process might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the 'best interests of the child.'"[131] The Court also rejected the father's equal protection claim on essentially the same basis: "Under any standard of review, the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child."[132]

However, the most important statement in *Quilloin* was the Court's strong endorsement of a rigorous procedural due process protection for fit parents living with their children:

> We have little doubt that the Due Process Clause would be offended "[if] a State were to attempt to force the

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125 *See* Armstrong v. Manzo, 380 U.S. 545, 551 (1965).

126 *Id.*

127 *Quilloin*, 434 U.S. at 253.

128 *Id.*

129 *Id.* at 254.

130 *Id.* at 252–54.

131 *Id.* at 255.

132 *Id.* at 256.

> 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."[133]

The Court was tacitly following this principle in this case. There is no doubt that the father's failure to shoulder any meaningful responsibility for the child for over eleven years was implicitly deemed to justify the use of the best interest standard in this case.

A unanimous Court elevated the precedential value of this important passage language from Justice Stewart's concurrence in *Smith v. Organization of Foster Families for Equality and Reform.*[134] Procedural due process does not allow a court to substitute its judgment of what is best for a child for that of a parent without "some showing" of unfitness.[135] In practical terms, this may be the most important Supreme Court quotation of all time concerning the rights of parents.

All nine Justices[136] joined this opinion with its clear endorsement of the standard requiring proof of harm in normal cases. Even Chief Justice Burger and future Chief Justice Rehnquist, both of whom exhibited a consistently narrow view of parental rights, joined in this bold declaration of the general principle of parent's rights in *Quilloin*.

The final case involving the rights of absentee fathers was decided in 1983. In *Lehr v. Robertson*,[137] a father claimed that New York's adoption law denied him procedural due process since, under New York law, he was not entitled to prior notice before the adoption of his child.[138]

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[133] Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (quoting Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring)).

[134] *See* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816 (1977) (Stewart, J., concurring).

[135] *Quilloin*, 434 U.S. 246 at 255.

[136] The opinion was authored by Justice Thurgood Marshall and joined by Chief Justice Burger and Justices Brennan, Stewart, White, Blackmun, Powell, Rehnquist, and Stevens. *Id.* at 247.

[137] *See* Lehr v. Robertson, 463 U.S. 248 (1983).

[138] *Id.* at 250.

In this case, the father, Jonathan Lehr, had never supported and had rarely seen his child.[139] The mother married another man when the child was eight months old.[140] The step-father moved to adopt when the child was more than two years old.[141] New York law provided Lehr with a simple procedure that would have guaranteed that he would have received notice prior to any adoption of his child.[142] It merely required him to mail in a postcard to the "putative father registry."[143]

Importantly, the majority expressly relied on a general principle we shall discuss in detail later: "the rights of the parents are a counterpart of the responsibilities they have assumed."[144]

Even with Lehr's minimal relationship with the child, the Court did not suggest that he had no rights under the doctrine of procedural due process. Rather, the majority[145] held that the New York law adequately protected his interests by making the postcard/putative father program available to him.[146]

The dissent, written by Justice White,[147] focused on the fact that the State, in fact, knew where Lehr was located and that he was interested in the child.[148] In light of these additional facts, the dissenters concluded that procedural due process could only be satisfied if he was given actual notice prior to the adoption.[149]

Once again, every Justice agreed that Lehr had rights that required satisfaction of procedural due process. The disagreement was solely about

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139 *Id.* at 252.

140 *Id.* at 250.

141 *Id.*

142 *Id.* at 250–51.

143 Lehr v. Robertson, 463 U.S. 248, 264 (1983).

144 *Id.* at 257.

145 *Id.* at 249 (consisting of Stevens, J. (author); Burger, C.J.; Brennan, J.; Powell, J.; Rehnquist, J.; and O'Connor, J.).

146 *Id.* at 264–65.

147 Joined by Justice Marshall and Justice Blackmun. *Id.* at 268 (White, J. dissenting).

148 *Id.* at 273–74.

149 Lehr v. Robertson, 463 U.S. 248, 273 (1983) (White, J. dissenting).

the adequacy of the New York postcard system.[150] Whether the context was the termination of an unfit parent's rights or adoption of the child of an absent biological father, every Justice in every procedural due process case has agreed with the general proposition that a parent's right to the custody of their child is a protected liberty interest. There are many differing views on the details of what process is due, but the Supreme Court has spoken with a unanimous voice on this key general principle.

IV. THERE IS ONLY ONE PARENTAL LIBERTY INTEREST

The tendency to think about parental rights cases in two separate categories of substantive versus procedural due process might give rise to the idea that there are in fact two distinct constitutional rights. However, it is readily apparent that the Supreme Court treats the parental liberty interest as a singular idea. It regularly cites both substantive and procedural due process cases in the same paragraph to prove the long-standing recognition of this singular liberty.

For example, *Santosky v. Kramer,* a leading procedural due process case, cites three procedural due process cases (*Lassiter v. Department of Social Services, Quilloin v. Walcott,* and *Stanley v. Illinois*), and three substantive due process cases (*Meyer v. Nebraska, Pierce v. Society of Sisters,* and *Prince v. Massachusetts*), along with a variety of miscellaneous cases which mention parents and family in slightly differing contexts. In citing these cases *Santosky* demonstrates "th[e] Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."[151]

Likewise, *Stanley*, another procedural due process case,[152] cites *Meyer v. Nebraska* and *Prince v. Massachusetts*—both substantive due process

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[150] *See id.* at 273–74.

[151] Santosky v. Kramer, 455 U.S. 745, 753 (1982).

[152] Justice Scalia's solo dissenting opinion in *Troxel* takes issue with the categorization of *Stanley v. Illinois* as a procedural due process claim. He said that *Stanley* "purports to rest in part upon that proposition." Troxel v. Granville, 530 U.S. 57, 92 n.1 (2000) (Scalia, J., dissenting). *Stanley's* claim to be properly characterized as a procedural due process case is bolstered by the fact that the Court itself has repeatedly described *Stanley* as a procedural due process case. *E.g.*, Caban v. Mohammed, 441 U.S. 380, 385 n.3 (1979). *Roth* subsequently lists

cases—to demonstrate that "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment."[153]

In the most recent substantive due process case, *Troxel v. Granville,* the plurality cites a mixture of substantive (*Meyer, Pierce, Prince,* and *Yoder*) and procedural (*Stanley, Quilloin,* and *Santosky*) due process cases to bolster its conclusion that parental rights are a protected liberty interest.[154] There is nothing in the history of parental rights litigation before the Court that remotely suggests that there are two related, but distinct interests. In fact, in *Troxel,* the plurality describes *Stanley* as the lead case for the proposition that parents have a "fundamental right" to "make decisions concerning the care, custody, and control of their children."[155]

Whether the state seeks to remove all decision-making authority, as in *Stanley*, or one aspect of parental decision-making, as in *Yoder* or *Troxel*, the Court treats all such cases as presenting a singular right deserving protection. Accordingly, it is entirely logical to conclude that permanent, temporary, or partial curtailment by the government of parental decision-making should be subject to the same basic form of judicial review.

Stanley as an example of a protected procedural due process interest. *See also* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569–70 (1972) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount."); Mathews v. Lucas, 427 U.S. 495, 504 n.8 (1976) (citing Stanley v. Illinois, 405 U.S. 645 (1972)) ("The Court . . . has found the privacy of familial relationships, to be entitled to procedural due process protections from disruption by the State . . . ."); Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 842 (1977) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)) ("There does exist a 'private realm of family life which the state cannot enter,' that has been afforded both substantive and procedural protection.") (citing *Stanley* as the lead example of procedural protection). In addition, Justice Rehnquist authored a dissent joined by Chief Justice Burger and Justice Powell which describes *Stanley* as a procedural due process case. U.S. Dep't of Agric. v. Murry, 413 U.S. 508, 524 (1973) (Rehnquist, J., dissenting).

153 Stanley v. Illinois, 405 U.S. 645, 651 (1972).

154 *Troxel*, 530 U.S. at 65–66.

155 *Id.* at 66.

V. THE NEED TO DEMONSTRATE HARM APPEARS IN NEARLY ALL PARENTAL RIGHTS CASES

In *Quilloin,* a unanimous court declared the general rule that "the Due Process Clause would be offended" if government sought to break up a natural family absent a showing of unfitness. Moreover, claiming that "the best interest of the child" which would justify removing children from their parents, without more, was likewise unanimously rejected."[156] Fit parents have the authority to make decisions for their children without governmental interference. Those who harm their children may lose some, or all, of their ability to make such decisions.

This theme can be identified in virtually all thirteen Supreme Court cases which relied on due process, whether substantive or procedural, to make a constitutional decision about parental rights. *Troxel* is the lone exception. There, the plurality expressly refrained from discussing the harm standard relied on by the lower court because it could affirm on another basis without resolving the required proof in visitation cases.[157]

Beginning with *Meyer*, the Court has routinely noted that if there was proof of harm to the child, then the outcome in case after case would be different. In *Meyer*, the Court said, "No emergency has arisen which renders knowledge by a child of some language other than English *so clearly harmful* as to justify its inhibition with the consequent infringement of rights long freely enjoyed."[158] Continuing this theme, the Court said, "It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is *not injurious* to the health, morals or understanding of the ordinary child."[159]

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[156] Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (alteration in original) (emphasis added) (quoting Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 862–63 (1977)).

[157] *Troxel*, 530 U.S. at 73.

[158] Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (emphasis added).

[159] *Id.* (emphasis added).

In *Pierce*, the Court twice noted that the private schools "were not unfit or harmful to the public" and "not inherently harmful, but long regarded as useful and meritorious."[160]

Likewise in *Yoder*, the Court turned to the theme of harm to children as a limiting principle: "To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."[161]

And, of course, in *Prince*, the Court upheld the power of the state to override a parent's decision concerning the nighttime employment of a child—even in a religious context—on the basis of harm to the child:

> The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.[162]

The same theme is inherently present in all cases of parental termination. Proof of unfitness—or its equivalent is always required.

In *Parham,* the Court recognized that while parental harm of children would constitute grounds for overriding the parents child-rearing decisions, the Court rejected the "statist notion" that such harm could be simply assumed on the basis that some parents might abuse their children.[163]

In *Lassiter*, *Santosky,* and *M.L.B. v. S.L.J.*, the parents faced allegations that they had (in the order listed) abandoned,[164] permanently neglected,[165]

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160 Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).

161 Wisconsin v. Yoder, 406 U.S. 205, 233–34 (1972).

162 Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944).

163 Parham v. J.R., 442 U.S. 584, 603 (1979).

164 *See* Lassiter v. Dep't of Soc. Servs., 451 U.S. 18, 21 (1981).

165 Santosky v. Kramer, 455 U.S. 745, 748 (1982).

and committed "serious neglect, abuse, prolonged and unreasonable absence or unreasonable failure to visit or communicate with her minor children."[166] Obviously, proof of harm and the process employed to establish such proof was central in all three cases.

Unfitness, usually in the form of some form of abandonment or neglect, was the implicit central issue in all four cases involving fathers who stood to lose their custodial rights in an adoption proceeding—or its equivalent.

In *Stanley*, the central failure of the Illinois scheme was that unfitness of the unmarried father was presumed rather than proven.[167] This was the very reason the Court found the law to be unconstitutional.[168]

In *Armstrong*, the Texas law presumed the unfitness of the father without proof. All that was required was that a pleading be filed alleging the lack of support by the absentee father for two years.[169] Neither notice to the father nor proof of this fact was required[170]—but the burden of proof shifted to the father for him to prove that he had in fact supported the child.[171] Non-support is clearly abandonment and the Court did not question the constitutionality of a father losing the right to consent to an adoption upon proper notice and proof of this failure—a form of unfitness. But unfitness could not simply be presumed.

The father in *Quilloin* had failed for eleven years to play a role in the life of his biological child.[172] The Court refused to honor his claimed rights in light of the clear proof of his prolonged abandonment.[173] And in *Lehr*, the Court found that proof of the father's failure to shoulder any responsibility for his child, together with his failure to even file a simple postcard

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166 M.L.B. v. S.L.J., 519 U.S. 102, 108 (1996) (citing MISS. CODE ANN. § 93-15-103(3)(e) (1994)).

167 *See* Stanley v. Illinois, 405 U.S. 645, 647, 650 (1972).

168 *Id.* at 657–58. The Court took issue with the presumption of unfitness but affirmed the idea that "neglectful parents may be separated from their children." *Id.* at 652.

169 Armstrong v. Manzo, 380 U.S. 545, 546–47 (1965).

170 *Id.* at 546–47.

171 *Id.* at 551.

172 Quilloin v. Walcott, 434 U.S. 246, 247, 249–51 (1978).

173 *See id.* at 256.

acknowledging paternity, led to a determination that the postcard program sufficiently protected his liberty interest.[174]

Troxel, of course, is the outlier. The Washington Supreme Court had followed the exact rule announced in *Quilloin*—fit parents may not have their decisions reviewed by a court for the simple reason that a judge might find that a different decision would be in the child's best interest.[175] But the Supreme Court failed to follow this clear, and precedentially correct, decision.

Instead, the Court issued no less than six opinions, none of which followed *Quilloin*.[176] The six-way split has produced a great deal of confusion in the aftermath. It is fair to suggest, in light of the basic axioms of appellate law, that a splintered collection of minority decisions cannot overturn this otherwise unbroken string of precedents. Proof of harm should be the controlling standard, *Troxel* notwithstanding.

Justice Steven's dissent which criticized the central holding of the lower court[177] is breathtakingly wrong unless viewed only in light of the specific facts of the case. It is true that the Supreme Court had never decided a third-party visitation case prior to *Troxel*. But there were more than sufficient Supreme Court precedents on the general topic of parental custody to support the Washington court's application of these principles to the context of third-party visitation. Justice Stevens, at best, was reasoning from a vacuum. But it was a vacuum of his own making which simply ignored the broad themes repeatedly embraced by the Court and unanimously endorsed in *Quilloin*. *Troxel* notwithstanding, the Court's binding precedent reveals a pattern of looking to see if children are being harmed before parental rights may be curtailed in whole or in part by the government.

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174 Lehr v. Robertson, 463 U.S. 248, 262, 264–65 (1983).

175 Troxel v. Granville, 530 U.S. 57, 68–69 (2000); *Quilloin*, 434 U.S. at 255.

176 *Compare Quilloin*, 434 U.S. 246, *with Troxel*, 530 U.S. 57.

177 *Troxel*, 530 U.S. at 85–86 (Stevens, J., dissenting) ("[T]he Washington Supreme Court's holding—that the Federal Constitution requires a showing of actual or potential 'harm' to the child before a court may order visitation continued over a parent's objections—finds no support in this Court's case law.").

VI. THE SUPREME COURT LINKS PARENTAL RIGHTS WITH PARENTAL RESPONSIBILITIES

Anyone who has ever held a leadership position recognizes the necessity for authority and responsibility to go hand in hand. Being held responsible for outcomes while being denied the actual authority to make decisions is not only a thankless task; it is intrinsically unjust. Thus, it is not surprising that, like Blackstone and Locke, the Supreme Court has strongly affirmed the linkage between parental duties and parental rights.

Justice Stevens, writing for the six Justice majority in *Lehr v. Robertson*, fully described the Court's longstanding endorsement of the principle that parental rights flow from and are linked to their responsibilities for their children:

> In some cases, however, this Court has held that the Federal Constitution supersedes state law and provides even greater protection for certain formal family relationships. In those cases, as in the state cases, the Court has emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed. Thus, the "liberty" of parents to control the education of their children that was vindicated in *Meyer v. Nebraska* and *Pierce v. Society of Sisters* was described as a "right, coupled with the high duty, to recognize and prepare [the child] for additional obligations." The linkage between parental duty and parental right was stressed again in *Prince v. Massachusetts*, when the Court declared it a cardinal principle "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." In these cases the Court has found that the relationship of love and duty in a recognized

> family unit is an interest in liberty entitled to constitutional protection.[178]

One point made in this recitation of parental rights precedents deserves special emphasis. *Meyer*, *Pierce*, and *Prince* are all categorized as substantive due process cases.[179] None of the parental rights cases now categorized as procedural duty process decisions were decided prior to these three cases. Moreover, the phrase "substantive due process" was not yet recognized when these three early cases were issued.[180] Thus, it is extremely important to note the exact phrasing employed by the Court in *Lehr*. Citing only these three early cases,[181] the majority said "[i]n *these cases* the Court has found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection."[182] Then the Court immediately adds "[State] intervention to terminate [such a] relationship . . . must be accomplished by *procedures meeting the requisites of the Due Process Clause*."[183]

Accordingly, it is fair to observe that the Court in *Lehr* held that because of the linkage between parental duties and parental rights, the so-called substantive rights of parents can only be terminated by compliance with procedural due process.[184]

This discussion clearly endorses the central argument of this Article. Cases like *Meyer, Pierce,* and *Prince*, which all deal with a governmental

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178 *Lehr*, 463 U.S. at 257–58 (citations omitted).

179 *See id.*

180 The first use of the phrase "substantive due process" was in *Republic Nat. Gas Co. v Oklahoma,* 334 U.S. 62, 90 (1948) in a dissent by Justice Rutledge. This case involved a dispute over the rights to natural gas—a property rights claim. The first use in a majority opinion was in *Galvan v. Press*, 347 U.S. 522, 530 (1954). The Court held that substantive due process did not provide a basis for a former member of the Communist Party to avoid deportation.

181 The Court did add a "see also" reference to *Moore v. Cleveland*, which is more about extended family and not precisely a parental rights case. *Id.* at 258.

182 *Lehr*, 463 U.S. at 258 (emphasis added) (citing Moore v. E. Cleveland, 431 U.S. 494 (1977) (plurality opinion)).

183 *Id.* (emphasis added) (quoting Santosky v. Kramer, 455 U.S. 745, 753 (1982)).

184 *See id.* at 257–58, 261–64.

intrusion into a single element of parental custodial decision-making, require constitutionally proper *procedures* before this liberty interest can be invaded.[185] Parental duties to their children are very wide indeed. Accordingly, their right to make decisions for their children in these areas must be accompanied by similarly broad protections. The scope of parental rights is parallel to the scope of parental duties.

Two of the cases involving the rights of biological fathers demonstrate the operation of this link. In *Stanley*, the father was unmarried but fully engaged in the life of his children.[186] His rights were protected.[187] While in *Lehr,* the father had practically ignored his child for all eleven years of the child's life.[188] His claim of rights was rejected.[189] But, once again, the *Lehr* majority took the time to emphasize that in families where the parents are shouldering their responsibilities, the government may not intervene on the mere ground that officials think they can make better decisions as to the best interest of the child.[190]

Recognition of the pairing of parental rights and parental responsibilities offers an additional reason for concluding that the correct constitutional approach is to allow a limitation of rights only when there is proof of harm—a breach of parental duties. When parents fail to carry out their responsibilities, they should suffer a curtailment of their rights commensurate with the breach. When dealing with fit parents, there is no justification for a court interfering with the exercise of their rights. This approach strikes the balance between parents' rights and children's needs in exactly the right manner.

Other balancing tests fall short. The problem with even the compelling interest standard is that it allows for other policy reasons to justify

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185 *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399–400, 402–03 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 533–35 (1925); Prince v. Massachusetts, 321 U.S. 158, 164–66, 170 (1944).

186 Stanley v. Illinois, 405 U.S. 645, 646, 650 n.4 (1972).

187 *Id.* at 657–58.

188 *Lehr*, 463 U.S. at 252, 262.

189 *Id.* at 265.

190 *See id.* at 262.

government invasions into the family. Our discussion from Blackstone offers a dangerous illustration of how such invasions operate. England had an anti-Catholic policy and used that as a justification for invading the decisions of parents relative to the raising and educating of one's child.

Our country learned from and repudiated such an approach to both religious freedom and the family. Parents, not government, should make religious decisions for their children.

Today, there is a growing clash between parents and officials—particularly school officials—concerning the philosophical values in the raising of children. The compelling interest test allows a government to try to argue that the advancement of its philosophy is more important than a parent's right.[191] Whether the issue is medical, educational, or religious, governments can be extremely creative in concocting reasons to justify substituting their ideas about raising children for those of parents. But the at bottom of all such situations, we find government agents claiming that they have a better idea of what is best for children.

No matter what philosophical fad is advanced by the government to override parental decisions, grounding this right in procedural due process eliminates any temptation to favor one philosophy over the other. The unanimous opinion in *Qulloin* forecloses such an approach. The government may not justify such interference on the basis of a claim that the government seeks to advance the best interest of the child—there must be proof of unfitness.[192]

VII. THE BEST INTEREST OF THE CHILD STANDARD IS A CONSTITUTIONALLY INAPPROPRIATE STARTING POINT FOR PARENTAL RIGHTS ANALYSIS

The central legal question in any case involving an effort to apply the "best interest of the child" standard is not "what is in the best interest of the child?" Rather, the central question is "who decides what is in the best interest of the child."

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[191] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 221–22, 224 (1972); Jonathan L. v. Superior Ct., 165 Cal. App. 4th 1074, 1103 (2008).

[192] Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (quoting Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 862–63 (1977)).

A growing number of courts appear to believe that it is appropriate to use the "best interest" standard as the beginning point for litigation.[193] Such decisions routinely claim compliance with *Troxel v. Granville* by ensuring that the person seeking to overturn a parent's decision (usually concerning grandparent visitation) must bear the burden of proof that the proposed visitation is in the child's best interest.[194] Simply flipping the burden of proof does not comply with the full body of Supreme Court law. It is unconstitutional for judges to be permitted to decide what is best for children no matter who bears the burden of proof. There must first be proof of unfitness—and the burden of proof rests on the government (or other party challenging a parent's decision) by clear and convincing evidence.[195]

The Supreme Court has made it abundantly clear that starting with best interest is contrary to the requirements of the Due Process Clause. It is tantamount to starting a criminal case with consideration of sentencing factors without first establishing the guilt of the accused.

The plurality in *Troxel* correctly summarized the Court's line of decisions on this point. "As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made."[196] While this statement from *Troxel* was endorsed only by a four Justice plurality,[197] a unanimous Court in *Quilloin* endorsed the rule that the state cannot "force the breakup of the natural family . . . without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."[198]

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[193] *See, e.g.*, Michels v. Lyons (*In re* A.A.L.), 927 N.W.2d 486, 497–98 (Wis. 2019); Grant v. Grant, 173 A.3d 1051, 1057 (Del. 2017); Walker v. Blair, 382 S.W.3d 862, 871 (Ky. 2012); Polasek v. Omura, 136 P.3d 519, 522–23 (Mont. 2006); Wilson v. McGlinchey, 811 N.E.2d 526, 529 (N.Y. 2004); State *ex rel.* Brandon L. v. Moats, 551 S.E.2d 674, 684 (W. Va. 2001).

[194] *E.g.*, *Polasek*, 136 P.3d at 523; *State ex rel. Brandon L.*, 551 S.E.2d at 685.

[195] Santosky v. Kramer, 455 U.S. 745, 747–48 (1982).

[196] Troxel v. Granville, 530 U.S. 57, 72–73 (2000).

[197] *Id.* at 60, 72–73.

[198] Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (Stewart, J., concurring) (quoting Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 862–63 (1977)).

The Court has engaged in substantive discussions of the "best interest of the child" standard in *Stanley*,[199] *Yoder*,[200] *Quilloin*,[201] *Parham*,[202] *Santosky*,[203] and *Troxel*,[204] all previously discussed, and additionally in *Reno v. Flores*.[205] Several key principles may be distilled from these discussions.

First, parents must be presumed to act in the best interest of their children.[206] Second, proof of harm or some form of wrongdoing is a necessary and prior element before a court may substitute its judgment for that of a parent as to what is best for a child. In *Stanley*, the Court acknowledged that the state may act to protect "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community" but this is accompanied by the requirement that only "neglectful parents may be separated from their children."[207] Similarly, in *Yoder,* the state argued that two additional years of compulsory education

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[199] *See* Stanley v. Illinois, 405 U.S. 645, 653 n.5 (1972).

[200] *See* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

[201] *See Quilloin*, 434 U.S. at 255.

[202] *See* Parham v. J.R., 442 U.S. 584, 602–03 (1979).

[203] *See* Santosky v. Kramer, 455 U.S. 745, 760 (1982).

[204] *See* Troxel v. Granville, 530 U.S. 57, 67 (2000).

[205] *See* Reno v. Flores, 507 U.S. 292, 303–05 (1993).

[206] *See Parham,* 442 U.S. at 602 ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."); *id.* at 603 ("The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition."); *Santosky*, 455 U.S. at 760 ("At the factfinding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge."); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("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.").

[207] Stanley v. Illinois, 405 U.S. 645, 652 (1972) (quoting 37 ILL. COMP. STAT. 701–02 (1972)).

were necessary to protect the best interests of the Amish children.[208] The Court forcefully rejected this idea saying "we cannot accept a *parens patriae* claim of such all-encompassing scope." It noted that "[t]he record strongly indicates" that allowing the Amish children to opt out "will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society."[209]

Third, the Constitution prohibits government intervention if the state's reason for supplanting the parent's choices is that a better choice is available. So long as the parental choices are adequate to meet the child's needs, the government may not second guess a parent's decision in any area of their responsibility. In *Reno,* the Court engaged in a lengthy discussion of the "best interest of the child" standard in the context of an argument about the positive rights owed to children being held by the Immigration and Naturalization Service.[210] The Court began with the observation that the "venerable phrase" is "familiar from divorce proceedings" and properly employed when fashioning custodial orders between parents.[211] But, the Court warned, it is not the sole standard for determinations about children in other contexts, especially in constitutional matters.

> Even if it were shown, for example, that a particular couple desirous of adopting a child would *best* provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child *adequately*. Similarly, "the best interests of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests

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208 *Yoder*, 406 U.S. at 224.

209 *Id.* at 234.

210 *See Reno*, 507 U.S. at 305–07.

211 *Id.* at 303–04.

> of other children, or indeed even to the interests of the parents or guardians themselves.[212]

It is important to note the two different kinds of parental rights cases addressed in this section and the legal parity with which they are addressed. The first example involves the removal of custody.[213] The second addresses the "legal standard that governs parents' or guardians' exercise of their custody."[214] In other words, it doesn't matter whether the case involves the removal of the entire "bundle of rights" or a single "stick," the Constitution requires the same legal standard in both kinds of cases, to wit, that so long as the parent is making adequate decisions, the state may not intervene. Lack of adequacy indicates abuse, neglect, or some other form of harm.

This discussion underlines two important conclusions. First, parental rights are a unitary right and should be treated with the same legal standard. Second, until parents are proven to be unfit by engaging in harmful behavior, the government needs to give parents the constitutional freedom to carry out their responsibilities to their children.

The best-interest phrase has both a heart-warming appeal and a legitimate role in our law. But it is not the proper starting point for an effort to put the government between a child and his or her parent. Deciding what is best is always subjective and, in the wrong hands, could be used to second-guess nearly every parent. A finding of unfitness or harm must come first before allowing a judge to proceed to a determination of what she considers to be best for a child. The Supreme Court leaves no doubt that this is the constitutionally necessary sequence.

VIII. THE COURT'S SUBSTANTIVE DUE PROCESS RESULTS WOULD NOT BE DISTURBED BY THE ADOPTION OF THE PROCEDURAL DUE PROCESS STANDARD

The Court has decided six cases that have involved a partial override of parental decision-making by the government. Three involve educational

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212 *Id.* at 304.

213 *Id.*

214 *Id.*

issues—*Meyer*[215], *Pierce*[216], and *Yoder*[217] One dealt with nighttime employment by juveniles—*Prince*.[218] One decision, *Parham,* rested in substantial part on the right of parents to make medical decisions for their children.[219] And one, the most recent, *Troxel*, involved parental decisions about court-ordered visitations by non-parents.[220]

The traditional understanding of these cases is that substantive due process requires that a government must demonstrate that any substantial burden placed on a fundamental right requires the showing of a compelling governmental interest that is accomplished in the least restrictive means possible.[221]

If all six of these cases were examined under the standards of procedural due process the outcome would almost certainly be identical because, the Court actually looked at the issue of harm in all these cases. In *Meyer*, the Court discussed potential harm to children from learning a foreign language prior to high school.[222] No basis for such a conclusion was found.[223] Likewise, the Court in *Pierce* considered the possibility that private schooling was harmful to children.[224] Once again, there was neither evidence nor any logical suggestion that such harm existed.[225] And in *Yoder*, the Court's discussion of the state's interests of literacy and self-sufficiency is indistinguishable from a consideration of harm.[226] Children who are not literate or self-sufficient can be described as educationally neglected—a

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215 Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

216 Pierce v. Soc'y of Sisters, 268 U.S. 510, 529 (1925).

217 Wisconsin v. Yoder, 406 U.S. 205, 208 (1972).

218 Prince v. Massachusetts, 321 U.S. 158, 159 (1944).

219 Parham v. J.R., 442 U.S. 584, 587 (1979).

220 Troxel v. Granville, 530 U.S. 57, 60 (2000).

221 *See, e.g.*, *id.*, 530 U.S. at 80 (Thomas, J., concurring).

222 *See* Meyer v. Nebraska, 262 U.S. 390, 396–97 (1923).

223 *See id.* at 403.

224 *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 529–31 (1925).

225 *See id.* at 534–35.

226 *See* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

form of harm. The Amish clearly exceeded all standards in these crucial areas.

In *Meyer* and *Pierce*, the motivation for the legislation in both cases was very similar. The official voters' pamphlet used to advance the law challenged in *Pierce* was backed by the Ku Klux Klan and the Scottish Rite Masons.[227] Its goal was the homogenization of all children of the state. The official voter's guide offered this justification for the law: "Mix the children of the foreign born with the native born, and the rich with the poor. Mix those with prejudices in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product—a true American."[228]

Similarly in *Meyer*, the law banning such foreign language instruction was not aimed at foreign languages in general—the target was Nebraska's large German-American population.

> The use of German in parochial schools especially aroused the ire of self-styled patriots since they feared that young German-Americans could not properly absorb American values and become good citizens unless they received instruction in the English language.[229]

In both cases, as we have already seen, the Court expressly found that there was no allegation that the schooling was actually harmful to children. Rather, there was simply a differing view of patriotism and the rearing of children.

This is a far cry from any suggestion that the children were being harmed in a manner that would justify interfering in the parent's custody—no abuse, no neglect, no abandonment. The "harm," if simply having differing values and priorities can be described as any form of harm, was a fear of a

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[227] David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. R. 74, 77–79 (1968).

[228] Brief for Petitioner at 24, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (No. 583).

[229] William G. Ross, *A Judicial Janus:* Meyer v. Nebraska *in Historical Perspective*, 57 U. CINN. L. REV. 125, 132 (1988).

philosophical harm in our society—not any form of a personalized harm to the children who attended these schools.

The law in both cases was declared unconstitutional on its face. This is not to say that in the case of *Meyer*, that a law requiring some instruction in English would be held to be unconstitutional. In *Meyer*, the Court observed that such a requirement "is not questioned."[230] The issue arose because a collection of Biblical stories was taught in a private Lutheran school in the German language.[231]

There is little doubt that the use of the standard of custodial harm—abuse, neglect, or abandonment—would lead to the same result. Attending a private school or having one class in a foreign language would never constitute a sufficient harm to remove a parent's discretion to make such decisions for their children.

Yoder would likewise almost certainly reach the same result. The significant difference, as compared to *Meyer* and *Pierce*, is that the Wisconsin compulsory attendance law was declared unconstitutional as applied to the Amish families. The Court effectively employed educational neglect as its standard for decision. It said that the state's true interest behind compulsory attendance requirements was that children should be literate and self-sufficient participants of society upon their completion of the period of compulsory attendance.[232]

Of course, Wisconsin parents' ultimate duty is to ensure that their children receive an education which attains such results. Parents who send their children to a public school are deemed to have satisfied their responsibility—but the true goal is compulsory education and not merely compulsory attendance.

And the Supreme Court, buttressed by the expert testimony of Donald Ericson from the University of Chicago, expressly found that children who followed the pattern of the Old Order Amish—eight years of public education followed by vocational training by their families and community for the two remaining years of compulsory attendance—achieved

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230 Meyer v. Nebraska, 262 U.S. 390, 402 (1923).

231 *Id.* at 397.

232 *See* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

remarkable and reliable results that clearly met the standards of literacy and self-sufficiency.[233] Since the constitutional challenge was raised in an as applied manner, the correct focus was any evidence of harm to these particular children. Even though the State should always bear the burden of proof of harm, the parents' showing that the children turned out well, effectively closed the door on the State's efforts to demonstrate that harm to the children.[234]

The one case in which substantive due process failed to produce a favorable result for the parents—*Prince*—would likely turn out the same if the standard of procedural due process were followed.

Under Massachusetts law, boys under twelve and girls under eighteen were banned from selling newspapers or magazines on the streets.[235] Bolstered by studies from the Department of Labor on the evils of child labor, including a specific report on children selling newspapers on the streets, the Court had no difficulty in determining that the general evidence of harm to children was sufficiently strong to sustain the law as applied here.[236]

Prince involved a legislative measure designed to prevent future harm, but the expert studies had sufficiently demonstrated that the prediction of such harm was backed up by unfortunate experiences in the past.[237] Proof of harm is not limited to live testimony in the instant case, but can, in the proper context, be demonstrated by legislative facts, supporting expert studies, and documented experience. The parents' burden in such cases would be to demonstrate that either the studies were wrong, or that there

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[233] *Id.* at 212–13.

[234] *Id.* at 235–36 (citing Sherbert v. Verner, 374 U.S. 398 (1963)) ("In light of this convincing showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.").

[235] Prince v. Massachusetts, 321 U.S. 158, 160–61 (1944).

[236] *Id.* at 168 n.15–16, 169–70 ("[T]he parent's supervision may reduce but cannot eliminate entirely the ill effects of the prohibited conduct.").

[237] *See id.* at 168–69.

was clear evidence—as in *Yoder*—that their own children would not in fact be harmed because of other independent factors.

Parham v. J.R. was brought by children's advocates who sought to invalidate Georgia's system for the voluntary commitment of children to a mental health institution.[238] This meant that parents had consented to this placement for their children, but the child's wishes were either overridden or not consulted.

The essence of the plaintiff's argument was that the decision to commit a child was so significant to the child that it should require an independent review by a judicial officer to determine if the commitment was in the child's best interest.[239] The Court was asked to make a procedural due process finding for the children—a right to an independent hearing on best interests—without any prior evidence that the parent's decision was irresponsible or constituted a breach of the parental duties toward their children.[240]

The Court rejected the suggestion that the parental decisions could be overridden in this *carte blanche* fashion.[241] Of the parent's duty to properly raise their children, the Court said, "Surely, this includes a 'high duty' to recognize symptoms of illness and to seek and follow medical advice."[242] Consequently, the Court refused to overrule the state law's reliance on the presumption "that natural bonds of affection lead parents to act in the best interests of their children."[243]

A prominent feature of the Georgia system that impacted the Court's conclusions concerning the due process rights of the affected children was that the need for the institutionalization had to be agreed to by the medical professionals admitting the child.[244] This requirement, coupled with the parents' consent, was deemed to be sufficient to protect children in general

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238 Parham v. J.R., 442 U.S. 584, 587–88 (1979).

239 *Id.* at 603–04.

240 *See id.* at 602.

241 *Id.*

242 *Id.* at 602.

243 *Id.* (citing BLACKSTONE, *supra* note 51, at *447).

244 *See* Parham v. J.R., 442 U.S. 584, 604–05 (1979).

against an improper commitment.[245] Thus, the Court rejected the class action approach seeking to invalidate the system as a whole.[246] However, the Court did allow for the prospect that harm might be demonstrated in particular cases, and allowed that to be explored on remand.[247]

Thus, the ultimate standard was clear. Was the medical decision by the parent in fact harmful to the child? Accordingly, whether the Court was to frame the case in either substantive or procedural due process, both the standard employed and the ultimate outcome would be the same.

The Court has consistently focused on the issue of "harm to children" regardless of the legal framework claimed to guide their constitutional analysis. Reconfiguring parental rights cases which have been viewed as relying on substantive due process into the framework of procedural due process changes almost nothing in substance. It does, however, place parental rights upon a far stronger constitutional foundation.

Parental rights deserve a stable and predictable constitutional framework. Both our constitutional history and centuries of common sense support the view that parents, not governments, should be the primary decision-makers for their children.

In addition, public reliance and confidence in the judicial process results are unlikely to be negatively impacted when the only change is a different explanation rather than a new result. This is especially true in comparison with the public outcry that would certainly arise if the Court adopted Justice Scalia's position in *Troxel*—parents have no judicially enforceable rights.

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245 *See id.* at 604–05, 613.

246 *See id.* at 616.

247 *Id.* at 616–17 ("Although our review of the record in this case satisfies us that Georgia's general administrative and statutory scheme for the voluntary commitment of children is not *per se* unconstitutional, we cannot decide on this record whether every child in appellees' class received an adequate, independent diagnosis of his emotional condition and need for confinement under the standards announced earlier in this opinion. On remand, the District Court is free to and should consider any individual claims that initial admissions did not meet the standards we have described in this opinion.").

IX. CONCLUSION

Parental rights flow from the responsibilities they have undertaken. Governments operating under our Constitution may not assert their authority over children until there is first some proof that the parents have breached their responsibilities. There is no logical, textual, or historical reason why governmental invasions into some component of a parent's custodial decision-making should be decided by a different legal standard from the one employed when the government seeks to remove custodial decision-making authority entirely. We do not need substantive due process to protect parental rights. Give parents a fair trial and make the government first prove harm before it is allowed to intervene. Just and truly good results will usually follow.