UNEQUAL RIGHTS: THE FOURTEENTH AMENDMENT AND DE FACTO PARENTAGE

Adam K. Ake

Abstract: Faced with an unprecedented number of children born into non-traditional family arrangements, courts across the country are struggling to preserve relationships between same-sex partners and their partners’ biological children after those non-marital relationships end. This Comment argues that the Fourteenth Amendment limits the extent to which courts can intrude on the parental rights of a natural or adoptive parent in an attempt to provide remedies for non-parent partners, who are usually legal strangers to the children under applicable statutory schemes. U.S. Supreme Court jurisprudence implicitly recognizes hierarchical tiers of parental rights. Under this framework natural and adoptive parents have superior substantive due process rights to other adults who claim familial relationships with children. Courts also have limited ability to recognize new constitutional rights. Recent decisions of the Supreme Court of Washington and other state courts around the country have recognized de facto parents as parents with rights fully equivalent to those of natural and adoptive parents. Such decisions constitute state action that necessarily erodes existing parents’ protected fundamental rights under the U.S. Constitution and must be strictly scrutinized. Courts are therefore restricted in their ability to “promote” de facto parents into full legal parity with natural and adoptive parents.

That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. — Justice Byron White.

Throughout the United States, courts struggle with an ever more frequently recurring issue: soured same-sex relationships that lead to custody disputes over children. The central problem stems from the fact that in nearly all cases only one of the same-sex partners is the legal

parent of a given child; often the other partner is a legal stranger to any children born or adopted during the relationship. Many state legislatures have amended, or state judiciaries have interpreted, their adoption statutes to allow such non-biological parents to adopt their partners’ children. However, even in those states with liberal adoption statutes, cases in which no “second-parent” adoption took place present courts with a quandary when legal parents decide to limit or completely cut off former partners’ access to their children.

Most state courts that have addressed this issue recognize the significant bond that typically develops between the child and the non-parent partner. Accordingly, courts have utilized several means to prevent the legal parent from unilaterally terminating the quasi-parental relationship between the former partner and child. Frequently, courts have looked to authority under existing third-party visitation statutes to mandate continuation of the relationship despite the objection of the legal parent. Recently, however, some courts have gone even further.

Representative of this trend towards expansive remedies for non-parent partners is a recent decision of the Supreme Court of Washington, In re Parentage of L.B. L.B. concerned an attempt by Sue Ellen Carvin

---

3. Courts use the phrase legal stranger in the context of family law to mean a person with no recognized relationship that would provide standing. See A.J. v. L.O., 697 A.2d 1189, 1191 (D.C. App. 1997); see also BLACK’S LAW DICTIONARY 1461 (8th ed. 2004) (“One not standing toward another in some relation implied in the context; esp., one who is not in privity.”). In addition to the cases where one partner is a legal stranger and the other a recognized parent, more complex situations have arisen, such as when one woman provides her ova, which are then fertilized by donated semen and implanted in her partner for gestation and birth. See, e.g., K.M. v. E.G., 117 P.3d 673, 675 (Cal. 2005).


5. See Hindin, supra note 2, at 7.

6. See generally In the Interest of E.L.M.C., 100 P.3d 546 (Colo. Ct. App. 2004) (allowing plaintiff ex-partner full parental rights under Colorado statute authorizing such rights for those who had cared for a child for more than six months); E.N.O. v. L.M.M., 711 N.E.2d 886, 893 (Mass. 1999) (affirming award of visitation for former same-sex partner who had participated in planning for child and rearing before separation).


Unequal Rights

to resume contact with the seven-year-old child her ex-partner Page Britain bore during the women’s twelve-year relationship.\(^9\) The Supreme Court of Washington had previously held the state’s third-party visitation statute facially unconstitutional.\(^{10}\) Thus, Carvin found the avenue most frequently used by courts in other states to give relief to non-adoptive\(^{11}\) ex-partners closed. Instead, Carvin’s petition requested characterization as some form of “parent” or, alternatively, the award of visitation rights.\(^{12}\) The trial court dismissed Carvin’s petition for failure to state a claim on which relief could be granted, and she appealed.\(^{13}\) The Washington Court of Appeals was more sympathetic to Carvin’s plight, and used its common law rulemaking authority to recognize \textit{de facto} parentage and restore Carvin’s access to L.B.\(^{14}\) The Supreme Court of Washington subsequently upheld the intermediate court’s decision,\(^{15}\) explicitly recognizing \textit{de facto} parentage as fully equivalent to natural and adoptive parentage.\(^{16}\)

This Comment argues that state action that attempts to redefine parentage is limited by the Fourteenth Amendment to the U.S. Constitution. State recognition of \textit{de facto} parentage with rights equal to those of existing parents must surmount strict scrutiny review\(^{17}\) as such recognition inevitably diminishes existing parents’ fundamental right under the Fourteenth Amendment to the care, custody, and control of

---


\(^{11}\) Britain was apparently open to Carvin’s adoption of L.B. at one point during the relationship, but the record does not indicate definitively why the option was not exercised. \textit{Carvin}, 121 Wash. App. at 467, 89 P.3d at 274–75.

\(^{12}\) \textit{I d.} at 464, 89 P.3d at 273. Carvin sought characterization as either a co-parent, a \textit{de facto} parent, or a psychological parent.

\(^{13}\) \textit{I d.}

\(^{14}\) \textit{I d.} at 487, 89 P.3d at 285.

\(^{15}\) \textit{In re Parentage of L.B.}, 155 Wash. 2d 679, 710, 122 P.3d 161, 178 (2005). The Supreme Court of Washington reversed that portion of the Court of Appeals’ decision that would have granted Carvin visitation as an alternative form of relief to the recognition of full parental rights. This reaffirmed that the visitation statute ruled unconstitutional in 1998 remained a nullity. \textit{See id.} at 714–15.

\(^{16}\) \textit{I d.} at 710.

their children. 18 Part I of this Comment clarifies the constitutional definition of “parent” and illustrates how the U.S. Supreme Court has recognized distinct tiers of “parents” with hierarchical rights. Part II asserts that, based on prior Court decisions, de facto parents may at most claim rights in the lower tiers within the multi-tiered paradigm. Part III explains that state-law characterization of parental status does not control interpretation of federal constitutional protections and that state courts have limited ability to create new constitutional rights. Part IV argues that recognition of de facto parentage must surmount strict scrutiny review because that recognition significantly detracts from a natural or adoptive parent’s fundamental parental rights. This Comment concludes that states are therefore restricted by the U.S. Constitution in their ability to “promote” de facto parents into full legal parity with natural and adoptive parents.

I. FOURTEENTH AMENDMENT PRECEDENT RECOGNIZES A HIERARCHY OF PARENTAL RIGHTS

On close examination, the U.S. Supreme Court’s otherwise confusing parental rights jurisprudence is harmonized when read as delineating tiers of “parental” or “family” rights. Each tier concerns the rights of adults therein to the “care, custody, and control” of children with whom they have relationships. 19 In the upper tier are natural mothers and their husbands, as well as adoptive parents. In the lower tiers are other adults, including unwed fathers, whose relationships with children are afforded varying levels of protection depending on the nature of their relationship with the child. While upper-tier parents have long been recognized as possessing fundamental due process rights that protect parental interests under the Fourteenth Amendment, 20 the Court has more recently recognized lesser rights in other family relationships. 21 These lower tiers have rights that protect those family interests from intrusive state action, but are never equivalent to the rights enjoyed by parents in the highest tier. 22

19. See Troxel, 530 U.S. at 65.
20. Id. ("[T]he 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.").
21. See infra Part I.A.
22. See infra Part I.B.
Unequal Rights

A. The U.S. Supreme Court Recognizes Hierarchical Tiers of Parental Rights

Although some legal scholars argue that the Court’s jurisprudence governing parental rights is confused and unhelpful, a careful reading of the Court’s decisions reveals that over time it has come to identify at least two, and probably three, distinct tiers of parental rights. The Court’s earliest parental rights cases made no distinction among tiers of parents and generally protected the family, as directed by an adult serving as the “parent,” from state intrusion into parents’ child-rearing decisions. Where states sought to intrude upon such decisions, the U.S. Supreme Court construed “family” expansively, finding child-rearing rights to inhere in a broad array of family relationships.

For the first fifty years of constitutional parental rights jurisprudence, nothing indicated that traditional marital and adoptive parents had different parental rights than others who found themselves in a parental role. However, various statutes distinguished among people who would claim parental rights. A challenge to one such statute reached the Supreme Court in Stanley v. Illinois. The statute at question in Stanley defined the plaintiff, an unwed father, as a legal stranger to his biological children. On that basis, Illinois removed his children from him upon the death of their mother without affording him process equivalent to that extended to married fathers. Upon review, the U.S. Supreme Court

25. See, e.g., Moore v. City of E. Cleveland, 431 U.S. 494, 505 (1977) (protecting right of grandmother to live with grandchild despite zoning ordinance generally limiting household to nuclear family); Stanley v. Illinois, 405 U.S. 645, 658 (1972) (placing unwed natural fathers alongside natural mothers, married parents, and adoptive parents in the same category for Equal Protection purposes as against state action); Prince, 321 U.S. at 161, 166 (finding family rights to inhere when household headed by legal guardian).
27. 405 U.S. 645 (1972).
28. Id. at 648.
29. Id. at 646.
held that the state’s distinction between unwed and married fathers violated the Equal Protection Clause of the Fourteenth Amendment and reversed on that basis. The Court concluded that, under the Fourteenth Amendment, Stanley was entitled to the same procedural due process as a married father before the state could remove his children.

Following Stanley, the Court began to articulate a distinction between the rights of parents in traditional families (upper-tier parents) and the rights of those other adults who would claim protection in their family interests under Stanley. Stanley both encouraged other non-traditional parents to claim due process protection for their family interests and placed various state policies, most frequently relating to adoption, in conflict with this recent expansion in the class of non-traditional parents with recognized rights. The Court responded to the increase in cases instituted by non-traditional parents arising after Stanley by creating, if only implicitly, greater protections for upper-tier parents when their interests are challenged by those with lower-tier rights.

The first indication that the Court recognized distinctions among levels of parental rights came in a case where it confronted a claim of rights arising from “psychological parenthood.” In Smith v. Organization of Foster Families for Equality and Reform, the Court reviewed a challenge to New York’s procedures for removing children from foster family care and moving them to alternative foster homes, returning them to their parents, or placing them with adoptive families. The foster parents claimed that they had established “psychological parenthood.”

30. Id. at 658.
31. Id. (“Under the Due Process Clause [the state’s] advantage [from presuming parental unfitness] is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.”).
32. See infra notes 36–51 and accompanying text.
34. See infra Part I.B.
35. “Psychological parenthood” is an idea closely related to de facto parentage. See In re Parentage of L.B., 155 Wash. 2d 679, 691–92 n.7, 122 P.3d 161, 167–68 n.7 (2005). “Psychological parent is a term created primarily by social scientists but commonly used in legal opinions and commentaries to describe a parent-like relationship which is ‘based . . . on [the] day-to-day interaction, companionship, and shared experiences’ of the child and adult.” Id. (quoting JOSEPH GOLSTEIN, ANNA FREUD, ALBERT J. SOHNIT, BEYOND THE BEST INTERESTS OF THE CHILD 19 (1973)). De facto parent means “parent in fact” in juxtaposition to a legally recognized parent. Id. (quoting BLACK’S LAW DICTIONARY 448 (8th ed. 2004)).
37. Id. at 829.
Unequal Rights

families” with their foster children and thus had acquired a Fourteenth Amendment familial liberty interest entitling them to increased procedural protection from the break-up of their foster family units. The Court decided *Smith* without reaching the question of whether the foster parents had gained such increased protection, but in dicta articulated hostility to recognition of such rights, particularly if they would conflict with the return of the children to their biological parents. That concern apparently prompted the Court to distinguish between the rights of traditional parents and others who would attempt to claim parental rights:

> It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another’s constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right . . . .

The Court also noted that even had it chosen to recognize a parental interest in the foster parents’ relationships with their wards, such recognition would not “require that foster families be treated as fully equivalent to biological families for purposes of substantive due process review.”

These statements marked out the Court’s apparently new stance that not all family rights under the Fourteenth Amendment are uniform. It also marked a divergence from the path the Court had been following in expanding recognition of apparently uniform parental rights in *Stanley*

---

38. *Id.* at 839.

39. *Id.* at 847–49 (holding New York’s removal procedure satisfied constitutional procedural due process requirements).

40. *Id.* at 847 n.54 (noting uncritically that “[t]he New York Court of Appeals has as a matter of state law ‘[p]articularly rejected . . . the notion . . . that third-party custodians may acquire some sort of squatter’s rights in another’s child’” (quoting Bennett v. Jeffreys, 356 N.E.2d 277, 285 n.2 (1976))).

41. Returning children to their biological parents was an infrequent outcome in fact (occurring only thirteen percent of the time), but the potential for “foster family rights” to interfere with that outcome was apparently the Justices’ greatest concern. *Id.* at 829 n.23.

42. *Id.* at 846.

43. *Id.* at 842–43 n.48 (citing Moore v. City of E. Cleveland, 431 U.S. 494, 546–47 (1977) (White, J., dissenting)).
and by according Fourteenth Amendment protection to an extended family’s right to live together in *Moore v. City of East Cleveland*. The *Smith* Court indicated that it recognized a distinction between the lesser liberty interests of “family-like associations” recognized in *Stanley* and *Moore* and the more fundamental “constitutionally recognized” parental interests stemming from the combination of “blood relationship, state-law sanction, and basic human right.”

In *Quilloin v. Walcott*, the Court reinforced the distinction between types of parental rights and began the process of clarifying the differing levels of constitutional protection to which each was entitled. In *Quilloin*, a child’s unwed father sought to block the termination of his parental rights in favor of the mother’s husband, who wished to adopt the child. Georgia law required only the mother’s consent for adoption of illegitimate children; thus, the statute authorized a woman to unilaterally terminate an unwed father’s parental rights in the process. Based on *Stanley*, the natural father contended that such a distinction violated Equal Protection guarantees. However, a unanimous Court upheld the Georgia statute, and found that the unwed father’s constitutional rights were “readily distinguishable from those of a separated or divorced father, and . . . that the State could permissibly give appellant less veto authority than it provides to a married father.”

Significantly, *Quilloin* marked the first time that the Court actually specified the lower level of constitutional protection to which an unwed father’s interests are entitled.

B. The Court Scrutinizes Infringements of Parental Rights at Different Levels Depending on the Tier of Parent Involved

Synthesis of the post-*Stanley* unwed father cases establishes that while infringement of the parental rights of those in the upper tier must survive strict scrutiny, infringement upon the rights of those in lower

44. 431 U.S. 494 (1977) (protecting grandparent/grandchild family relationship).
47. *Id.* at 247.
50. *Id.* at 256.
51. See infra Part I.B.2.
52. See infra Part I.B.1.
Unequal Rights
tiers need only surmount lower standards of review.\footnote{See infra Parts I.B.2–3.} A father with only a biological relationship to a child has minimal rights that can be infringed by the state given a rational basis for doing so.\footnote{See infra Part I.B.2.} In contrast, an unwed biological father who establishes a paternal relationship with his child strengthens his due process rights such that infringing state action must withstand intermediate-level scrutiny,\footnote{See Caban v. Mohammed, 441 U.S. 380, 394 (1979).} but this father still lacks the fundamental parental rights possessed by those in the upper tier.\footnote{See infra Part I.B.3.} Outside of wedlock, the U.S. Supreme Court has provided no avenue for even a biological father to obtain parental rights fully equivalent to those of a fit, natural mother.\footnote{See infra Part I.B.3.}

1. Courts Apply Strict Scrutiny to Infringement of Upper-Tier Parents’ Rights

Upper-tier parents have a fundamental right to the care, custody, and control of their children under the Fourteenth Amendment.\footnote{See Troxel v. Granville, 530 U.S. 57, 65–66 (2000) (charting the historical development of the fundamental parental due process right).} Fundamental rights are protected by judicial review at the level of strict scrutiny.\footnote{See Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (defining Fourteenth Amendment strict scrutiny review as “forbid[ding] the government to infringe . . . ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest”).} While other post-
Stanley cases have indicated that parents in the lower tiers have protection at lower levels of scrutiny,\footnote{See infra Part I.B.2–3.} the Court’s most recent parental rights case, Troxel v. Granville,\footnote{530 U.S. 57 (2000).} confirms that upper-tier parents continue to enjoy protection at this highest level.\footnote{Id. at 66 (“In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”).}
2. Infringement of the Parental Rights of Unwed Fathers Who Fail to Actively Participate in Rearing Their Children Need Only Pass Rational Basis Review

Unwed fathers who have not participated in the rearing of their children are entitled to protection at the level of rational basis review, which protects their interests only from arbitrary government policies.63 Quilloin established that where such an unwed father’s interests are fundamentally in conflict with the mother’s interests,64 his rights can be terminated merely by a showing that termination is in the best interests of the child.65 By implication, the unwed father does not have a fundamental right, infringement of which could only have been justified if the state could show a compelling interest. Instead, the Court applied only a lower “best interest” standard to authorize infringement, confirming that the unwed father’s rights were significantly diminished when they conflicted with the mother’s parental rights.66

The Court continued to apply this low degree of protection for uninvolved, unwed fathers in Lehr v. Robertson.67 Reiterating its rationale from Quilloin, the Lehr decision clarified that a biological relationship between a father and child confers only minimal parental rights absent the establishment of an actual parental relationship.68 Like Quilloin, Lehr involved an unwed father’s challenge to a New York adoption law that failed to guarantee him notice when the mother of his

63. See Tuan Anh Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53, 76 (2000) (“Rational basis review, by contrast, is much more tolerant of the use of broad generalizations about different classes of individuals, so long as the classification is not arbitrary or irrational.”).

64. In Quilloin v. Walcott, the U.S. Supreme Court reiterated that:
We have little doubt that the Due Process Clause would be offended “[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.” But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant.

65. Id. (“Whatever 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.’”).

66. Id.


68. See id. at 267–68.
child sought to have her current husband adopt their daughter. 69 Lehr had neither supported nor participated in the rearing of his child. 70 The Court had little trouble disposing of Lehr’s assertion of fundamental parental rights, noting that “[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.” 71 The Court went on to note that three of its members would not even accord protection at the level of rational basis review to an unwed father who failed to develop a relationship with his child. 72 Significantly, however, Lehr left open an avenue for an unwed father to increase the level of protection for his relationship with his child through his affirmative action. 73

3. Infringement of the Parental Rights of an Unwed Father Who Has Actively Participated in the Life of His Child Must Meet Intermediate Scrutiny

An unwed father can increase the level of protection afforded his parental relationship to intermediate-level scrutiny by participating in the rearing and support of his child. In Lehr, the Court declined to accord protection at the level of intermediate scrutiny to the petitioner. 74 However, it contrasted Lehr’s negligible involvement with his child to the more involved unwed father who successfully gained recognition for his parental rights in Caban v. Mohammed. 75 Harmonizing the disparate treatment accorded the unwed fathers in the two cases, the Court declared:

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

69. Id. at 250.
70. Id. at 252.
71. Id. at 260 (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stevens, J., dissenting)).
72. Id. (citing Caban, 441 U.S. at 414 (Stevens, J., dissenting)).
73. See id. at 261.
74. See id. at 267–68.
75. 441 U.S. 380 (1979).
biological link does not merit equivalent constitutional protection.\textsuperscript{76} However, even for an unwed father (like Caban) who has been actively involved in rearing his child, the Court still only accords “substantial protection” under the Fourteenth Amendment’s Due Process clause rather than recognition of full fundamental rights.\textsuperscript{77}

4. \textit{A Lower-Tier Parent Cannot Establish Full Rights Parity with an Upper-Tier Parent Outside the Context of Marriage}

Although some understood Lehr as opening a door for unwed fathers to gain upper-tier rights by their affirmative action, in \textit{Michael H. v. Gerald D.},\textsuperscript{78} the Court clarified that fathers cannot achieve upper-tier status outside of marriage. \textit{Michael H.} presented a conflict between two apparently protected relationships: that of an unwed, putatively biological father (Michael H.) who had asserted paternity of and established a relationship with his child, and that of an intact marital family unit including a presumed father (Gerald D.).\textsuperscript{79} The Court avoided directly addressing the conflict between the two recognized relationships.\textsuperscript{80} Rather, the Court ruled only on the narrower issue of whether Michael could compel Gerald to submit to a paternity test in order to overcome the statutory presumption that the mother’s husband was the father.\textsuperscript{81} The Court held that a state need only show a rational relationship between its interest in family stability and its policy on presumed paternity.\textsuperscript{82} This policy was manifested in the state’s evidentiary rule that declined to require a presumed father to prove his paternity in the face of another man’s challenge.\textsuperscript{83}

\textsuperscript{76} Lehr, 463 U.S. at 261 (quoting Caban, 441 U.S. at 392, 397 n.7) (citations omitted).
\textsuperscript{77} Id.
\textsuperscript{78} 491 U.S. 110, 123 (1989) (plurality opinion).
\textsuperscript{79} Id. at 115. The court said: [T]he issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.″ Cal. Evid. Code § 621(a) (West Supp. 1989). The presumption [of paternity by the husband] may be rebutted by blood tests, but only if a motion for such tests is made, within two years from the date of the child’s birth, either by the husband or, if the natural father has filed an affidavit acknowledging paternity, by the wife. § 621(c) and (d).
\textsuperscript{80} Id. at 116–18.
\textsuperscript{81} Id. at 117–18.
\textsuperscript{82} Id. at 131.
\textsuperscript{83} Id. at 117–18.
Still, the Court’s decision did address Michael’s parental liberty interest claim in dicta, and the plurality rejected the view some had taken from Lehr that an unwed biological father’s establishment of a relationship with the child could move him into full rights parity with the mother:

Michael reads the landmark case of Stanley v. Illinois, and the subsequent cases of Quilloon v. Walcott, Caban v. Mohammed, and Lehr v. Robertson, as establishing that a liberty interest is created by biological fatherhood plus an established parental relationship—factors that exist in the present case as well. We think that distorts the rationale of those cases. As we view them, they rest not upon such isolated factors but upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family.84

Thus, the “substantial [due process] protection” a father can obtain under Caban85 and Lehr86 is still less than the fundamental parental rights possessed by married couples.

In sum, an unwed father never possesses the same parental liberty interest as a fit mother. A child’s mother has a fundamental parental right against which adverse state action must meet strict scrutiny. By contrast, in the absence of an established parental relationship, an unwed biological father has a minimal due process interest that can be constitutionally infringed upon a showing of a state’s rational interest or the best interests of the child. If an unwed father has established a relationship with his child, intermediate scrutiny applies to state action that infringes his parental rights. However, in no case does the father move into full rights parity with the mother outside of marriage.

C. Defensive Use of Parental Rights by Those in the Upper Tier
Remains Largely Untested But Can Be Asserted Against Those in Lower Tiers

Those in the highest tier may defend against state action seeking to expropriate some of their rights in favor of those in a lower tier. The United States Supreme Court has only considered defensive use of constitutional parental rights against state action favoring third parties

84. Id. at 123 (citations omitted).
once—in *Troxel v. Granville*. 87 *Troxel* presented a different type of case than *Stanley* and its progeny; 88 it involved an assertion of statutorily-created rights of continued visitation for grandparents rather than claims of constitutional right. 89 The state statute in question allowed a court to award an order of child visitation to any third party, even over the objections of a fit parent, merely upon a showing that such visitation would be in the best interests of the child. 90

The Court had previously found in *Moore* that in some cases grandparents have a protected family right against state action. 91 In *Moore*, a plurality of the Court struck down a city zoning ordinance barring a grandparent from living with her grandchild in the same household as certain other family relatives. 92 The *Moore* decision indicated that at least some grandparents have claim to inclusion in the lower tier of parental rights. 93

Nevertheless, the *Troxel* Court held that a statute allowing a court to overrule the wishes of a fit parent in favor of what the court determines to be in the best interests of a child violates the substantive due process rights of the upper-tier parent. 94 Thus, although some grandparents can claim a liberty interest in their familial relationship with their grandchildren against intrusive state action under *Moore*, *Troxel* makes it clear that there are limits to the claims grandparents may assert where such claims conflict with the wishes of a fit upper-tier parent. 95

88. See supra Part I.B.
89. See *Troxel*, 530 U.S. at 60–61.
91. See *Moore* v. City of E. Cleveland, 431 U.S. 494, 505–06 (1977) (holding that city could not bar grandchildren from living with their grandparents in a single-family home when zoning laws defined a single family exclusively as a nuclear one). Though not cited by the majority in *Troxel*, *Moore* is cited three times in concurring and dissenting opinions. See *Troxel*, 530 U.S. at 76, 88, 98.
92. See *Moore*, 431 U.S. at 499–500. Read together, sections 1351.02 and 1341.08 of the East Cleveland, Ohio, Housing Code of 1966, allowed a grandparent and spouse to live with one dependent child and the offspring of that dependent child. See *Moore*, 431 U.S. at 496 n.2. However, any other relatives were barred from living in the household. See id. The grandmother in *Moore* lived with her son Dale, his son Dale, and another grandchild, John (Dale’s cousin). The Court framed the decision around only the relationship between the grandmother and John. Id. at 496–97 n.4.
93. See *Moore*, 431 U.S. at 502 (noting Fourteenth Amendment does not cut off protection of family rights at nuclear family’s boundary).
94. See *Troxel*, 530 U.S. at 72 (plurality opinion).
95. See id.
Unequal Rights

Significantly, *Troxel* demonstrates that such an infringement is not constitutionally saved by the backing of the state legislature.96

In sum, recognizing tiers of parental rights harmonizes seemingly dissonant precedents holding that those in the lower tiers have parental rights in some situations and not in others. Those in all tiers enjoy protection against intrusive state action into their family affairs at varying levels of judicial scrutiny. But the Court has consistently found that those in the lower tiers are not in full parity with those in the highest tier, and furthermore that even biological fathers do not have the ability to move into full parity with their children’s mothers without the benefit of marriage.

II. AT BEST, *DE FACTO* PARENTS CAN CLAIM INCLUSION IN ONLY THE LOWER TIERS OF PARENTAL RIGHTS

Under this tiered parental rights hierarchy, a *de facto* parent might have a claim to a liberty interest in her relationship with a child, but only to a lower-tier interest. Lower-tier interests are protected against the intrusive effect of state laws and judicially reviewed at either rational basis or intermediate-level scrutiny.97 However, the strength of *de facto* parents’ claims to inclusion in even one of the lower tiers is not clear because the Court has never found any parental liberty interest in the absence of an adult’s pre-existing duty of care to a child arising from marriage,98 blood ties,99 legal adoption,100 or guardianship.101

---

96. Id. at 73.
98. *See* Michael H. *v.* Gerald D., 491 U.S. 110, 119–20 (1989) (plurality opinion) (approving the California state policy providing a conclusive presumption of paternity for husbands as a “substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy, that given a certain relationship between the husband and wife, the husband is to be held responsible for the child”).
99. *See* Santosky *v.* Kramer, 455 U.S. 745, 747–48 (1982) (holding under Fourteenth Amendment that to terminate parental rights, the state must provide “clear and convincing” evidence that natural parents have not met duty of care to children).
100. *See* Smith *v.* Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 846 (1977) (declining to find a protected parental liberty interest arising from a duty of care to children established by contract with the state, notwithstanding the other similarities of foster care to adoption and guardianship).
101. *See* Prince *v.* Massachusetts, 321 U.S. 158, 159–161 (1944) (holding state’s interest in child welfare overcame parent’s right of care, custody and control of the child; “parent” involved was an aunt with “legal custody”); *see also* Moore *v.* City of E. Cleveland, 431 U.S. 494, 506 (1977) (Brennan, J., concurring) (holding city’s interest in zoning did not overcome grandmother’s right to live with her grandson; grandmother had taken custody of then ten-year-old grandson when he was
A *de facto* parent’s claim to inclusion in a lower tier of rights is not a given because all cases recognizing even lower-tier family rights share a common element—the adult had a pre-existing legal duty to the child. Though the presence of a pre-existing legal duty has not alone been dispositive,\(^{102}\) the U.S. Supreme Court has never recognized a familial right in a relationship that lacked such a duty. In *Stanley*, the fact that the petitioner had fulfilled a legal duty of support\(^{103}\) certainly played a role in his successful claim to equal protection of rights against the state’s attempt to remove his children without affording him a hearing.\(^{104}\) In contrast, in *Michael H.*, where the petitioner was a legal stranger to the child and had no legal duty of support, a plurality of the Court refused to recognize his parental interest.\(^{105}\) Both dissenting opinions in *Michael H.*, each of which would have recognized the putatively biological father’s parental interests,\(^{106}\) noted repeatedly that Michael had *voluntarily* provided support to his daughter.\(^{107}\)

It is conceptually reasonable to extend the protections of a liberty interest to unwed fathers as a means of correcting the unfair situation that arises where a man owes a duty to support his child but gains no corresponding right to the relationship.\(^{108}\) In contrast, support tendered voluntarily in the absence of a legal duty can also be withdrawn without penalty. Therefore, voluntary provision of support would seem a weaker foundation on which to base recognition of rights. In this regard, a *de facto* parentage situation arising from a failed same-sex relationship is closer to a *Michael H.* scenario where there is a well-established

\(^{102}\) See Quillioin v. Walcott, 434 U.S. 246, 256 (1977) (noting that although petitioner had been under the same child support duties as a married father, he enjoyed a lesser liberty interest in the relationship with his child than would a married father); Smith, 431 U.S. at 845–46 (1977) (finding no liberty interest inhered where state action had created the duty of care).

\(^{103}\) Stanley v. Illinois, 405 U.S. 645, 650 n.4; id. at 664 (Burger, C.J., dissenting) (“A man . . . found to be the biological father of the child pursuant to a paternity suit initiated by the mother” was “made liable for the support of the child until the latter attains age 18 or is legally adopted by another.” (quoting ILL. REV. STAT., c. 106 3/4, § 52 (1967)).

\(^{104}\) Id. at 658.


\(^{106}\) Id. at 143 (Brennan, J., dissenting); id. at 157 (White, J., dissenting).

\(^{107}\) Compare id. at 143 (Brennan, J., dissenting) (“This commitment is why Mr. Stanley and Mr. Caban won; why Mr. Quillioin and Mr. Lehr lost; and why Michael H. should prevail.”) with id. at 163 (White, J., dissenting) (distinguishing *Lehr* on the basis of provision of support).

\(^{108}\) For a discussion of *in loco parentis* doctrine, where assumption of parental duties brings with it corresponding parental rights, see *infra* note 110.
Unequal Rights

emotional relationship but no legal duty, and where a plurality of the Court declined to find any protected interest.\textsuperscript{109}

Though not yet considered by the U.S. Supreme Court, state courts have sometimes found that adults have a legal duty of care and concomitant liberty interests\textsuperscript{110} in their relationship with a non-biologically related child;\textsuperscript{111} however, this duty springs from entry into marriage and nearly always ends upon divorce.\textsuperscript{112} In \textit{In re Parentage of L.B.}, where the Supreme Court of Washington granted full parental rights to \textit{de facto} parents, the court focused on this exception to the normal rule that parental rights and responsibilities derive from biology or adoption.\textsuperscript{113} However, in so doing, that court ignored the fact that the U.S. Supreme Court has prioritized parental interests created by marriage over those created by mere biology:

\textsuperscript{109} \textit{Michael H.}, 491 U.S. at 124 (plurality opinion). The plurality stated:

Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts.

\textit{Id.} Of note is the fact that of the three Justices remaining on the Court from the \textit{Michael H.} Court (Scalia, Stevens, and Kennedy), all were in the plurality.

\textsuperscript{110} Under the common law doctrine of \textit{in loco parentis}, “a stepfather, as such, is not under obligation to support the children of his wife by a former husband, but that, if he takes the children into his family or under his care in such a way that he places himself \textit{in loco parentis}, he assumes an obligation to support them, and acquires a correlative right to their services.” Harris v. Lyon, 140 P. 825, 826 (Ariz. 1914) (quoting H.W.C., Annotation, Parent’s Duty to Support Child as Affected by Child’s Interest in Trust Estate or Other Property, 57 L.R.A. 728, 729 (1902)).

\textsuperscript{111} This is not to imply that a biological parental relationship always creates a legal duty, because public policy sometimes dictates otherwise, e.g., the policy favoring donation of genetic material for artificially assisted reproduction. See Susan B. Apel, \textit{Cryopreserved Embryos: A Response to “Forced Parenthood” and the Role of Intent}, 39 FAM. L.Q. 663, 668 (2005) (“There is a final category of men who despite genetic ties to an offspring are held almost universally not to be the legal fathers. These men are sperm donors. These are individuals who donate their gametes without any intention of ever claiming or being subject to a determination of paternity.” (emphasis in original)).

\textsuperscript{112} See David B. Sweet, Annotation, \textit{Stepparent’s Postdivorce Duty to Support Stepchild}, 44 A.L.R.4th 520, §2(a) (2006) (“Under the traditional rule, the fact that a stepparent has served \textit{in loco parentis} to a child during marriage to a natural parent does not put the stepparent under any legal duty to continue to support the child after the spouses are divorced.”).


803
By tradition, the primary measure [of the father’s parental interest] has been the legitimate familial relationship he creates with the child by marriage with the mother . . . . [T]he absence of a legal tie with the mother may . . . appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the [biological] father’s actual relationship with the children. 114

Statements like this reflect the U.S. Supreme Court’s continued emphasis on the primacy of the marital relationship rather than any pronouncement that one may have a parental right absent biology, marriage, or adoption. 115 Thus, while a de facto parent might have a colorable claim to the lower tier of parental rights based on his or her well-developed emotional relationship with a child, it seems premature to assume that the U.S. Supreme Court would recognize even that liberty interest absent any biological, marital, or other pre-existing legal tie between the de facto parent and either the child or its mother. 116

III. STATES CAN NEITHER CONTROL INTERPRETATION OF NOR CREATE NEW FEDERAL CONSTITUTIONAL RIGHTS

The Fourteenth Amendment would pose no bar to state creation of de facto parentage with upper-tier parental rights if states were free to change the meaning of “parent” to avoid federal constitutional strictures. 117 Similarly, although states may create new classes of relationships, they cannot freely vest those new relationships with

115. The Court in Michael H. v. Gerald D. similarly prioritized marriage over biology:

What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made.

491 U.S. 110, 127 (1989); see also Smith v. Org. of Foster Families for Equal. and Reform, 431 U.S. 816, 843 (1977) (“[B]iological relationships are not exclusive determination [sic] of the existence of a family. The basic foundation of the family in our society, the marriage relationship, is of course not a matter of blood relation. Yet its importance has been strongly emphasized in our cases.” (citation omitted)).

116. Although at least one state court, on the petition of the natural mother, declared a former same-sex partner a parent so that the plaintiff natural mother could pursue a claim for child support. The court based its decision on the theory of equitable estoppel, rather than any pre-existing legal status. See Chambers v. Chambers, No. CN00-09493, 2002 Del. Fam. Ct. LEXIS 39, at *29 (Feb. 5, 2002).

117. **See infra** Part III.A.
Unequal Rights

fundamental due process rights.118 If states could vest newly created relationships with fundamental due process rights under the Fourteenth Amendment, then they could effectively insulate such action from constitutional challenge by those divested of recognized rights in the process.119 However, states can neither tinker with definitions that have distinct meanings under the U.S. Constitution nor recognize new fundamental rights except under narrowly constrained circumstances.121

A. States Cannot Alter Definitions with Constitutional Meanings

While states are generally free to define who is a parent without federal oversight or approval due to the general abstention of the federal government from family law,122 states may not do so in any way that violates the federal constitutional rights of its citizens. The U.S. Supreme Court generally will not review a decision of a highest state court so long as the decision rests on “separate, adequate, and independent” state law grounds.123 However, a decision is substantively inadequate if it creates an unconstitutional result.124 When a state court purports to consider a party’s assertion of a federal constitutional right, but then by device of redefining the asserted right abrogates it, the court’s decision is substantively inadequate and subject to review.125

118. See infra Part III.B.

119. The Supreme Court of Washington attempted to evade Fourteenth Amendment scrutiny via this device:

Significantly, our holding today regarding the common law status of de facto parents renders the crux of Britain’s constitutional arguments moot. Britain’s primary argument is that the State, through judicial action, cannot infringe on or materially interfere with her rights as a biological parent in favor of Carvin’s rights as a nonparent third party. However, today we hold that our common law recognizes the status of de facto parents and places them in parity with biological and adoptive parents in our state. Thus, if, on remand, Carvin can establish standing as a de facto parent, Britain and Carvin would both have a “fundamental liberty interest[ ]” in the “care, custody, and control” of L.B.


120. See infra Part III.A.

121. See infra Part III.B.

122. The U.S. Supreme Court first recognized the so-called “Domestic Relations Exception” in Barber v. Barber, 62 U.S. (21 How.) 582, 602–03 (1859), which remains in force.


124. See, e.g., Indiana ex rel Anderson v. Brand, 303 U.S. 95 (1938) (reversing the Indiana Supreme Court’s ruling that a schoolteacher’s tenure created by state statute did not constitute a contract for purposes of the Contracts Clause).

125. See id. at 98.
For example, in Stanley, the Court initially granted certiorari solely to consider the definition of parent under the Constitution. The statute in question in Stanley excluded unwed fathers from the definition of a legal “parent.” The U.S. Supreme Court looked past the state’s definition excluding Stanley and held that he must be considered a parent under the Equal Protection Clause of the Fourteenth Amendment.

The U.S. Supreme Court’s refusal to uncritically accept a state law definition in Stanley is typical of the Court’s jurisprudence. Areas where the Court has refused to be bound by state definitions include cases where state law characterized an essentially criminal proceeding as “juvenile” to avoid requirements of the Fifth and Sixth Amendments; where state law defined subordinate political units as state instrumentalities to immunize them from suit under the Eleventh Amendment; and where state law defined the tort of libel so broadly that it effectively eroded First Amendment protections. The Court has also found allegedly “independent state grounds” as substantively inadequate in other cases involving substantive due process under the Fourteenth Amendment, including the landmark marital rights case of Loving v. Virginia. In Loving, the state argued that because under its anti-miscegenation laws there was no such thing as “marriage” between whites and minorities, the mixed-race plaintiffs were indeed free to...

126. Stanley v. Illinois, 405 U.S. 645, 659 (1972) (Burger, C.J., dissenting) (“The only constitutional issue raised and decided in the courts of Illinois in this case was whether the Illinois statute that omits unwed fathers from the definition of ‘parents’ violates the Equal Protection Clause.”).

127. Under 37 ILL. COMP. STAT. ANN., § 701-14 (West 1972), a “parent” was defined as “the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent,” but did not include unwed fathers. Stanley, 405 U.S. at 650.


129. See In re Gault, 387 U.S. 1 (1967) (finding that a “juvenile” hearing where a juvenile faces effective incarceration for a period of five years was akin to a criminal trial, entitling the accused to the same notice afforded adult criminal defendants, right to counsel of his choosing, and the privilege against self-incrimination).

130. See Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280–81 (1977) (finding school district was not entitled to claim state sovereign immunity though it received direct funding from the state and the state law was ambiguous on proper characterization).

131. See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278–79 (1964) (finding constitutionally deficient the rule of law applied by Alabama courts based on failure to provide petitioner the safeguards for freedom of speech and of the press guaranteed by the First and Fourteenth Amendments).

Unequal Rights

marry as they chose—within the statutory framework—and so no discrimination was taking place.134

Thus, while the definition of “parent” is generally left to the states,135 if a state’s categorization infringes existing constitutional rights, that state definition does not control the interpretation of federal constitutional protections.

B. States Are Empowered to Recognize New Fourteenth Amendment Fundamental Rights Only Under Limited Circumstances

The U.S. Supreme Court has been extremely reluctant to endorse the creation of new rights under the Due Process Clause of the Fourteenth Amendment.136 In Michael H., the plurality stated that a court “comes nearest to illegitimacy” when it makes constitutional law with “little or no cognizable roots in the language or even the design of the Constitution.”137 The Court reiterated its aversion to the expansion of such rights in Washington v. Glucksberg,138 stating that only fundamental rights and liberties which are “deeply rooted in this Nation’s history and tradition”139 and “implicit in the concept of ordered liberty”140 qualify for Fourteenth Amendment protection.141 In Michael

133. “All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.” VA. CODE ANN. § 20-57 (1960 Repl. Vol.).

134. Loving, 388 U.S. at 8.

135. Washington’s definition of parentage is found at WASH. REV. CODE § 26.26 (2004), the state’s version of the Uniform Parentage Act. Though it is far from certain, it appears that this statute would apply to de facto parents as that status was defined by the Supreme Court of Washington in In re Parentage of L.B., 155 Wash. 2d 679, 122 P.2d 161 (2005), because it governs child custody as between unmarried couples. WASH. REV. CODE § 26.26.130(7) (2004) indicates that custody arrangements between an unmarried couple are to be handled on the same basis as those between a divorcing couple, which are governed by WASH. REV. CODE § 26.09 (2004).


139. Id. at 721 (quoting Moore, 431 U.S. at 503 (plurality opinion)).

140. Id. (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

141. Id.
H., against criticism that this historically-centered approach turned the due process clause into a redundancy,\textsuperscript{142} the plurality stated that the Fourteenth Amendment’s purpose is to prevent future generations from lightly casting aside important traditional values—not to enable courts to invent new ones.\textsuperscript{143} Thus, the Court has purposefully made it difficult to expand substantive due process rights under the Fourteenth Amendment.

IV. RECOGNITION OF DE FACTO PARENTAGE MUST MEET STRICT SCRUTINY

A state cannot recognize and vest a \textit{de facto} parent with rights equivalent to those of a natural or adoptive parent unless such recognition is narrowly tailored to advance a compelling state interest.\textsuperscript{144} Because the parental rights of those in the highest tier are constitutionally protected as a fundamental right, any state intrusion that erodes that right on behalf of a third party—even a lower-tier parental figure—must be strictly scrutinized.\textsuperscript{145} A state cannot increase the rights of a non-parent vis-à-vis an existing parent without eroding the rights of the latter.\textsuperscript{146}

While a de minimis derogation of a parent’s rights in favor of another may face correspondingly lower scrutiny,\textsuperscript{147} strict scrutiny review attaches to any significant infringement of a fundamental right.\textsuperscript{148} Since the impact of awarding full, equal parental rights to a \textit{de facto} parent significantly detracts from an existing parent’s fundamental right to the care, custody, and control of his or her child, any state action constituting such an infringement must be strictly scrutinized.\textsuperscript{149}

\textsuperscript{142} \textit{Michael H.}, 491 U.S. at 141 (Brennan, J., dissenting).
\textsuperscript{143} \textit{Id.} at 122 n.2 (plurality opinion). \textit{But see} Lawrence v. Texas, 539 U.S. 558, 572 (2003) (“History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))).
\textsuperscript{145} \textit{Id.}
\textsuperscript{147} An award of mere visitation to a former caregiver may be such a de minimis derogation. \textit{See Troxel v. Granville}, 530 U.S. 57, 100–01 (2000) (Kennedy, J., dissenting) (suggesting that best interests standard, and not strict scrutiny, would be appropriate standard of review for such an award of visitation over the objections of the parent).
\textsuperscript{149} \textit{See, e.g., id.; Troxel}, 530 U.S. at 66–67.
Unequal Rights

Further, a state may not “promote” a lower-tier parent either explicitly or by device of definitional change to escape strict scrutiny.\textsuperscript{150} State recognition of a third party as a \textit{de facto} parent significantly infringes upon existing parents’ rights. When there is legal parity between two parents, each “parent has authority to act as agent for the other in matters of their child’s upbringing and education.”\textsuperscript{151} For instance, under Washington law parental rights include the potential for award of either shared or sole custody,\textsuperscript{152} shared decision-making about myriad facets of the child’s upbringing,\textsuperscript{153} and an unconstrained ability to make day-to-day decisions while the child is residing with that parent.\textsuperscript{154} Any inability to come to an agreement on some important aspect of a child’s upbringing could lead to mandatory dispute resolution proceedings to resolve such issues.\textsuperscript{155}

Even if a \textit{de facto} parent is not awarded any share of custody, he or she could contest any future relocation by the natural or adoptive parent, a right denied nearly all non-parents, even those entitled to visitation.\textsuperscript{156} If the parent dies, the \textit{de facto} parent becomes the child’s sole parent and custodian, regardless of the natural or adoptive parent’s desire that alternative caregivers rear her child.\textsuperscript{157} Each of these, even taken separately, are a greater imposition on the natural or adoptive parent’s pre-existing rights to the “care, custody, and control”\textsuperscript{158} of a child than the order for increased grandparent visitation that the \textit{Troxel} Court ruled an unconstitutional infringement of those rights.\textsuperscript{159}

\textsuperscript{150} See supra Part III.
\textsuperscript{151} Hodgson v. Minnesota, 497 U.S. 417, 446 n.32 (1990).
\textsuperscript{152} WASH. REV. CODE § 26.09.187(3) (2004).
\textsuperscript{153} Id. § 26.09.184(4)(a).
\textsuperscript{154} Id. § 26.09.184(4)(b).
\textsuperscript{155} Id. § 26.09.184(4)(c).
\textsuperscript{156} WASH. REV. CODE § 26.09.480 (2004) gives one parent standing to contest the custodial parent’s relocation. Section 26.09.540 gives those who have visitation orders in place this right as well, but only if they have served as primary caregiver to the child for “a substantial period of time during the thirty-six consecutive months preceding the intended relocation.”
\textsuperscript{157} WASH. REV. CODE § 26.10.030 (2004) only allows third parties to petition for custody if neither parent is a suitable custodian.
\textsuperscript{158} See \textit{Troxel} v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion).
\textsuperscript{159} See \textit{id.} at 63. However, as the Supreme Court of Washington pointed out in its decision in \textit{L.B.}, Justice Kennedy suggested in his dissenting opinion in \textit{Troxel} that the statute could have been constitutional if applied to a \textit{de facto} parent, suggesting his willingness to grant the remedy of visitation to someone in Carvin’s position. \textit{See In re L.B.}, 155 Wash. 2d 679, 711 (2005) (citing \textit{Troxel}, 530 U.S. at 100–01 (Kennedy, J., dissenting)). Justice Kennedy’s seeming endorsement of \textit{de facto} parentage seems limited to the visitation context, however, rather than full recognition of
Taken together, these rights expropriated by the state and awarded to the *de facto* parent constitute a significant imposition on a natural or adoptive parent’s fundamental rights. In most instances, a state or one of its courts can increase a person’s liberty interest against the government without diminishing the rights of others. However, because recognition of a second parental interest when there is one existing parent necessarily creates tension with the existing parent’s rights, conflict between the two is unavoidable.

States cannot evade this conflict by asserting that the *de facto* parent has equal Fourteenth Amendment rights. A state cannot change the Court-recognized definition of upper-tier “parent” to encompass *de facto* parents and then hold that the resulting constitutional claims of right against the recognition are mooted by equality under the Fourteenth Amendment. Additionally, unless a state makes a compelling argument that recognition of *de facto* parentage is both “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty,” it is not permitted to vest *de facto* parents with fundamental parental rights. States are thus limited by the Fourteenth Amendment from expropriating significant parental rights from existing upper-tier parents and allotting them to third parties, irrespective of how state law defines the third party.

V. CONCLUSION

The U.S. Supreme Court has implicitly created a tiered, hierarchical structure of parental rights, and has consistently rejected assertions that adults in the lower tier have rights on par with those in the upper tier—mothers, married fathers, and adoptive parents. Instead, the Court has uniformly held that those other parties have lesser rights, particularly when their interests conflict with those in the upper tier. Parents in the upper tier may assert their rights against state action seeking to expropriate their parental rights even when the state acts in favor of

---

Fourteenth Amendment parental rights to *de facto* parents, and no other justice joined his dissent. See *Troxel*, 530 U.S. at 100-01.


161. *Id.*

162. *See supra* Part III.A.


164. *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).
those adults with recognized rights in the lower tiers. This is because the former have a recognized fundamental right and the latter, particularly when in conflict with the former, do not.

*De facto* parents have a claim, at most, to inclusion in a lower tier of parental rights. State action recognizing *de facto* parentage significantly intrudes on an existing parent’s rights. States cannot avoid scrutiny under the Fourteenth Amendment by changing the constitutionally accepted meanings of critical terms. Further, states are not free to create new rights in this area—especially when doing so would derogate from another’s existing fundamental right. Therefore, state law creation of *de facto* parentage that purports to put a *de facto* parent on legal par with an existing upper-tier parent must be strictly scrutinized and permitted to stand only if it is narrowly tailored to meet a compelling state interest. While the U.S. Supreme Court has not dealt directly with a state court decision placing a *de facto* parent in full Fourteenth Amendment rights parity with an existing parent, it is unlikely to ratify such an action upon review.