

**TOWARDS THE RECOGNITION OF A PARENTAL
RIGHT OF COMPANIONSHIP IN ADULT CHILDREN
UNDER THE FOURTEENTH AMENDMENT
SUBSTANTIVE DUE PROCESS CLAUSE**

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INTRODUCTION

The United States Supreme Court has long recognized that due process¹ under the Fourteenth Amendment consists of both procedural and substantive components.² The procedural aspect ensures that adequate procedure is provided when the government or government actors take life, liberty, or property from an individual.³ The substantive component ensures that fundamental

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¹ The Constitution contains Due Process Clauses in both the Fifth and Fourteenth amendments. U.S. CONST. amend. V, XIV. The Fifth Amendment Due Process Clause applies to the federal government and reads, “No person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. The Fourteenth Amendment Due Process Clause applies to state and local governments and provides, “No state shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV. The Fourteenth Amendment Due Process Clause is the means by which Congress has incorporated most of the Bill of Rights and made them applicable to the states. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

² “Although a literal reading of the [Due Process] Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years . . . [it] has been understood to contain a substantive component as well, one ‘barring certain government actions regardless of the fairness of the procedures used to implement them.’” *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992).

³ *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). The *Mathews* court laid out the test to determine whether due process has been provided.

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

rights are protected from governmental intrusion;⁴ hence, it is said to add "substance" to the normally procedural Due Process Clause.⁵

Under the substantive component of the Fourteenth Amendment Due Process Clause, the Supreme Court has recognized many familial rights. These include the right to companionship, care, custody, and management of minor children;⁶ the right to keep the family together;⁷ the right to child-rearing;⁸ and the right to marry and procreate.⁹ Recently, several circuit courts have addressed the issue of whether parents have a Fourteenth Amendment liberty interest in the continued association of their adult children.¹⁰ While the Seventh, Ninth and Tenth Circuits have held that parents do have a constitutionally protected right of companionship in their adult children,¹¹ the First, Third, and D.C. Circuits have held that they do not.¹² The issue might have been resolved by the Supreme Court in two cases in which certiorari was granted, but in both cases certiorari was dismissed as improvidently granted.¹³

Id. at 335.

⁴ *Planned Parenthood of Southeastern Pa.*, 505 U.S. at 847 (quoting Justice Brandeis in *Whitney v. California*, 274 U.S. 357, 373 (1927) saying, "it is settled that the Due Process Clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.")

⁵ James W. Hilliard, *To Accomplish Fairness and Justice: Substantive Due Process*, 30 J. MARSHALL L. REV. 95, 95 (1996). For a thorough discussion of the concept of substantive due process as based on traditional American political theory, see *id.* at 95-104. See also James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 320-45 (1999).

⁶ *Santosky v. Kramer*, 455 U.S. 745 (1982).

⁷ *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

⁸ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁹ *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁰ Such a right would allow recovery to a parent upon the wrongful death of a child who was above the statutory age of minority. See, e.g., *McCurdy v. Dodd*, 352 F.3d 820 (3d Cir. 2003); *Butera v. District of Columbia*, 235 F.3d 637 (D.C. Cir. 2001); *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001); *Ortiz v. Burgos*, 807 F.2d 6 (1st Cir. 1986); *Strandberg v. City of Helena*, 791 F.2d 744 (9th Cir. 1986); *Trujillo v. Bd. of County Comm'rs of the County of Santa Fe*, 768 F.2d 1186 (10th Cir. 1985); *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984).

¹¹ *Bell*, 746 F.2d at 1243; *Lee*, 250 F.3d at 685-86; *Strandberg*, 791 F.2d at 748, 748 n.1; *Trujillo*, 768 F.2d at 1189.

¹² *Ortiz*, 807 F.2d at 10; *McCurdy*, 352 F.3d at 822; *Butera*, 235 F.3d at 656.

¹³ *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981), *cert. dismissed*, 456 U.S. 430 (1982); *Jones v. Hildebrandt*, 550 P.2d 339 (Colo. 1976), *cert. dismissed*, 432 U.S. 183 (1977). In *Espinoza*, the Supreme Court summarily dismissed certiorari for lack of finality. *Espinoza*, 456 U.S. at 430. In *Jones*, the Supreme Court dismissed certiorari because Petitioner initially had claimed that her case was based on her personal liberty interest in raising her child without governmental interference, but afterwards, indicated that her claim was based on her unconstitutional deprivation of

This Comment articulates the view that a right of companionship in adult children should be recognized. Part I of this Comment outlines general substantive due process analysis guidelines under the Fourteenth Amendment. Part II examines various familial rights that the Supreme Court has recognized under the Due Process Clause. Part III surveys cases that have dealt with the right of companionship between parents and adult children. Part IV looks at recent social and economic trends that urge recognition of the right. Finally, this Comment concludes that recognition of a parental right of companionship in adult children is in line with general substantive due process analysis, and provides a framework for the scope of such a right.

I. GENERAL SUBSTANTIVE DUE PROCESS ANALYSIS UNDER THE FOURTEENTH AMENDMENT

In the beginning of the twentieth century, the Supreme Court used the substantive component of the Due Process Clause to protect economic freedom of contract, which the Court saw as a fundamental right.¹⁴ The Court invalidated as many as two hundred state economic laws based on the implied fundamental right to freedom of contract found under the substantive Due Process Clause.¹⁵ By the mid-1930s, however, economic substantive due process came under attack as the Great Depression placed tremendous pressure on the government to play a more active role in the economy.¹⁶ Since 1937, the Supreme Court has shied away from using the Due Process Clause to invalidate state economic laws.¹⁷

The Court, however, has not shown similar restraint in the non-economic arena. Under the substantive Due Process Clause, the Court has found that many non-economic rights are fundamental

property. *Jones*, 432 U.S. at 184-89.

¹⁴ *Lochner v. New York*, 198 U.S. 45 (1905). The Court held that a law enacted by the New York state legislature, which regulated the maximum number of hours that a baker could work, was violative of the individual's right to freedom of contract under the substantive Due Process Clause. *Id.* at 64. The case marked the start of what is known as the "*Lochner* era," in which the Court is said to have trammelled over state police powers. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977). The Court's broad definition of liberty under *Lochner*, however, has never been officially rejected. Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. DAYTON L. REV. 313, 319 (1991). While the negative history of the substantive Due Process Clause "counsels caution and restraint, . . . it does not counsel abandonment." *Moore*, 431 U.S. at 502.

¹⁵ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 592 (2d ed. 2002).

¹⁶ *Id.* at 597.

¹⁷ *Id.* at 601.

including: the right to marry,¹⁸ the right to the companionship, care, and custody of one's children,¹⁹ the right to keep the family together,²⁰ the right to control the upbringing of one's children,²¹ the right to get an abortion,²² the right to refuse medical treatment,²³ and numerous other rights.²⁴

The process by which the Court implies fundamental rights via the substantive Due Process Clause is far from an exact science. Justice Harlan described this unempirical analysis in his famous dissenting opinion in *Poe v. Ullman*:²⁵

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.²⁶

Because the Supreme Court has recognized that substantive due process analysis often has little backing in the text of the Constitution, the Court follows a conservative path when deciding which rights are and are not fundamental.²⁷ As an initial principle, the Court has warned that there should be "great resistance" to expanding the substantive reach of the Due Process Clause.²⁸

Despite its pervasive indefiniteness, substantive due process analysis consistently follows some general guidelines. The Court's

¹⁸ *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁹ *Santosky v. Kramer*, 455 U.S. 745 (1982).

²⁰ *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

²¹ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

²² *Roe v. Wade*, 410 U.S. 113 (1973).

²³ *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

²⁴ This rather broad recognition of rights has had its critics. Substantive due process has often been chided as the judiciary's means by which to interject its personal beliefs into constitutional law-making. John Hart Ely stated, "[W]e apparently need periodic reminding that 'substantive due process' is a contradiction in terms – sort of like 'green pastel redness'." JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980). Also, Robert H. Bork called substantive due process "a momentous sham." ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 31 (1990). Despite this criticism, however, substantive due process in the non-economic sphere has remained strong in the late twentieth century. Ely, *supra* note 5, at 315-16.

²⁵ 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

²⁶ *Id.*

²⁷ "The Court is 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 design of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

²⁸ *Id.* at 195.

first query is to determine the right at stake and to assess whether the interest is a fundamental right that falls within the ambit of “life, liberty,²⁹ or property” comprising the Due Process Clause.³⁰ In ascertaining whether a fundamental right is at stake, the Court uses broad guideposts such as: whether the right is “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed,”³¹ if it is “deeply rooted in the Nation’s history and tradition,”³² or, if it is “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”³³ Hence, there is a large emphasis on American tradition and culture to determine whether a right is fundamental.

If the Court finds that the sought right represents American historic traditions and values, a fundamental right is implicated.³⁴ On the other hand, if the Court finds that the sought right does not represent the Nation’s traditional values, there is no implied fundamental right cognizable in the Fourteenth Amendment substantive Due Process Clause.³⁵ While this describes the general framework, the Court has recently departed somewhat from this standard. For instance, in *Lawrence v. Texas*,³⁶ the Court found that consenting adults had the right to engage in private homosexual activity under the substantive Due Process Clause,³⁷ even though the argument that there were historical traditions underlying this type of activity was tenuous.³⁸

²⁹ In general, the Court has defined the “liberty” protected under the substantive Due Process Clause very broadly. The Court has stated:

Without doubt, [“liberty” in the Fourteenth Amendment Due Process Clause] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer, 262 U.S. at 399.

³⁰ Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 630-31 (1992).

³¹ *Bowers*, 478 U.S. at 190-91 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

³² *Moore*, 431 U.S. at 503.

³³ *Palko*, 302 U.S. at 325 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

³⁴ *See id.*

³⁵ *See* CHEMERINSKY, *supra* note 15, at 765.

³⁶ 539 U.S. 558 (2003).

³⁷ *Id.* at 578.

³⁸ *See id.* at 570-72. The Court explained that historically, there were laws

Based on whether or not the Court finds a fundamental right, different levels of means-end scrutiny ensue.³⁹ On one end, when the Court finds that no fundamental right exists, a challenged government action need only survive “rational basis” review.⁴⁰ This means that a government action allegedly depriving an individual of a right must be a “rational” means for furthering a “legitimate” government interest.⁴¹ Under this standard, the Court defers to the government upon a finding of any valid reason for the government action.⁴² At the other extreme, if a fundamental right is at stake, a government action must survive “strict scrutiny” review.⁴³ This means

banning homosexual acts, but argued that they generally were not enforced when dealing with consenting adults acting in private. *Id.* On the other hand, the Court acknowledged that “for centuries there have been powerful voices to condemn homosexual conduct as immoral.” *Id.* at 571. Given this incongruent historical background, the Court concluded, “[h]istory and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry.” *Id.* at 572 (quoting *Sacramento v. Lewis*, 523 U.S. 833, 857 (Kennedy, J., concurring)).

³⁹ For the genesis of means-end scrutiny, see *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). In general, the judiciary defers to the legislature unless it finds that the government action infringes a fundamental right. See Hilliard, *supra* note 5, at 105-06. Means-end scrutiny is also used for analysis under the Equal Protection Clause, in which the judiciary defers to the legislature unless it finds that the government action discriminates against a “discrete and insular” minority. See *id.* The “discrete and insular” terminology comes from *Carolene Products*. 304 U.S. at 152, n.4. Means-end scrutiny under the Due Process Clause has only two tiers of review, rational basis and strict scrutiny. See Hilliard, *supra* note 5, at 105. The analysis for the Equal Protection Clause has three tiers, rational basis, strict scrutiny, and an intermediate level of review. CHEMERINSKY, *supra* note 15, at 645-47. For an argument urging the Court to adopt intermediate level scrutiny for the Due Process Clause as well, see *Leading Cases, Substantive Due Process – Intermediate Level Scrutiny*, 106 HARV. L. REV. 210 (1992).

⁴⁰ CHEMERINSKY, *supra* note 15, at 764.

⁴¹ *Id.* at 651. Although this is the gist of the test, rational basis review has been phrased in numerous ways by the Supreme Court. In *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911), the Court said:

When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. . . . One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Lindsley, 220 U.S. at 78-79. In other instances, the Court has not articulated the test to be so deferential. For example, in *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920), the Court declared, “the classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike.” *Royster Guano Co.*, 253 U.S. at 415.

⁴² Hilliard, *supra* note 5, at 106. Although rational basis review is very deferential, it is not merely a formality. *Id.* Courts have invalidated legislation under the standard. *Id.*

⁴³ CHEMERINSKY, *supra* note 15, at 767.

that the government action must be “necessary”⁴⁴ to further a “compelling” government interest.⁴⁵

II. SUPREME COURT RECOGNITION OF FUNDAMENTAL RIGHTS INVOLVING THE FAMILY

Under the substantive Due Process Clause, the Court has recognized various familial rights. This section will survey each of these familial rights and discuss the context in which the Supreme Court recognized these rights as fundamental.

A. *The right to marry*

The Court first held that the right to marry was a fundamental right protected under the substantive Due Process Clause in *Loving v. Virginia*.⁴⁶ The case arose out of a Virginia law that made it illegal for a white person to marry other than another white person.⁴⁷ When a white male Virginia resident married a black female Virginia resident, both were sentenced to one year in prison.⁴⁸ Although the bulk of the Supreme Court’s opinion dealt with the statute’s violation of the Equal Protection Clause,⁴⁹ the Court posited that the statute also violated the Due Process Clause of the Fourteenth Amendment.⁵⁰ The Court noted, “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”⁵¹

⁴⁴ For an action to be “necessary,” the government must show that it could not further its interest with less of an infringement on the fundamental right. *Id.*

⁴⁵ *Id.*

⁴⁶ 388 U.S. 1 (1967).

⁴⁷ *Id.* at 2.

⁴⁸ *Id.* at 3. The trial judge suspended the sentence for twenty-five years as long as the couple agreed to leave the state of Virginia and not to return together for that period of time. *Id.*

⁴⁹ The Court rejected the State’s argument that the statute should pass constitutional muster because it applied equally to all races. *Id.* at 8.

There can be no question but that Virginia’s miscegenation statutes rest solely upon distinctions drawn according to race. . . . At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the ‘most rigid scrutiny,’ and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective

Id. at 11 (citations omitted).

⁵⁰ *Loving*, 388 U.S. at 12.

⁵¹ *Id.* The Court also articulated, “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. . . . Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.” *Id.*

In *Zablocki v. Redhail*,⁵² the Court reaffirmed the premise of *Loving* that the right to marry is fundamental.⁵³ *Zablocki* concerned a Wisconsin statute that prevented a person from marrying if he had a non-custodial minor child for whom he was required to pay child support.⁵⁴ The Court stated, “it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.”⁵⁵ Because the Court found that the right to marry was a fundamental right, it applied strict scrutiny review and held that none of the reasons for interfering with the right were necessary to achieve a compelling government interest.⁵⁶

Although the Court reaffirmed the right to marry as fundamental in *Zablocki*, it did so under the Equal Protection Clause.⁵⁷ The Court, however, also adopted *Loving’s* view that the right to marry was protected by the Fourteenth Amendment Due Process Clause.⁵⁸ In addition, Justice Stewart wrote a concurring opinion arguing that the case should have been decided under due

⁵² 434 U.S. 374 (1978).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 386. The Court also noted that “[l]ong ago, the Court characterized marriage as ‘the most important relation in life.’” *Id.* at 384 (quoting *Maynard v. Hill*, 125 U.S. 190 (1888)). “It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships.” *Id.* at 386.

⁵⁶ *Zablocki*, 434 U.S. at 388. The reasons provided for the statute were: (1) it provided a mechanism by which people who had prior support obligations could be counseled before they entered into a marital relationship from which they derived even more support obligations; and (2) it protected the welfare of out-of-custody children. *Id.* For more Supreme Court cases that recognize the right to marry as fundamental, see *Turner v. Safley*, 482 U.S. 78 (1987) (holding that a state law requiring prisoners to get permission from the superintendent before getting married was unconstitutional) and *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that a state cannot require individuals to pay filing fees and court costs in order to receive a divorce).

⁵⁷ *Id.* at 382-83.

⁵⁸ *Id.* at 383-84. As noted by the *Zablocki* court:

The Court’s opinion [in *Loving*] could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause. But the Court went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry. The Court’s language on the latter point bears repeating: “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Id. at 383 (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

process rather than equal protection:⁵⁹

The problem in this case is not one of discriminatory classifications, but of unwarranted encroachment upon a constitutionally protected freedom. I think that the Wisconsin statute is unconstitutional because it exceeds the bounds of permissible state regulation of marriage, and invades the sphere of liberty protected by the Due Process Clause of the Fourteenth Amendment.⁶⁰

B. The right to keep the family together

The Supreme Court recognized the right to keep the family together in *Moore v. City of East Cleveland*.⁶¹ The case concerned an Ohio housing ordinance that restricted the categories of family members that could live together in one household.⁶² Under the ordinance, a grandmother was prohibited from living with her grandson.⁶³ The Court applied strict scrutiny review and held that the ordinance was not necessary to achieve a compelling government interest.⁶⁴

In holding the ordinance to be violative of the Due Process Clause of the Fourteenth Amendment, the Court noted, “[t]his Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”⁶⁵ The Court continued, “[a] host of cases . . . have consistently acknowledged a ‘private realm of family life which the state cannot enter.’”⁶⁶ Additionally, the Court commented on the unsuitability of bright line rules in substantive due process analysis, and the traditional value that American society has placed on the institution of the family.⁶⁷

⁵⁹ *Id.* at 391-403.

⁶⁰ *Id.* at 391-92.

⁶¹ 431 U.S. 494 (1977).

⁶² *Id.* at 495-96.

⁶³ *Id.* at 499. The particular household consisted of a grandmother, her son, and her two grandsons who were first cousins to each other. *Id.* at 496. John Moore, Jr., the grandson with whom it was a violation for the grandmother to live, came to live with his grandmother when his mother died. *Id.* at 496-97.

⁶⁴ *Id.* at 499-500. The city claimed that the governmental interests were (1) “preventing overcrowding,” (2) “minimizing traffic and parking congestion,” and (3) “avoiding an undue financial burden on East Cleveland’s school system.” *Moore*, 431 U.S. at 499-500. While the Court recognized that these were legitimate goals, it held that the ordinance “serve[d] them marginally at best.” *Id.* at 500.

⁶⁵ *Id.* at 499 (citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974)).

⁶⁶ *Id.* (citations omitted).

⁶⁷ *Id.* at 503-04.

The Court emphasized that American tradition valued not only the nuclear family, but also the extended, non-traditional family unit.⁶⁸ Thus, the Due Process Clause protects constitutional rights not only for parents and children, but also for the extended family unit.⁶⁹

In *Smith v. Organization of Foster Families for Equality and Reform*,⁷⁰ which dealt with the rights of foster parents, the Court moved beyond biological relationships and recognized that a parent-child bond could be created even without a blood relationship.⁷¹

[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot(ing) a way of life' through the instruction of children, as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship.⁷²

Despite this strong language, the Court did not affirmatively hold that the relationship was protected by the Due Process Clause because it opted to decide the case on narrower grounds.⁷³ What is

Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teaching of history (and), solid recognition of the basic values that underlie our society.' 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. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

Id. (citations omitted).

⁶⁸ *Moore*, 431 U.S. at 504-05.

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years, millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and satisfactions of a common home.

Id.

⁶⁹ *See id.*

⁷⁰ 431 U.S. 816 (1977).

⁷¹ *Id.* at 844.

⁷² *Id.* (citations omitted).

⁷³ *Id.* at 847. Additionally, the Court also noted differences between foster

clear, however, is that in both *Moore* and *Smith*, the Court chose not to draw arbitrary lines deciding who was entitled to a fundamental right under the substantive Due Process Clause.

C. *The right to control upbringing of children*

One of the first cases that dealt with familial substantive due process rights, *Meyer v. Nebraska*,⁷⁴ recognized the right of a parent to control the upbringing of his or her children. The case concerned a state law that proscribed teaching a subject in any language besides English, and prohibited teaching a child any language other than English before he or she passed eighth grade.⁷⁵ The Court acknowledged that the statute's purpose, to make English the mother tongue of all American students, was legitimate,⁷⁶ but held that the law improperly interfered with the parent's right to direct the upbringing of his or her children.⁷⁷ Two years later, in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*,⁷⁸ the Court again recognized the right of parents to control and direct the upbringing of their children.⁷⁹

Even when the governmental interest has been extremely compelling, the Court has not allowed curtailment of a parent's right to control the upbringing of his or her children. For example, in *Wisconsin v. Yoder*,⁸⁰ the Supreme Court held that Amish parents had a

parents and biological parents. *Id.* at 845. For example, the Court explained that a biological parent-child relationship existed entirely apart from the State, but a foster parent-child relationship had state law as its source. *Id.*

⁷⁴ 262 U.S. 390 (1923).

⁷⁵ *Id.* at 397.

⁷⁶ *Id.* at 398.

⁷⁷ *Id.* at 400.

⁷⁸ 268 U.S. 510 (1925).

⁷⁹ *Id.* at 534-35. The case dealt with a state law that required children to attend public schools. *Id.* at 530. The Court held that:

[T]he Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Id. at 534-35. *Cf.* *Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding that a child labor law as applied to a minor girl engaging in religious solicitation did not violate the parents' substantive due process right in directing the upbringing of their child). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder But the family itself is not beyond regulation in the public interest" *Id.* at 166.

⁸⁰ 406 U.S. 205 (1972).

right to decide not to send their children to school beyond eighth grade despite a compulsory school attendance law.⁸¹ The Court noted, “a State’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as . . . the traditional interest of parents with respect to the religious upbringing of their children.”⁸²

The Supreme Court, in a plurality opinion, recently upheld the right of parents to control the upbringing of their children even in the face of objection by grandparents. In *Troxel v. Granville*,⁸³ the Court permitted a mother (“Granville”) to limit her two daughters’ visitation with their grandparents (“the Troxels”).⁸⁴ In that case, a Washington state law gave “any person” the right to petition for visitation of a child, and authorized a court to grant visitation whenever it found that granting visitation was within “the best interest of the child.”⁸⁵ After the father of the children committed suicide, Granville decided to decrease the number of visits between the Troxels and her daughters.⁸⁶ In response, the Troxels filed a petition seeking increased visitation with the children.⁸⁷ Granville appealed when the state court allowed increased visitation.⁸⁸

The Supreme Court, in reversing the state court’s holding, first noted that the right of parents to determine the upbringing of their children was one of the oldest rights found under the substantive Due Process Clause.⁸⁹ The Court then faulted the state court for not

⁸¹ *Id.* at 234. The Amish believed that sending their children to school beyond eighth grade would interfere with the inculcation of Amish values and way of life. *Id.* at 210-11.

⁸² *Id.* at 214 (citations omitted).

⁸³ 530 U.S. 57 (2000).

⁸⁴ *Id.* at 72-75. The Troxels were the grandparents on the father’s side. *Id.* at 60.

⁸⁵ *Id.* at 60.

⁸⁶ *Id.* at 60-61.

⁸⁷ *Id.* at 61.

⁸⁸ *Troxel*, 530 U.S. at 61. The court did not grant either party’s requested visitation exactly, but granted compromised visitation somewhere in between what each party had originally requested. *Id.*

⁸⁹ “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.” *Id.* at 65. Justice Scalia agreed that the right of parents to control the upbringing of their children was important, but objected to the Court’s decision to grant it Constitutional protection:

In my view, a right of parents to direct the upbringing of their children is among the “unalienable Rights” with which the Declaration of Independence proclaims “all men . . . are endowed by their Creator.” And in my view that right is also among the “othe[r] [rights] retained by the people” which the Ninth Amendment says the

giving Granville's determination of her children's best interest the deference that it deserved.⁹⁰ Thus, the Court held that a parent's right to control the upbringing of her children was expansive enough to override any right that grandparents may have to seek increased visitation.⁹¹

D. The right to companionship, care, custody, and management of one's children

The Court recognized the right to the companionship, care, custody, and management of one's children in *Stanley v. Illinois*.⁹² The case arose out of a situation where a couple, Joan and Peter Stanley, had lived together intermittently for eighteen years, having three children together.⁹³ After Joan died, the children were placed with court-appointed guardians pursuant to an Illinois law that required children of unwed fathers to become wards of the State upon the mother's death.⁹⁴ Peter Stanley sued arguing that he had been denied the equal protection of the laws.⁹⁵

Stanley claimed that since married fathers and unwed mothers could not be deprived of their children without a showing of parental unfitness, he, as an unwed father, had been denied the equal protection of the laws under the Fourteenth Amendment.⁹⁶ Although the case dealt mainly with equal protection and procedural due process, the Court relied in part on previous substantive Due Process cases respecting the family in finding that Peter Stanley had been

Constitution's enumeration of rights "shall not be construed to deny or disparage." The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. *Id.* at 91 (Scalia, J., dissenting).

Furthermore, it seems that Justice Thomas would agree with Justice Scalia. *See id.* at 80. (Thomas, J., concurring). "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." *Id.* (Thomas, J., concurring). Given that neither party had brought up the issue, Justice Thomas opined that a parent's fundamental right to control the upbringing of her children resolved the case. *Id.* (Thomas, J., concurring).

⁹⁰ *Id.* at 69.

⁹¹ *See id.* at 72-73.

⁹² 405 U.S. 645, 651 (1972).

⁹³ *Id.* at 646.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

denied both constitutional rights.⁹⁷

In finding that the Illinois law violated equal protection and procedural due process, the Court noted the extreme importance that the Court has historically allotted to the family:

[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'⁹⁸

Furthermore, the Court made clear that historically it had refused to draw bright line rules based on the presence or absence of a marriage ceremony.⁹⁹ As an example, the Court stated that in *Levy v. Louisiana*,¹⁰⁰ it had declared unconstitutional a state statute that denied illegitimate children the right to bring a wrongful death action following the death of their natural mother.¹⁰¹ In that case, the Court had been influenced by the fact that familial bonds could be just as warm and enduring as those within a more formal family unit.¹⁰² Thus, the Court held that the mere fact that Peter Stanley had never married Joan could not be used to deny him the fundamental right to companionship, care, custody, and management of his children.¹⁰³

In *Lehr v. Robertson*,¹⁰⁴ however, the Court held that the state could terminate an unmarried father's parental rights without providing procedural due process.¹⁰⁵ It distinguished *Stanley* by noting that in that case, the father had a close relationship with his children, but in *Lehr*, the father did not. The Court opined:

[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the due process clause. At that point it

⁹⁷ *Id.* at 651 (citing, *inter alia*, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

⁹⁸ *Stanley*, 405 U.S. at 651 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

⁹⁹ *Id.* at 651-52.

¹⁰⁰ 391 U.S. 68 (1968)

¹⁰¹ *Id.* (citing *Levy*, 391 U.S. at 71-72).

¹⁰² *Id.* at 652 (citing *Levy*, 391 U.S. at 71-72).

¹⁰³ *Id.* at 658.

¹⁰⁴ 463 U.S. 248 (1983).

¹⁰⁵ *Id.* at 265.

may be said that he ‘act[s] as a father toward his children.’ But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds.¹⁰⁶

Thus, the Court looked to the actual relationship that a parent shared with his child to determine whether that parent had a constitutional claim for continued companionship with his child rather than arbitrarily assuming that every unwed father possessed such an interest.¹⁰⁷

In another decision, *Santosky v. Kramer*,¹⁰⁸ the Court reiterated the importance of the right to companionship, care, custody, and management of a child.¹⁰⁹ The Court emphasized that a biological parent’s right to companionship, care, and custody of her children is far more valuable than any property right.¹¹⁰ The decision primarily dealt with procedural due process and held that a state must support its allegations of parental neglect with clear and convincing evidence before it can sever a parent’s rights in her natural child.¹¹¹ The decision, however, referred to the parental right of “care, custody, and management” of a child as a fundamental right under the Due Process Clause.¹¹²

This survey of cases makes clear that the Supreme Court has consistently recognized and preserved fundamental rights involving the family. Furthermore, the Court has shunned the use of arbitrary lines and markers in determining whether a fundamental right exists. Especially when dealing with non-traditional family units such as those involving step-children and step-parents, the court has looked to the actual relationship shared by parent and child to determine whether there is a fundamental right under the Due Process Clause.

III. CASES DISCUSSING THE PARENTAL RIGHT OF COMPANIONSHIP WITH ADULT CHILDREN

The cases discussed in Part II of this Comment deal generally with Supreme Court recognition of familial rights under the substantive Due Process Clause. While they illustrate the Court’s

¹⁰⁶ *Id.* at 261 (quoting *Caban v. Mohammed*, 441 U.S. 380, 392, 389 n.7 (1979)).

¹⁰⁷ *Id.* But see *Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989) (holding that even an unmarried father who had a close relationship with his child was not entitled to due process when the child’s mother was married to another man).

¹⁰⁸ 455 U.S. 745 (1982).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 758-59 (quoting *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981)).

¹¹¹ See *id.* at 769.

¹¹² *Id.* at 1394-95.

expansive protection of the family, they all involve minor children in their parents' custody and thus point only vaguely towards the recognition of a parental right of companionship with adult children who are no longer in their parents' custody. Lower courts, however, have directly addressed parents' right of companionship with adult children and the Seventh,¹¹³ Tenth,¹¹⁴ and Ninth¹¹⁵ Circuits have ruled that it is constitutionally protected. The First,¹¹⁶ Third,¹¹⁷ and D.C.¹¹⁸ Circuits, however, have disagreed. This section surveys these cases.

A. *Cases Extending Constitutional Protection to the Parental Right of Companionship in Adult Children*

1. The Ninth Circuit

In *Smith v. City of Fontana*,¹¹⁹ the Ninth Circuit held that where it had previously recognized a parental right of companionship with minor children in *Kelson v. City of Springfield*,¹²⁰ it was required as a matter of logic to find a child's right of companionship with parents.¹²¹ Smith died as a result of excessive police violence during his arrest.¹²² Smith's children alleged that the police officers had violated their substantive due process rights "not to be deprived of the life of their father and not to be deprived of his love, comfort,

¹¹³ *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) (holding that a father had a constitutional right to companionship of an adult child, but that the adult child's siblings had no comparable right in their relationship with him).

¹¹⁴ *Trujillo v. Bd. of County Comm'rs*, 746 F.2d 1186 (10th Cir. 1985) (holding that a mother and sister had a constitutionally protected interest in their relationship with their son and brother).

¹¹⁵ *Strandberg v. City of Helena*, 791 F.2d 744 (9th Cir. 1986) (holding that parents had a constitutionally protected interest in the companionship of their adult son apart from their right to parent); *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001) (finding that a mother had a right to the companionship of her mentally-incompetent adult son).

¹¹⁶ *Ortiz v. Burgos*, 807 F.2d 6 (1st Cir. 1986) (holding that neither a stepfather nor siblings had a constitutionally protected liberty interest in the companionship of an adult son and brother).

¹¹⁷ *McCurdy v. Dodd*, 352 F.3d 820 (3d Cir. 2003) (holding that a father did not have a constitutionally protected right of companionship with his adult son).

¹¹⁸ *Butera v. District of Columbia*, 235 F.3d 637 (D.C. Cir. 2001) (holding that a mother did not have a constitutionally protected right of companionship with her adult son).

¹¹⁹ 818 F.2d 1411 (9th Cir. 1983), *overruled on other grounds by* *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1041 n.1 (9th Cir. 1999).

¹²⁰ 767 F.2d 651, 653 (9th Cir. 1985).

¹²¹ *Smith*, 818 F.2d at 1418-20.

¹²² *Id.* at 1414.

and support.”¹²³ Having already recognized a parental right of companionship with children, the court found that the interest logically extended to a child’s right in the companionship of his parents:

We now hold that this constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents. The companionship and nurturing interest of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship.¹²⁴

The court acknowledged that allowing constitutional protection for a child-parent relationship implicated no custody concerns, unlike the parent-child relationship.¹²⁵ The court, however, found this distinction insufficient to warrant differing constitutional protection.¹²⁶ The court explained:

When, as in this case, a child claims constitutional protection for her relationship with a parent, there is no custodial interest implicated, but only a companionship interest. This distinction between the parent-child and the child-parent relationships does not, however, justify constitutional protection for one and not the other. We hold that a child’s interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable interest.¹²⁷

The Ninth Circuit took the next step and first officially recognized the right of companionship with adult children in *Strandberg v. City of Helena*.¹²⁸ The claim arose out of a situation where police arrested the Strandbergs’ twenty-two year old son, Edward, for reckless driving.¹²⁹ After arresting him, the police took Edward to the station and incarcerated him during the booking procedure.¹³⁰ Thirty minutes into the incarceration period, the police found Edward hanging from the cell ceiling, dead.¹³¹ Among other claims,

¹²³ *Id.* at 1417.

¹²⁴ *Id.* at 1418.

¹²⁵ *Id.* at 1419.

¹²⁶ *Id.*

¹²⁷ *Smith*, 818 F.2d at 1419. The court found support in its recognition of the non-custodial companionship right in *Strandberg v. City of Helena*, 791 F.2d 744, 748, 748 n.1 (9th Cir. 1986).

¹²⁸ 791 F.2d 744 (9th Cir. 1986).

¹²⁹ *Id.* at 746.

¹³⁰ *Id.*

¹³¹ *Id.*

the Strandbergs filed suit for violation of their Fourteenth Amendment rights.¹³²

The district court dismissed the Strandbergs' claim that they had been deprived of their constitutional right to parent the decedent because Edward was past minority age.¹³³ The Ninth Circuit, however, viewed the Strandbergs' claim of companionship under the Fourteenth Amendment separate and apart from their right to custody and control of Edward, and found that the district court had not dismissed that claim.¹³⁴ In doing so, the court recognized the right of companionship between parents and their adult child.¹³⁵

In *Lee v. City of Los Angeles*,¹³⁶ the Ninth Circuit confirmed its recognition of the Fourteenth Amendment right of companionship between parents and their adult children. The case arose out of the two-year long wrongful incarceration of Kerry Sanders, the mentally disabled son of Mary Sanders Lee.¹³⁷ After police arrested Sanders, they mistakenly identified him as a fugitive named Robert Sanders.¹³⁸ The police department, however, failed to take appropriate steps to confirm his identity.¹³⁹ Specifically, plaintiffs alleged that the police failed to take proper fingerprints and should have known that Sanders was not Robert Sanders because of his "obvious" mental incapacity and different identifying characteristics.¹⁴⁰ The court found that the actions of the police department, if true, constituted a violation of Lee's Fourteenth Amendment right to companionship of her son.¹⁴¹

2. The Seventh Circuit

The Seventh Circuit dealt with the question of a parental right to

¹³² *Id.* The plaintiffs also brought suit for violations of Edward's rights under the First, Fourth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments as well as pendent state claims for assault and battery, negligence and gross negligence, and intentional infliction of emotional distress. *Id.*

¹³³ *Strandberg*, 791 F.2d at 748 n.1.

¹³⁴ *Id.*

¹³⁵ *See id.*

¹³⁶ 250 F.3d 668, 685-86 (9th Cir. 2001).

¹³⁷ *Id.* at 676-77.

¹³⁸ *Id.* at 677.

¹³⁹ *Id.* at 678.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 685-86. The opinion did not mention Kerry Sanders' age; thus, one can fairly assume that he was an adult. Furthermore, the court did not rely on any special considerations of Sanders' mental condition in finding a violation of his mother's constitutionally-protected companionship right. Therefore, the argument that *Lee* is a special case dealing with the rights of parents in relation to their mentally incompetent children is invalid.

adult companionship in *Bell v. City of Milwaukee*.¹⁴² The case involved a police officer's shooting and killing of a black man, Daniel Bell,¹⁴³ and a subsequent conspiracy, allegedly racially motivated, to conceal the facts underlying the shooting.¹⁴⁴ Daniel Bell's siblings and the estate of his father, Dolphus Bell, filed suit against the city of Milwaukee and numerous members of the Milwaukee police department for violation of their civil rights.¹⁴⁵ Among other things, plaintiffs asserted that the police officers' actions interfered with Dolphus Bell's Fourteenth Amendment liberty interest in the continued association of his son and the siblings' comparable associational right.¹⁴⁶

In finding a violation of Dolphus Bell's constitutional rights, the Seventh Circuit noted that in its decisions, the Supreme Court had placed much importance on the parent-child relationship.¹⁴⁷ Additionally, the Seventh Circuit addressed the defendants' argument that Daniel Bell was no longer a minor and that Dolphus Bell thus did not have an associational right with his son.¹⁴⁸ The court countered, however, "we are unpersuaded that a constitutional line

¹⁴² *Bell*, 746 F.2d 1205.

¹⁴³ *Id.* at 1245. Daniel Bell was twenty-three years old, and thus, no longer a minor at the time of the killing. *Id.* at 1245.

¹⁴⁴ *Id.* at 1214-22.

¹⁴⁵ *Id.* at 1224.

¹⁴⁶ *Id.* The relevant statute under which plaintiffs based their claims is 42 U.S.C. § 1983. The statute provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1996). The statute only provides a remedy for the deprivation of constitutional and federal rights; it does not grant any substantive rights in and of itself. *Bell*, 746 F.2d at 1232 n.29 (citing *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1979)).

¹⁴⁷ *Bell*, 746 F.2d at 1243 (citing *May v. Anderson*, 345 U.S. 528 (1953) (holding that a state court that did not have personal jurisdiction over a mother could not cut off her right to custody of her children); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding that a child labor law as applied to a minor girl engaging in religious solicitation did not violate the parents' substantive due process right in directing the upbringing of their child); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (holding that forced sterilization of certain categories of convicted criminals violated a person's right to procreate); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (finding that a state law that proscribed teaching a subject in any other language but English violated the parents' right to control the upbringing of their children)).

¹⁴⁸ *Bell*, 746 F.2d at 1245.

based solely on the age of the child should be drawn.”¹⁴⁹ The court reasoned that more than mere custody of a minor was constitutionally protected, and that the right extended to the parent’s “‘interest in the companionship, care, custody, and management’ of the child.”¹⁵⁰ The court added that even in situations where a parent did not have legal custody of a child, the Supreme Court had protected the right to care and companionship of a child.¹⁵¹

The Seventh Circuit panel also considered the particular familial situation of Daniel Bell.¹⁵² The court noted, “Daniel was single and had no children. He had not become a part of another family unit; his father’s family was his immediate family.”¹⁵³ The court also considered the “warm and close” relationship Daniel Bell shared with his father.¹⁵⁴ Additionally, the court reasoned that as opposed to taking a child from a parent’s custody, the deprivation caused by the killing of a child, as in Daniel Bell’s situation, was far more remarkable.¹⁵⁵ Thus, the court concluded that Daniel Bell’s majority age was not a bar to recovery, but rather, a fact that the jury appropriately could have taken into account when assessing the damages to be awarded to Dolphus Bell’s estate.¹⁵⁶

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)); see discussion *supra* Part II.D.

¹⁵¹ *Id.* (citing *Caban v. Mohammed*, 441 U.S. 380, 394 (1979)) (holding that an adoption law that allowed an unwed mother, but not an unwed father, to block the adoption of her child violated equal protection principles).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Bell*, 746 F.2d at 1245.

¹⁵⁵ *Id.* “[T]his deprivation was far more substantial than the unlawful removal of a child from the parent’s custody; it was the annihilation of the parent-child relationship.” *Id.*

¹⁵⁶ *Id.* In coming to this conclusion, the court considered three factors: (1) other Seventh Circuit decisions that protected the parent-child relationship, *see id.* at 1244 (citing *Ellis v. Hamilton*, 669 F.2d 510, 512 (7th Cir. 1982) (holding that due process protects a parent’s relationship with his child); *Drollinger v. Milligan*, 552 F.2d 1220, 1226-27 (7th Cir. 1977) (holding that due process protects the interest in nurture and development of a child)); (2) the legislative history of the Ku Klux Klan Act of 1871 from which § 1983 is derived, *see id.*, (“[T]he Act was meant to create a remedy where the parent-child relationship was interfered with by lawless, racially-motivated violence.”); and (3) other federal appellate court decisions recognizing due process violations for parental deprivations of custody and care of children in § 1983 actions, *see id.* at 1244-45 (citing *Morrison v. Jones*, 607 F.2d 1269 (9th Cir. 1979) (holding that a plaintiff mother, whose son was transported to Germany by officials, had the right to establish at trial a deprivation of her relationship with her son without due process); *Drollinger*, 552 F.2d 1220 (holding that a grandfather’s claim that his daughter-in-law’s probation conditions deprived him of his constitutional right to

3. The Tenth Circuit

In *Trujillo v. Board of County Commissioners of the County of Santa Fe*,¹⁵⁷ the Tenth Circuit recognized a right of parental association with adult children.¹⁵⁸ The case concerned the wrongful death of Richard Trujillo while he was an inmate at the Santa Fe County Jail.¹⁵⁹ As a result, Richard's mother, Rose Eileen Trujillo, and his sister, Patricia Trujillo, filed suit claiming that Richard's wrongful death deprived them of their right of intimate familial association under the First and Fourteenth Amendments.¹⁶⁰

The Tenth Circuit quoted the Supreme Court in *Roberts v. United States Jaycees*,¹⁶¹ which found that certain human relationships are protected against undue interference by the State.¹⁶² These relationships included "[f]amily relationships, [which] by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life."¹⁶³ Thus, the court held that Rose Trujillo had a constitutionally protected right of association with her son.¹⁶⁴

care and development of his grandchild was actionable under § 1983); *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977) (holding that city bureau's action of retaining custody of children without judicial approval was a deprivation remediable under § 1983)).

¹⁵⁷ 768 F.2d 1186 (10th Cir. 1985).

¹⁵⁸ *Id.* at 1189. The Tenth Circuit disagreed with the *Bell* court's refusal to allow siblings to claim the right of continued association, and it extended the right to Richard's sister, Patricia Trujillo. *Id.* The court stated, "[a]lthough the parental relationship may warrant the greatest degree of protection and require the state to demonstrate a more compelling interest to justify an intrusion on that relationship, we cannot agree that other intimate relationships are unprotected and consequently excluded from the remedy established by section 1983." *Id.*

¹⁵⁹ *Id.* at 1187.

¹⁶⁰ *Id.*

¹⁶¹ 468 U.S. 609 (1984).

¹⁶² *Trujillo*, 768 F.2d at 1188. *Roberts* dealt with an organization whom the Court held was required to accept women as regular members. *Roberts*, 468 U.S. at 621. The Court held that such a requirement did not interfere with the Jaycees' right to intimate association. *Id.* at 621-22.

¹⁶³ *Trujillo*, 768 F.2d at 1188 (quoting *Roberts*, 468 U.S. at 619-20).

¹⁶⁴ *Id.* at 1189. Although the court found that Rose Trujillo had a constitutionally protected right of association with her son, it maintained that to recover on the right, she had to prove an intentional interference under § 1983. *Id.* at 1190. Because the Trujillos' complaint did not allege that the defendants acted with the intent to deprive them of their relationship with their son and brother, the court held that the Trujillos could not recover on the right. *See id.*

B. *Cases Declining to Recognize a Constitutional Parental Right of Companionship in Adult Children*

1. The First Circuit

In direct opposition to the Ninth, Seventh and Tenth Circuits, the First Circuit has held that there is no parental right of companionship with adult children.¹⁶⁵ The First Circuit addressed the matter in *Ortiz v. Burgos*, when Jose Valdivieso Ortiz's stepfather and siblings appealed the district court's dismissal of their claims for loss of companionship.¹⁶⁶ The case arose when prison guards allegedly beat Ortiz to death while he was an inmate at a prison.¹⁶⁷ The court held that Supreme Court decisions establishing constitutional protections for various facets of family life fell short of establishing a liberty interest in the continued association of an adult child.¹⁶⁸ The court divided Supreme Court decisions involving familial liberty interests into two categories and reasoned that neither of the categories applied in Ortiz's situation.¹⁶⁹

The first category, the *Ortiz* court explained, involved decisions in which the Supreme Court held that substantive due process prohibits the government from interfering in particularly private family decisions.¹⁷⁰ These private decisions included whether to procreate,¹⁷¹ whether to educate one's children in religious matters,¹⁷² and how to define the family.¹⁷³ According to the court, these

¹⁶⁵ *Ortiz v. Burgos*, 807 F.2d 6 (1st Cir. 1986).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 7. The original plaintiffs were Ortiz's mother, stepfather, and siblings. *Id.* The defendants filed a motion seeking dismissal of all of the family member's claims, and the district court granted the motion for all but the mother's claims. *Id.* The stepfather and siblings then appealed dismissal of their claims in federal appellate court. *Id.*

¹⁶⁸ *Ortiz*, 807 F.2d at 7. The court cited *Meyer v. Nebraska*, 262 U.S. 390 (1923) (*see supra* text accompanying notes 74-77), *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (*see supra* note 79), and *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (*see discussion infra* Part II.D.), all of which recognized the fundamental right to "freedom of personal choice in matters of family life." The court also cited *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (*see discussion infra* Part II.D.), recognizing the right of a parent to "companionship, care, custody, and management of his or her children."

¹⁶⁹ *Ortiz*, 807 F.2d at 8.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)). *Griswold* held that a law prohibiting the use of contraceptives was an unconstitutional violation of the right to marital privacy. *See Griswold*, 381 U.S. at 485-86.

¹⁷² *Id.* (citing *Pierce*, 268 U.S. 510).

¹⁷³ *Id.* (citing *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977)). *See supra* notes 61-69 and accompanying text.

Supreme Court decisions only established protection against the state interfering with an individual's right to decide how to conduct her family affairs.¹⁷⁴ Additionally, the court noted that in cases involving parental rights, the Supreme Court had protected against governmental interference in the rearing of *minor* children, not adults.¹⁷⁵ Accordingly, the court reasoned that the *Ortiz* case was different from the first category of cases in two respects: first, it did not involve the government's imposition of a choice in a private family decision, and second, it did not involve a minor child.¹⁷⁶ Thus, the court concluded that the first category of cases was inapplicable.¹⁷⁷ Nor did the *Ortiz* situation fall under the second category of cases, which according to the court, has held that when the state attempts to change the relationship of a parent and her child in order to further a legitimate state interest, it must adhere to strict procedural requirements due to the fact that a Fourteenth Amendment liberty interest is implicated.¹⁷⁸ Finally, because the *Ortiz* case fell into neither the first category nor the second category of cases, the court concluded that Ortiz's stepfather had no constitutional liberty interest in his son's companionship.¹⁷⁹

¹⁷⁴ *Ortiz*, 807 F.2d at 8.

¹⁷⁵ *Id.* (quoting *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 38-39 (1981)) (Blackmun, J. dissenting) (citations omitted) ("The Court has given particular 'constitutional respect to a natural parent's interest both in controlling the details of the child's upbringing . . . and in retaining the custody and companionship of the child.'"). As examples of cases that protected this liberty interest, the court cited *Pierce*, 268 U.S. at 534-35, *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972) (*see supra* notes 80-82 and accompanying text), and *Moore*, 431 U.S. at 505. *Ortiz*, 807 F.2d at 8.

¹⁷⁶ *Ortiz*, 807 F.2d at 8.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* As examples of this category of cases, the court cited *Santosky v. Kramer*, 455 U.S. 745 (1982) (concerning termination of parental rights), *Little v. Streater*, 452 U.S. 1 (1981) (determining paternity), and *Stanley v. Illinois*, 405 U.S. 645 (1972) (determining whether unwed father may retain custody of children after mother's death).

¹⁷⁹ *Ortiz*, 807 F.2d at 8. The court also held that Ortiz's siblings had no constitutional liberty interest in association with their brother, *id.*, nor did the mother have a similar interest. *Id.* at 7 n.1. Significantly, the court did admit that Ortiz's killing affected the parent-child relationship at least as irreversibly as a severance in a parent-child relationship proceeding. *Id.* at 8. The court opined, however, that the Supreme Court has only protected the relationship between parent and child when the government deliberately severs or otherwise affects the relationship, not when the severance is incidental as in the *Ortiz* case. *Id.* at 9. On the other hand, the court noted that while some courts have allowed constitutional protection for incidental deprivations, those cases at least involved one legal parent, unlike the *Ortiz* situation. *Id.* at 9 n.3 (citing *Kelson v. City of Springfield*, 767 F.2d 651, 653-55 (9th Cir. 1985); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1242-48 (7th Cir. 1984); *Mattis v. Schnarr*, 502 F.2d 588, 593-95 (8th Cir. 1974); *Myers v. Rask*, 602 F. Supp. 210, 211-13 (D. Colo. 1985); *Jones v. McElroy*, 429 F. Supp. 848, 852-53

2. The D.C. Circuit

In *Franz v. United States*,¹⁸⁰ the D.C. Circuit found that a companionship right existed between a non-custodial parent and his minor child. *Franz* dealt with a situation where various federal officials had relocated and changed the identities of a divorced mother and her minor children in accordance with the federal Witness Protection Program.¹⁸¹ The move resulted in severing the relationship between the children and their non-custodial father, who tried unsuccessfully to determine the location of his children in order to make contact with them.¹⁸² In finding that the father's constitutional right to companionship with his children had been violated, the court noted that "[a]mong the most important of the liberties accorded . . . special treatment is the freedom of a parent and child to maintain, cultivate, and mold their ongoing relationship."¹⁸³ The willingness of the court to allow a right of companionship for a non-custodial parent, "one who retains and regularly exercises 'visitation rights' but who participates little in the day-to-day care and nurturing of his children,"¹⁸⁴ displays that custodial concerns need not be present for courts to recognize the right.

The holding in *Franz* suggests that the D.C. Circuit would recognize a companionship right between parents and adult children, but surprisingly, the circuit has refused to recognize that right on grounds that adult children are not as close to their parents as minor children are.¹⁸⁵ The D.C. Circuit dealt specifically with the issue of the parental right of companionship with an adult child in *Butera v. District of Columbia*.¹⁸⁶ The case involved the death of 31-year-old Eric Butera while he was serving as an undercover operative for the police department.¹⁸⁷ Eric had become involved in the operation after he called the police department with information about a

(E.D. Penn. 1977)).

¹⁸⁰ 707 F.2d 582, 602 (D.C. Cir. 1983).

¹⁸¹ *Franz*, 707 F.2d at 589. The Witness Protection Program was initially established as a part of the Organized Crime Control Act of 1970. *Id.* at 586. Its purpose is to provide protection for people who agree to testify against alleged participants of organized criminal activity. *Id.*

¹⁸² *Id.* at 589.

¹⁸³ *Id.* at 595.

¹⁸⁴ *Id.*

¹⁸⁵ *Butera*, 235 F.3d at 655-56.

¹⁸⁶ 235 F.3d 637 (D.C. Cir. 2001).

¹⁸⁷ *Id.* at 640.

homicide.¹⁸⁸ Following Eric's death, his mother, Terry Butera, filed suit against the District of Columbia and the four police officers who supervised the operation, alleging that they had failed to provide sufficient protection to Eric.¹⁸⁹ The district court found for Terry, but the circuit court reversed, holding that there is no parental liberty interest in the companionship of an adult child who is independent.¹⁹⁰

Although the court's holding was contrary to the opinion of the Seventh Circuit in *Bell v. City of Milwaukee*,¹⁹¹ the D.C. Circuit, like the Seventh Circuit, engaged in a fact-intensive analysis, paying particular attention to Eric Butera's personal situation.

Terry Butera testified that her son was an adult, living on his own, and that he was not providing her with any financial assistance at the time of his death. The evidence further showed that Eric Butera had moved out of his mother's house when he was eighteen years old, married, moved to Pennsylvania, and had a child.¹⁹²

Concluding that Eric Butera was an independent adult who was past minority age, the court held that Terry Butera had no constitutional right in his companionship.¹⁹³

The court devoted much of its analysis to the *Franz*¹⁹⁴ opinion, on which the district court had relied when holding that Terry Butera had a right of companionship with her son.¹⁹⁵ The *Butera* court distinguished *Franz* by noting that *Franz* dealt with minor children whereas Eric Butera was past minority age.¹⁹⁶ Additionally, the court explained that it was not prepared to follow *Bell v. City of Milwaukee*, in which the Seventh Circuit had refused to draw a constitutional line based solely on age.¹⁹⁷ The court instead posited that constitutional treatment should differ depending on whether a child is past minority age, in large part due to the court's belief that the relationship between a minor child and a parent is markedly different from that of an adult child and a parent.¹⁹⁸ Finally, although the

¹⁸⁸ *Id.* at 641.

¹⁸⁹ *Id.* at 640.

¹⁹⁰ *Id.* at 641.

¹⁹¹ 746 F.2d 1205 (7th Cir. 1984); see *infra*, Part III.A.2 (discussing the opinion).

¹⁹² *Butera*, 235 F.3d at 654.

¹⁹³ *Id.* at 656.

¹⁹⁴ *Franz v. United States*, 707 F.2d 582 (D.C. Cir. 1983).

¹⁹⁵ *Butera*, 235 F.3d at 654.

¹⁹⁶ *Id.* at 655.

¹⁹⁷ *Id.* (citing *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984)).

¹⁹⁸ *Id.* at 655-56 (citing *Franz*, 712 F.2d at 1432). "When children grow up, their

court conceded the significance of the parent-child relationship regardless of a child's age, it held that the precedent of *Franz* could not be read so broadly as to establish a constitutional liberty interest in companionship between a parent and an adult child.¹⁹⁹

While the *Butera* opinion held that Terry Butera did not have a constitutional liberty interest in companionship with her adult son, the court was careful to limit its holding to the particular facts of the situation.²⁰⁰ The opinion states, "we hold that a parent does not have a constitutionally-protected liberty interest in the companionship of a child who is past minority *and independent*."²⁰¹ Hence, *Butera's* holding only applies when an adult child is independent.²⁰² The opinion does not provide guidance regarding a dependent adult child, for example, if a child is a college student past the age of minority, but not yet an independent adult.

Rejecting a right of companionship between parents and adult children solely based on assumptions about relationships is wrong.²⁰³ Experience shows that companionship may be present in a relationship between a parent and an adult child and it need not be present in the relationship between a minor and a parent.²⁰⁴ If a non-custodial parent has a right to the company of his minor children with whom he only exercises visitation rights and with whose day-to-day care and nurturing he has little involvement, the right must be based on companionship alone and extend to situations where custody and child-rearing concerns are not present. It should also extend to the relationship between a parent and his adult child, at least in those cases where a close bond continues to exist.

3. The Third Circuit

The Third Circuit recently considered the issue of the substantive due process right of companionship in adult children.²⁰⁵ *McCurdy v. Dodd* dealt with the fatal shooting of Donta Dawson, a

dependence on their parents for guidance, socialization, and support gradually diminishes. At the same time, the strength and importance of the emotional bonds between them and their parents usually decrease." *Id.*

¹⁹⁹ *Id.* at 656.

²⁰⁰ *Id.*

²⁰¹ *Butera*, 235 F.3d at 656 (emphasis added).

²⁰² *Id.*

²⁰³ For more discussion on this topic and other related topics, see *infra* Part IV. In essence, research indicates that the parent-child relationship may actually grow stronger with age. See, e.g., Chris Knoester, *Transitions in Young Adulthood and the Relationship Between Parent and Offspring Well-Being*, SOC. FORCES, June 1, 2003, at 1431.

²⁰⁴ See *infra* note 215 and accompanying text.

²⁰⁵ *McCurdy v. Dodd*, 352 F.3d 820 (3d Cir. 2003).

nineteen year-old male, stemming from a Philadelphia police officer's mistaken belief that Dawson was armed.²⁰⁶ As a result, Dawson's biological father, Bobby McCurdy, filed suit against several police officers and the city of Philadelphia.²⁰⁷ In finding against McCurdy, the court held that there is no substantive due process right in the companionship of an adult, independent child.²⁰⁸

The court's opinion first recognized that substantive due process analysis "requires scrupulous attention to the guideposts that have previously been established."²⁰⁹ Like the *Ortiz* decision, the Third Circuit opined that these guideposts required only protecting parental choice and decision-making for minor children.²¹⁰ Such a fundamental right, then, "must cease to exist at the point at which a child begins to assume the critical decisionmaking responsibility for himself or herself."²¹¹

Lastly, however, the court recognized that the analysis need not always be so clear-cut. The court explained that although in the majority of cases, adulthood would be determined by the state's age of majority, in a small percentage of cases, a parent may be able to rebut the presumption of adulthood by providing clear and convincing evidence that her child was not emancipated.²¹² Because

²⁰⁶ *Id.* at 822. Dawson was sitting alone in a parked car when police officers approached him to inquire whether he needed any help. *Id.* After repeated demands to raise his hands, Dawson remained unresponsive. *Id.* Believing that Dawson had a gun, Philadelphia police officer Christopher DiPasquale shot Dawson in the head, resulting in his death. *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 830.

²⁰⁹ *Id.* at 826 (quoting *Bayanowski v. Capital Area Intermediate Unit*, 215 F.3d 396, 400 (3d Cir. 2000)).

²¹⁰ *McCurdy*, 352 F.3d at 826-27.

²¹¹ *Id.* at 829. Additionally, the *McCurdy* court followed *Ortiz* in finding that the Due Process Clause only protects liberty interests when the state takes deliberate actions against life, liberty, or property—not when the state's actions are negligent. *Id.* (citing *Daniels v. Williams*, 474 U.S. 327, 328 (1986)). Hence, because Officer DiPasquale's actions were not deliberately directed against the parent-child relationship, the court found that it would be stretching due process too far if it were to recognize a fundamental right in Dawson's companionship. *Id.* at 830.

²¹² *Id.* at 830. As an example of a situation where the court might find a right of companionship in an adult child, the court provided the facts of *Geiger v. Rouse*, 715 A.2d 454 (Pa. Super. Ct. 1998). *Id.* at 830 n.8. That case dealt with a child, over the age of eighteen, who had cerebral palsy and was completely dependent on her parents. *McCurdy*, 352 F.3d at 830 n.8. Thus, it seems that the Third Circuit would only allow a parent to recover for the loss of an adult child in an extreme situation, for example, when she has an illness that renders her completely dependent. This Comment argues that a parental right of companionship in adult children should be recognized not only in such extreme situations, but also when a parent and adult child share a close and fulfilling relationship, even if they are not totally dependent

McCurdy had provided no evidence of Dawson's lack of emancipation, the Third Circuit held that McCurdy had no right of companionship with his son.²¹³

IV. SOCIAL AND ECONOMIC TRENDS THAT SUPPORT RECOGNITION OF A PARENTAL RIGHT OF COMPANIONSHIP IN ADULT CHILDREN²¹⁴

Limiting a right of companionship to only minor children is not in line with reality. Experience shows that filial bonds between parent and child can exist well beyond the time when a child reaches the age of majority, and that they can cease to exist well before that age. It is contrary to human experience to assume that a parent does not suffer a loss of companionship from tragic events severing the relationship between parent and child after that child reaches a certain age, or that the parent automatically does suffer such a loss when the child is a minor. As one court has stated,

[s]urely nature recoils from the suggestion that the society, companionship and love which compose filial consortium automatically fade upon emancipation; while common sense and experience teach that the elements of consortium can never be commanded against a child's will at any age. The filial relationship, admittedly intangible, is ill-defined by reference to the ages of the parties and ill-served by arbitrary age distinctions. . . . Therefore, to suggest as a matter of law that compensable consortium begins at birth and ends at age eighteen is illogical and inconsistent with common sense and experience. Human relationships cannot and should not be so neatly boxed.²¹⁵

Social science data indicate that the parent-child relationship may actually grow more significant with age.²¹⁶ A recent study concludes that the parent-child relationship is important for the psychological well-being of both parents and children throughout the

on one another.

²¹³ *Id.* at 830-31.

²¹⁴ As discussed in Part I, substantive due process analysis does not look to social and economic trends to determine what is and is not a fundamental right, but rather to the Nation's traditions and values. Part IV, therefore, does not claim that the parental right to companionship in adult children should be recognized because of current social trends. Rather, these trends are presented as evidence that reaching the age of majority does not necessarily end the parent-child relationship or diminish it to a point that it no longer merits constitutional protection.

²¹⁵ Howard Frank, M.D., *P.C. v. Superior Court*, 722 P.2d 955, 959 (Ariz. 1986) (dealing with state loss of consortium claims, not substantive due process claims).

²¹⁶ Timothy D. Ament, *Parents' Loss of Consortium Claims for Adult Children in Iowa: The Magical Age of Eighteen*, 41 *DRAKE L. REV.* 247, 259 (1992).

course of life, not only when children are minors.²¹⁷ Moreover, the study finds that the existence of a bond between a parent and adult child is key to each individual's well-being.²¹⁸ Parents and adult children who have intimate ties experience "a sense of security and belonging, a perception that one is cared for deeply."²¹⁹

Furthermore, elderly parents need not be biologically related to adult children to experience intimacy.²²⁰ If a stepchild's parent remarries early in life, he may view the stepparent as mother or father by the time the child is an adult.²²¹ Thus, the "step" aspect may become less meaningful as children and parents age.²²² This may be more true in some cultures than others.²²³

Numerous studies have shown that contrary to popular misconception, parents and adult children often have substantial amounts of contact, sometimes as often as weekly or more.²²⁴ Although contact need not be directly related to quality of relationship, as discussed earlier, studies indicate that parent-child relationships often grow stronger with age.²²⁵ Many elderly adults are single, widowed, or divorced; for these people, a grown child may be their only social contact.²²⁶ Hence, the assumption that the parent and child bond automatically grows less important or weaker as parents and children age is not consistent with recent social science data. Ending a parental right of companionship with children at age eighteen would be unrealistic.

²¹⁷ Chris Knoester, *Transitions in Young Adulthood and the Relationship Between Parent and Offspring Well-Being*, SOC. FORCES, June 1, 2003, at 1431.

²¹⁸ *Id.*

²¹⁹ Karen L. Fingerman, *A Distant Closeness: Intimacy Between Parents and Their Children Later in Life*, 25 GENERATIONS 26, 27 (2001). The characteristics of intimacy shared by elderly parents and adult children, however, are unlike those of other intimate ties. *Id.* at 29. This intimacy can be more rewarding than the intimacy experienced between parents and children in early life. *Id.* "In late life, intimacy feels more voluntary, more reciprocal, more mutual, and more controllable than the closeness that is demanded when offspring are young." *Id.*

²²⁰ *Id.* at 27.

²²¹ *Id.*

²²² *Id.*

²²³ *See id.* For example, African Americans often treat fictive kin as their own offspring. "Nieces, nephews, or unrelated younger adults from a church or community may serve in the role of a grown child." *Id.*

²²⁴ Lorraine T. Dorfman, *Retirement and Family Relationships: An Opportunity in Later Life*, 26 GENERATIONS 74, 76 (2002).

²²⁵ *See Ament, supra* note 216, at 259 and *see id.* If the parent and child did not share a close relationship before the parent's retirement, however, it is unlikely that they will afterwards. Dorfman, *supra* note 224, at 76.

²²⁶ *See Fingerman, supra* note 219, at 26. In fact, approximately eighty percent of women and forty percent of men over age seventy-five do not have a spouse. *Id.*

Another factor that urges recognition of a parental right of companionship in adult children is the realization that many adult children are the primary caretakers of their elderly parents.²²⁷ Although minor children require nurturing from their parents, as parents and children age, parents may require physical, social, and economic support from their adult children.²²⁸ It is estimated that 22.4 million American households, nearly one in four, actually provide care to elderly adults,²²⁹ and this number is expected to increase to 39 million households by 2007.²³⁰ Significantly, approximately twenty-seven percent of all caregivers for elderly parents are daughters and about fifteen percent are sons.²³¹

An increasing number of households will take on the responsibility of caring for elderly parents due to the phenomenon known as the "graying of America."²³² It is a well-known fact that members of the baby-boomer population are expected to survive into their eighties and nineties.²³³ The number of elderly people has more than doubled since 1960, from approximately 17 million to 36 million in 2003.²³⁴ It is estimated that there will be 51 million people over 65 by 2020 and 67 million by 2040.²³⁵ By the year 2020, twenty percent of the American population will be over the age of sixty-five.²³⁶ Currently, about one third of the adults over age sixty-five years old have a severe disability and more than sixteen percent require assistance with daily living activities.²³⁷ For people eighty years

²²⁷ EMILY K. ABEL, WHO CARES FOR THE ELDERLY? PUBLIC POLICY AND THE EXPERIENCES OF ADULT DAUGHTERS 4 (1991). "Families will always be the essential core of the long-term-care system, whether they are providing direct care or arranging and overseeing care provided by others." See also Judith A. Riggs, *A Family Caregiver Policy Agenda for the Twenty-first Century*, 27 GENERATIONS 68, 72 (2003-2004).

²²⁸ See Ament, *supra* note 216, at 259.

²²⁹ *Taking a Vacation at a Nursing Home*, WALL ST. J., June 16, 2004, at D1.

²³⁰ Mariko Thompson, *Handle with Care How Family Members Can Work Together when Elderly Parents Need Help*, L.A. DAILY NEWS, Sept. 15, 2003, at U4.

²³¹ *Id.*

²³² For a discussion of the phenomenon and its implications, see Kevin C. Fleming et al., *A Cultural and Economic History of Old Age in America*, MAYO CLINIC PROC., July 1, 2003, at 914 [hereinafter Fleming, *History of Old Age*].

²³³ *Id.*

²³⁴ Judy Singleton, *Women Caring for Elderly Family Members: Shaping Non-Traditional Work and Family Initiatives*, 31 J. COMP. FAM. STUD. 367, 369 and U.S. Census Bureau, National Population Estimates, available at <http://www.census.gov/popest/national/asrh/NC-EST2003/NC-EST2003-02.pdf>.

²³⁵ Singleton, *supra* note 234, at 369.

²³⁶ Fleming, *History of Old Age*, *supra* note 232, at 914.

²³⁷ Kevin C. Fleming et al., *Caregiver and Clinician Shortages in an Aging Nation*, MAYO CLINIC PROC., Aug. 1, 2003, at 1026 [hereinafter Fleming, *Caregiver and Clinician Shortages*].

and older, this degree of impairment is present in more than half.²³⁸

Along with this increase in the elderly population comes the reminder that old age has traditionally been a problem in American culture for all but the very wealthy.²³⁹ The elderly usually do not have enough savings to maintain their former standard of living.²⁴⁰ Moreover, those who can afford to live in nursing homes frequently face malnutrition and general neglect.²⁴¹ Care provided in nursing homes may deteriorate due to the current nursing shortage, a result of the aging of the nursing population and vocational burnout.²⁴² Given all these factors, it is likely that more and more children will take on the responsibility of caring for their elderly parents and will continue to share intimate bonds. Terminating a right of companionship between parents and children at age eighteen is inconsistent with these social trends.

CONCLUSION: A FRAMEWORK FOR RECOVERY

Although the Supreme Court has urged restraint in implying fundamental rights,²⁴³ the recognition of a parental right of companionship in adult children does not stray from substantive due process guidelines. The crux of substantive due process analysis looks to the traditions and culture of the American people in determining whether or not there exists a fundamental right that deserves constitutional protection.²⁴⁴ Over the years, the Supreme Court has consistently explained that American tradition emphasizes familial relationships, especially those of parent and child.²⁴⁵ Additionally, the Court has, on numerous occasions, discouraged the imposition of bright line rules in fundamental rights analysis and favored a fact-intensive approach.²⁴⁶ For these reasons, it is anomalous to cut off a

²³⁸ *Id.*

²³⁹ Fleming, *History of Old Age*, *supra* note 232, at 914.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² See Fleming, *Caregiver and Clinician Shortages*, *supra* note 237. More factors contributing to the nursing shortage include fewer available workers and job dissatisfaction. *Id.*

²⁴³ See *supra* notes 27-28 and accompanying text.

²⁴⁴ See *supra* text accompanying notes 29-33.

²⁴⁵ See *supra* Part II (discussing fundamental rights involving the family that the Supreme Court has recognized).

²⁴⁶ See *supra* notes 67-68 and accompanying text. Moreover, the Court has displayed its unparalleled respect for the parent-child relationship by recognizing the importance of parent-child bonds even without a traditional biological relationship or a marriage between the parents. See *supra* text accompanying notes 71-72 and 92-103.

parental constitutional right of companionship at the age of majority. Even more so, it seems illogical to recognize a right to keep the family together²⁴⁷ and a right to the companionship, care, custody, and management of one's children,²⁴⁸ but to not allow a general parental right of companionship in children.

Courts should extend a constitutional fundamental right to parents in the companionship of their adult children. This right should extend to foster parents and unwed natural parents as well as married biological parents. A survey of substantive due process cases illustrates that the Court has refused to assume that the nature of a foster parent's or unwed parent's relationship with her child is automatically less worthy of constitutional protection than a married natural parent's relationship with her child.²⁴⁹ Thus, the right to companionship of an adult child should not be automatically defined to exist only for natural, married parents.

Because of the great weight the Supreme Court has accorded the parent-child relationship, the circuits that have refused to recognize a right of companionship between parents and adult children are wrong. The allowance of the right is in line with substantive due process analysis because the court has repeatedly shunned the use of arbitrary lines and markers. Refusing to extend the right of companionship between parents and children beyond the age of eighteen is exactly that – an arbitrary marker. Furthermore, the courts that refuse to recognize the right base much of their analysis on the fact that the parent-child relationship grows weaker with age. Significantly, however, current research indicates otherwise.²⁵⁰

Using the state's age of majority as a marker for recovery creates the illogical situation where a deadbeat father is unjustly enriched from his child's death as long as the child is a minor, and an involved and attached father gets no recovery because his child happens to be an adult. Rather than cutting off a right of companionship at the age of majority, a court should determine whether a parent has a valid constitutional claim for loss of companionship in a child based on the relationship that he and his child shared.²⁵¹

²⁴⁷ See *supra* Part II.B (discussing the right).

²⁴⁸ See *supra* Part II.D and Part III.A (discussing the right and cases that have recognized the right without custody concerns being present).

²⁴⁹ See *supra* notes 71-72, 92-107 and accompanying text (discussing cases involving foster parents and unwed biological parents).

²⁵⁰ See *supra* Part IV.

²⁵¹ This is what the Seventh Circuit did in *Bell v. City of Milwaukee*, 746 F.2d 1205, 1245 (7th Cir. 1984). See *supra* text accompanying notes 142-154. Although the D.C.

For example, when due to unlawful state action, a father loses a minor child with whom he has not spoken in years, he should not be able to recover on a constitutional right of companionship, regardless of the fact that his child was a minor. On the other hand, when a father loses an adult child with whom he has a close and loving relationship, he should be able to recover for his loss, regardless of the fact that his child was nineteen years old or even thirty. Although no amount of damages can compensate for the death of a child, such a framework for recovery comes closer to compensating parents justly.²⁵²

Along with being in line with general substantive due process guidelines, the recognition of a parental right of companionship in adult children is in line with the reality of parent-child relationships in America. “Researchers have exploded the myth that families abandon their elderly relatives.”²⁵³ In fact, parents and adult children often share intimate relationships that can be more rewarding than the relationships they shared early in life.²⁵⁴ Though not a part of substantive due process analysis, social and economic trends also indicate that recognition of the right would be wise.

The Supreme Court has consistently recognized the importance of familial relationships without the imposition of arbitrary markers. The Fourteenth Amendment parental right of companionship in adult children is not the place to begin to impose such arbitrary bright line rules.

Circuit conducted a similar analysis in *Butera v. District of Columbia*, 235 F.3d 637 (D.C. Cir. 2001), *see supra* text accompanying notes 191-193, the court still decided to cut off a right of companionship at the age of majority, *see supra* text accompanying notes 197-199. It is unclear what conclusion the court would have come to if the child had not been an independent adult, for example, if he were a college student. *See supra* text accompanying notes 200-202.

²⁵² Of course, conducting a fact-intensive analysis is more difficult than imposing a bright-line rule. Even courts that have refused to recognize the right, however, have done so at least partly on the basis of a fact-intensive analysis. Furthermore, the position to which the Supreme Court has elevated the parent-child relationship discourages the imposition of bright line rules and markers in place of profound analyses.

²⁵³ ABEL, *supra* note 227, at 3.

²⁵⁴ *See supra* notes 215-226 and accompanying text.