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Growing Pains: The Scope of Substantive Due Process Rights of Parents of Adult Children

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I. INTRODUCTION

On February 2, 1958, Milwaukee city police officer Thomas Grady shot and killed 23-year-old Daniel Bell.¹ Officer Grady immediately attempted to cover up the incident, enlisting the help of a fellow officer to place a knife in Daniel's hand and concoct a fictional account of the event.² It was only years later, in 1978, that an investigation revealed the true circumstances of Mr. Bell's death.³ A year after this discovery, the estate of Daniel's father, Dolphus Bell, instituted an action under 42 U.S.C. § 1983 alleging that the shooting was unconstitutionally, racially motivated, and the death of Daniel Bell deprived him of his constitutionally protected liberty interest in the companionship of his child.⁴

Dolphus Bell's suit raises two important constitutional issues. First, does the Constitution protect Dolphus Bell's relationship with

1. Bell v. City of Milwaukee, 746 F.2d 1205, 1214-15 (7th Cir. 1984).
 2. *Id.* at 1216.
 3. *Id.* at 1223.
 4. *Id.* at 1224. The Seventh Circuit held that Dolphus Bell's section 1983 claims survived his death under Wisconsin statutory and case law. *Id.* at 1241-42.

his adult son from undue state interference? Second, assuming such a relationship is protected, did the police officers' conduct violate Dolphus Bell's constitutional rights even though their conduct was directed at his son? The Courts of Appeals have grappled with both questions and have reached divergent results. This Note addresses the circuit split with regard to the first issue: whether a parent has a constitutionally protected interest in the companionship of her adult child.⁵

Parents of adult children allegedly injured by government conduct often have pursued independent substantive due process claims for violations of their parental interests.⁶ The circuits have struggled in applying the amorphous doctrine of substantive due process to these claims. The Due Process Clause of the Fourteenth Amendment prohibits states from depriving individuals of "life, liberty, or property without due process of law."⁷ The Supreme Court has expanded individual rights in personal matters largely in the name of substantive due process.⁸ The Court typically describes substantive due process rights as those falling within a zone of privacy with which the state may not interfere, absent a compelling reason.⁹

The circuits have split over whether a parental liberty interest in the companionship of an adult child should be included within this constitutionally protected zone of privacy. The Seventh and Ninth Circuits have included the parental liberty interest within the zone,¹⁰ whereas the First, District of Columbia, and Third Circuits have denied the underlying right.¹¹ This Note attempts to resolve the circuit split. Part II looks to Supreme Court precedent on the

5. The focus of this Note on the first issue is not meant to diminish the importance of the question of what sorts of conduct offend the Due Process Clause, but such a broad topic is beyond the scope of this Note.

6. See, e.g., *Strandberg*, 791 F.2d 744, 748 (9th Cir. 1986); *Bell*, 746 F.2d at 1242-45.

7. U.S. CONST. amend. XIV, § 1.

8. See, e.g., John P. Safranek & Stephen J. Safranek, *Licensing Liberty: The Self-Contradictions of Substantive Due Process*, 2 TEX. REV. L. & POL. 231, 232 (1998).

9. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152 (1973) (noting that the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is "a right of personal privacy, or a guarantee of certain areas or zones of privacy."); see also *Carey v. Population Servs., Int'l*, 431 U.S. 678, 684-85 (1977) (noting that personal decisions, relating to marriage, procreation, contraception, family relationships, and childrearing and education fall within the zone of privacy protected by the Due Process Clause); *Paul v. Davis*, 424 U.S. 693, 712-13 (1976) (noting that the Court has recognized that "zones of privacy" may be created by more specific constitutional guarantees or by the substantive aspects of the Fourteenth Amendment and impose limits upon government power).

10. *Strandberg*, 791 F.2d at 748; *Bell*, 746 F.2d at 1245; see also *Trujillo v. Bd. of County Comm'rs of Santa Fe County*, 768 F.2d 1186, 1188-89 (10th Cir. 1985).

11. *McCurdy v. Dodd*, 352 F.3d 820, 829 (3d Cir. 2003); *Butera v. Dist. of Columbia*, 235 F.3d 637, 656 (D.C. Cir. 2001); *Ortiz v. Burgos*, 807 F.2d 6, 7 (1st Cir. 1986).

Constitution and family rights. This section pays special attention to the doctrinal underpinnings of substantive due process and then discusses how the Court has applied these underpinnings in defining the scope of familial autonomy rights. Part III analyzes the circuit split at issue. It begins by looking at the decisions of the Seventh and Ninth circuits. These circuits have recognized the underlying constitutional right, but they have done so for different reasons.¹² Part III then focuses on the decisions of the First, D.C., and Third Circuits, which have rejected a parental liberty interest in the companionship of an adult child. Part IV concludes by arguing that the Due Process Clause protects a parent's interest in the companionship of her adult child. It argues that the parental liberty interest, which protects the "interest of a parent in the companionship, care, custody, and management of his or her children,"¹³ does not arbitrarily disappear once children become adults. Out of necessity, the scope and extent of the right changes as children mature into adulthood; however, a parent still retains her interest in the companionship and care of her children. Such an outcome is dictated by a logical reading of precedent and this country's tradition of according special rights to and placing obligations on individuals by virtue of the parent-child relationship.

II. CONSTITUTIONAL PROTECTION FOR FAMILIAL AUTONOMY

In determining whether the Fourteenth Amendment accords a fundamental liberty interest in a parent's right to enjoy or maintain the continued companionship of her adult child, it is necessary to delve into the nebulous arena of Supreme Court precedent on constitutional protections of the family. Today, there is little doubt that the Due Process Clause contains a substantive as well as a procedural component, and the validity of substantive due process as a means of protecting certain liberty interests not contained in the Bill of Rights has been reaffirmed by the Court.¹⁴ In general, the rights

12. See *infra* Part III.A.

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

14. *Developments in the Law -- The Constitution and the Family*, 93 HARV. L. REV. 1156, 1167 (1980) [hereinafter *The Constitution and the Family*]. Jurists and scholars continue to question the validity and/or the prudence of using the Due Process Clause as a source of substantive rights. The legitimacy and precise contours of substantive due process are highly controversial matters. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1986); compare Michael J. Perry, *Abortion, The Public Morals, and The Police Powers: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689, 689 (1976) ("Substantive due process . . . is a nightmare from which the Supreme Court ought to awake.") with John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82

that the Court has found to be “fundamental” have tended to be in the related areas of marriage,¹⁵ childbearing,¹⁶ and childrearing,¹⁷ which the Court generally has treated as falling within the broad category of a right to privacy.¹⁸

In carving out fundamental, unenumerated rights, the Court has relied heavily on cases suggesting that family life is a uniquely private enclave, to be scrupulously protected against governmental intrusion.¹⁹ However, the Supreme Court’s decisions concerning the right to establish a family and other intimate relationships “reveal its failure to develop a coherent methodology in the face of new demands for constitutional protection.”²⁰ Without a cogent framework to determine which rights are fundamental and which are not, lower courts continually split over the question of what the category of

YALE L. J. 920, 920-49 (1973) [hereinafter Ely, *Crying Wolf*] (explaining the need to identify and define the constitutional values underlying the concept of unenumerated fundamental rights). However, there can be no doubt that the Supreme Court has repeatedly relied on the Due Process Clause as a source of substantive rights not specifically enumerated in the Constitution. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (overturning a Virginia miscengation law because it arbitrarily deprived couples of a fundamental liberty, the freedom to marry, protected by the Due Process Clause); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (overturning an Oregon statute requiring parents to send their children to public schools because it interfered with a parent’s Due Process right to make decisions regarding her child’s education); see also *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-640 (1974) (“This 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.”).

15. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978).

16. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 441, 454-55 (1972) (affirming the First Circuit’s overturning of a doctor’s conviction that was based on his giving contraceptives to an unmarried woman); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942) (finding unconstitutional an Oklahoma statute that sterilized persons that were “habitual criminals”).

17. See, e.g., *Pierce v. Society Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); see also *supra* note 14.

18. EDWARD KEYNES, *LIBERTY, PROPERTY, & PRIVACY: TOWARDS A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS* 159 (1996). Substantive due process not only protects fundamental rights but also safeguards citizens from wholly arbitrary governmental action affecting nonfundamental liberty and property interests. Accordingly, a plaintiff can raise a viable substantive due process claim, even in the absence of a fundamental right. See *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215-23 (6th Cir. 1992); *Sinaloa Lake Owners Ass’n, Inc. v. City of Simi Valley*, 882 F.2d 1398, 1407-12 (9th Cir. 1989), cert. denied sub nom., *Doody v. Sinaloa Lake Owners Ass’n, Inc.*, 494 U.S. 1016 (1990), overruled by *Armendariz v. Penman*, 75 F.3d 1311, 1326 (9th Cir. 1996) (en banc).

19. Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670, 738 (1973) [hereinafter *On Privacy*].

20. KEYNES, *supra* note 18, at 173 (arguing that the Court has failed to provide a rationale for affording unenumerated rights greater protection than unenumerated liberty and property rights). On the need to identify and define the constitutional values underlying the concept of unenumerated fundamental rights, see Ely, *Crying Wolf*, *supra* note 14, at 920-49.

family rights includes.²¹ In large part, the circuit split at issue in this Note is a result of this failure and a lack of consensus on the scope and nature of the Court's decisions on fundamental liberties.

This Section provides the necessary background and analysis for a coherent assessment of the liberty interest at issue in the circuit split. It does not attempt to decipher or suggest an overarching framework for adjudging whether or not a liberty interest is fundamental, but instead it engages in the less-Herculean task of analyzing how the Court has defined the scope of parental and familial liberty. In Part A of this Section, the Note discusses the doctrinal underpinnings of substantive due process, paying particular attention to the role tradition and contemporary validity play in determining whether a right is fundamental. Part B chronicles important Supreme Court decisions on substantive due process and the family. This part deals only with the fundamental right and how the Court established it; it does not delve further into the standard of review the Court uses in determining whether state conduct violates due process.²²

A. Finding Unenumerated Rights in the Due Process Clause

Substantive due process rights typically have flowed from three sources.²³ Two of those sources derive from the Constitution itself, including the Bill of Rights and the constitutional structure.²⁴ The third and most controversial source has been a "nonsource," what one scholar described as "naked judicial judgment that a liberty is of

21. *On Privacy*, *supra* note 19, at 738-39. The circuit split at issue in this Note, discussed *infra* Part IV, is an example of one such area where courts have split over the question of what the privacy protected by the Due Process Clause includes. By and large, the difference in opinions is how to define tradition. See *infra* Part II.A.1.

22. Many commentators think of substantive due process as fitting within a two-tiered framework. Richard J. Fallon, Jr., *Some Confusions about Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 314 (1993). Governmental intrusions on fundamental rights are subject to strict or exacting scrutiny. *Id.* Infringement on nonfundamental liberty and property interests are scrutinized under rational basis review to assure that the infringements are rationally related to legitimate government purposes. *Id.* at 315. For a discussion of how the Court has not adhered to a two-tiered framework, see *id.* at 314-325; see also Note, *The Supreme Court, 1991 Term; Leading Cases*, 106 HARV. L. REV. 163, 210-20 (1992) (arguing that the "Court has neither adhered in practice to its formal framework for analyzing substantive due process claims nor applied a coherent standard of scrutiny in its departures.").

23. Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1030 (1978-79).

24. *Id.* at 1030-31. The principal source of liberty has been the Bill of Rights, incorporated in the Due Process Clause. A second source of substantive liberties has been the constitutional structure and the values that structure implies. *Id.*

special constitutional magnitude, despite a lack of persuasive linkage with structural or textually identified values.”²⁵ Virtually all decisions falling in this category protect family relationships, actual or potential.²⁶ The contemporary view of substantive due process was fashioned by Justices John Marshall Harlan and Byron White in *Griswold v. Connecticut*.²⁷ Though disagreeing on the scope of the liberty that due process protects, both Justices believed that the Fourteenth Amendment was broad enough to include a married couple’s decision to prevent conception.²⁸ Since *Griswold*, the Due Process Clause has served as the Supreme Court’s “chosen vessel” for the protection of unenumerated rights.²⁹ Nonetheless, the Supreme Court has created no theory or methodology for reviewing liberty interests.³⁰ Instead, it has tended to recognize a right as fundamental only when a strong showing can be made to support it, typically including a demonstration that the right has a basis in tradition.³¹

The Court consistently has turned to tradition as a source of previously unrecognized rights.³² Justice Goldberg, though identifying the Ninth Amendment as a source of unenumerated rights, succinctly provided guidance in determining which liberty interests should be regarded as fundamental:

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the traditions and [collective] conscience of our people to determine whether a principle is so rooted [there] as to be ranked as fundamental. The inquiry is whether a right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.³³

The Court’s evaluation of a liberty claim should entail a search “for values deeply embedded in the society, values treasured by both past and present, values behind which the society and its legal system have unmistakably thrown their weight.”³⁴ Therefore, the claim must

25. *Id.* at 1032. Many scholars and jurists have criticized the expansion of this so-called judge-made law, arguing that it amounts to a judicial invalidation of the outcome of ordinary political processes and is therefore undemocratic and “presumptively counters the explicit premise around which we have organized our relationship to government.” *Id.*; see also BICKEL, *supra* note 14, at 19. Another common criticism is that the process of creating or finding fundamental rights is “purely and inescapably subjective.” Lupu, *supra* note 23, at 1035-36.

26. *Id.* at 1032.

27. *Griswold v. Connecticut*, 381 U.S. 479 (1965); KEYNES, *supra* note 18, at 154-55.

28. *Id.* at 155.

29. *The Constitution and the Family*, *supra* note 14, at 1174-75.

30. *Id.* at 1176-77.

31. *Id.* at 1176.

32. *Id.* at 1177.

33. *Griswold v. Connecticut*, 381 U.S. 479, 493-94 (1965) (Goldberg, J., concurring).

34. Lupu, *supra* note 23, at 1040.

satisfy two related tests. First, American institutions historically must have recognized the liberty claim as one of paramount stature.³⁵ Second, contemporary society must value the asserted liberty at a level of high priority.³⁶

1. Tradition

When a purported liberty interest is brought before the Court, the Court explicitly has inquired into the interest's foundation in tradition.³⁷ Much of the tradition inquiry centers on whether the value historically has been regarded as falling within the province of individual freedom or as an action upon which society's interference is improper.³⁸ There are a number of ways in which history may show recognition of a fundamental liberty, such as lengthy records of common or statutory law protecting the interest,³⁹ a conscious and purposeful tradition of nonregulation,⁴⁰ strong currents of respect for the liberty by the progenitors and architects of American institutions,⁴¹ or recognition of the interest in political, moral, and historical writings.⁴² Where the existence of the requisite tradition is self-evident, the Court often has contented itself with relying on statements made in past judicial opinions as indicia of an interest's stature as fundamental.⁴³

The use of tradition as a source for fundamental rights has been criticized because of the inherent elasticity of the concept. Professor John Hart Ely noted that "people have come to understand

35. *Id.*

36. *Id.* at 1041.

37. *The Constitution and the Family*, *supra* note 14, at 1178; *see, e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) (holding that the constitutional right to live together as a family extended beyond the nuclear family because the extended family traditionally played a role in providing sustenance and security); *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978) (recognizing as fundamental the right to enter into the matrimonial state because of the long history of appreciation of the fundamental nature of marriage); *Griswold*, 381 U.S. at 486 (protecting contraceptive privacy in marriage because of the respect for marital privacy and the high status of marriage in American society); *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923) (finding the protection of parental autonomy linked to the American culture's placement of primary childbearing responsibility on parents rather than the community).

38. *The Constitution and the Family*, *supra* note 14, at 1179.

39. *Lupu*, *supra* note 23, at 1044.

40. *Id.*

41. *Id.*

42. *The Constitution and the Family*, *supra* note 14, at 1179 n.129.

43. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 389 (1978); *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring).

that 'tradition' can be invoked in support of almost any cause."⁴⁴ He notes that the problems that arise from relying on tradition involve those of cultural geography, time, competing tradition, and levels of generality.⁴⁵ Some scholars have attempted to provide a workable solution to those problems Professor Ely identified.⁴⁶ However, the Supreme Court has yet to develop and apply a consistent definition of "tradition" in the substantive due process context.⁴⁷

2. Contemporary Validity

A fundamental right, moreover, must be something in which the American people continue to believe. That a right had been regarded in the past to be vitally important will not suffice, in and of itself, to elevate it to the stature of fundamental.⁴⁸ The Court will not and should not recognize as fundamental a traditional value whose status has been rejected by contemporary moral views.⁴⁹ Though theoretically simple, in application, social consensus for a particular liberty is difficult to measure, especially on a nationwide basis.⁵⁰

In cases involving parental rights, the Supreme Court typically does not engage in a detailed examination of contemporary validity, relying instead on the fact that continued respect for the family has

44. John Hart Ely, *The Supreme Court, 1977 Term — Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 39 (1978).

45. Lupu, *supra* note 23, at 1044. Professor Ely's criticism of the use of tradition in formulating unenumerated, substantive rights centers on the inherent difficulty in defining tradition; he points out that the key questions are: whose traditions, which era's traditions, and which region's traditions control. Ely, *supra* note 44, at 39-40.

46. See, e.g., Lupu, *supra* note 23, at 1045-47.

47. Compare *Bowers v. Hardwick*, 478 U.S. 186, 190-93 (1986) (noting the longstanding legal tradition of criminalizing homosexual sodomy) with *Lawrence v. Texas*, 539 U.S. 558, 568 (2003) ("At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter."). Compare also *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion) ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.") with *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992) ("It is also tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. . . . But such a view would be inconsistent with our law.").

48. *The Constitution and the Family*, *supra* note 14, at 1179.

49. *Id.* at 1179-80 (noting, as an example, that "it is unlikely that any historical showing would convince the Court that [the fundamental right of whites not to associate with blacks] [i]s worthy of recognition today.").

50. Ely, *supra* note 44, at 37-39. As Professor Ira C. Lupu noted, "[i]n a nation as demographically diverse as this one, the favorite freedom of northern California may be shocking sin to those in the Bible Belt." Lupu, *supra* note 23, at 1048.

been uncontroversial.⁵¹ Because it is difficult to demonstrate with any degree of certainty the extent of social support for the family and the importance of protecting such a liberty from transient majorities, the Court generally has regarded the traditions discussed in previous cases as presumptively valid.⁵² That presumption, however, would not be valid if social consensus clearly called into question the tradition's validity.⁵³

B. The Supreme Court's Decisions on Family Relations

One of the most striking expansions of the substantive due process doctrine in recent years has been in the area of family relations. The Supreme Court has regarded as fundamental the right of parents to raise their children in a certain way, as well as the right of family members to reside together.⁵⁴ These decisions may be traced to a concern with protecting family life,⁵⁵ and the Court generally has carved out these rights based on the profound tradition of and contemporary respect for families.⁵⁶ The privacy rights the Court regards as fundamental "give content to the American Dream."⁵⁷ From a more traditional, conservative viewpoint, the unimpeded right to establish a home and raise children is essential to the pursuit of happiness.⁵⁸ This Part reviews many of the Supreme Court's landmark decisions carving out unenumerated rights in the area of family relations. Broken into three subsections, this Part first analyzes the cases relating to child-rearing. It then looks at cases involving the natural father's attempt to assert parental rights over his child. Finally, this Part examines the Court's decision in *Moore v. City of East Cleveland*, where the Court found a fundamental right of family members to reside together.

51. *The Constitution and the Family*, *supra* note 14, at 1180.

52. *Id.* at 1180 n.134.

53. *Id.*

54. *See, e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 494 (1977) (plurality opinion); *Troxel v. Granville*, 530 U.S. 57, 57 (2000) (plurality opinion). State interference with these rights will be tolerated only where the "burden is necessary to promote a 'compelling' state interest." Fallon, *supra* note 22, at 314.

55. *On Privacy*, *supra* note 19, at 738; *see also supra* Part II.A.

56. *The Constitution and the Family*, *supra* note 14, at 1180.

57. *On Privacy*, *supra* note 19, at 739.

58. *Id.*

1. Childrearing

The Supreme Court long has recognized that parents have a constitutional right to raise their children without unjustified state interference.⁵⁹ This right was established over eighty years ago in *Meyer v. Nebraska*, when Justice McReynolds, writing for the Court, struck down a Nebraska state law prohibiting the instruction of foreign languages to children who had not passed the eighth grade.⁶⁰ The defendant, a parochial school teacher, was arrested for teaching German to 10-year-old students in violation of the law.⁶¹ Though the Court relied in part on the children's liberty interest in acquiring knowledge and the teacher's liberty interest in practicing that occupation, the Court also concluded that the law impeded on a parent's right to control her child, which the Due Process Clause protected from undue state interference.⁶² The parental liberty interest recognized and defined in *Meyers* included the "power of parents to control the education of their own."⁶³ Though observing that communal childrearing "has been deliberately approved by men of great genius," Justice McReynolds noted that "our institutions rest" on a different notion, namely the role of the nuclear family in raising the child.⁶⁴ Justice McReynolds argued that the nuclear family is essential to maintaining both the "letter and spirit of the Constitution."⁶⁵

Two years later, in *Pierce v. Society of Sisters*, the Court explicitly recognized that the parental liberty interest has independent status.⁶⁶ Confronted with a challenge to an Oregon statute requiring parents to send their children to public schools, a unanimous court declared it to be "entirely plain that the . . . [law

59. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925) (invalidating a requirement that parents send their children to public schools, holding that "the liberty of parents and guardians to direct the upbringing and education of their children under their control" includes the right to send their child to a private school); *Meyer v. Nebraska*, 262 U.S. 390, 400-01 (1923) (striking down a state law prohibiting the teaching of foreign languages to children who had not completed eighth grade because the law impermissibly interfered with "the power of parents to control the education of their own [children]").

60. *Meyer*, 262 U.S. at 403.

61. *Id.* at 396.

62. *Id.* at 401.

63. *Id.*

64. *Id.* at 402. The Court noted the ancient practice of communal childrearing, citing Plato's recommendation that "children are to be common, and no parent is to know his own child, nor any child his parent." *Id.* at 401-02. The Court also explained the Spartan practice of removing boys from their families at age seven to be raised, trained, and educated by official guardians. *Id.*

65. *Id.*

66. *The Constitution and the Family*, *supra* note 14, at 1351.

requiring compulsory public school attendance] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."⁶⁷ Such a liberty interest encompasses the right of parents to send their children to private or parochial schools.⁶⁸ Again writing for the Court, Justice McReynolds used rather lofty terms to deny the state's power "to standardize its children by forcing them to accept instruction from public teachers only."⁶⁹ In fact, it was not only the right but the "high duty" of parents to recognize and prepare their children for "additional obligations."⁷⁰ The Court did not engage in a lengthy discourse of tradition, as it did in *Meyer*, but instead relied on *Meyer* as establishing the parent's fundamental liberty interest.⁷¹

The *Meyer* and *Pierce* decisions are viewed together as establishing constitutional protection for a parental liberty interest, a right which the Supreme Court has repeatedly upheld in ad hoc review of state regulations affecting the parent-child relationship.⁷² Because of the piecemeal nature of the Supreme Court review, the scope of the parental liberty interest remains unclear. Since *Meyer* and *Pierce*, the Court has defined the parental liberty interest as a constellation of various rights;⁷³ however, it has not been uniform in identifying which rights are part and parcel of the liberty.

In the 1944 case *Prince v. Massachusetts*, the Court cited *Meyer* and *Pierce* for the "cardinal" proposition 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

67. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

68. *Id.* at 534. Because one of the plaintiffs was a Military Academy, the Court rested its opinion on Due Process grounds; it could have undoubtedly relied on the First Amendment if the case involved only parochial schools.

69. *Id.* at 535. This language reiterates Justice McReynolds's rejection, in *Meyer v. Nebraska*, of Plato's contention that children should be raised communally by the state. Here, Justice McReynolds shows his elevated regard for individualism, the inherent nature of personal rights, and the importance of such traditional institutions as the family. KEYNES, *supra* note 18, at 160 (citing JAMES EDWARD BOND, 1 DISSENT: THE LEGACY OF CHIEF JUSTICE JAMES CLARK MCREYNOLDS 131 (1992)).

70. *Pierce*, 268 U.S. at 535.

71. *Id.* at 534.

72. See *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion) (statute permitting any person to petition for visitation with a child); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (state law requiring school attendance until the age of sixteen); *Ginsberg v. New York*, 390 U.S. 629 (1967) (state regulation of sale of "girlie" magazines to minors); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (state regulation of child labor laws).

73. Compare *Stanley v. Illinois*, 405 U.S. 645 (1972) (noting that the parental liberty interest included the right to "companionship, care, custody, and management of his or her children.") with *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion) (noting that a parent has a fundamental right in controlling the care and custody of her child).

supply nor hinder.”⁷⁴ In *Prince*, the Court refused to strike down a state law prohibiting minors from selling merchandise in public places as violative of the parental liberty interest, finding the state’s interest in protecting children compelling.⁷⁵ The majority painstakingly emphasized the narrowness of its decision by stressing the importance of the parental liberty interest.⁷⁶

Seventeen years later, in *Ginsberg v. New York*, the Court again identified the parental liberty interest as entailing a parent’s right to direct the “care, custody, and nurture” of her child.⁷⁷ In *Ginsberg*, the defendant appealed his conviction for selling pornography to a minor in violation of state law, and the Court rejected his argument that the state law infringed on the right to rear one’s child, since the law only prohibited the sale of pornography and a parent could purchase it for her child if she so desired.⁷⁸

More recently, in *Wisconsin v. Yoder*, the Burger Court considered the application of the state’s compulsory education law as applied to the Amish, a group whose religious tenets prohibit education beyond the eighth grade.⁷⁹ The Court held the application of the law to the Amish unconstitutional, relying, *inter alia*, on the parental liberty interest.⁸⁰ The Court did not seek to increase the scope of the liberty interest but instead explained that *Meyer* and *Pierce* conclusively held that the parental liberty interest included a parent’s right to direct “the religious upbringing and education” of her children.⁸¹

In *Troxel v. Granville*, the Rehnquist Court weighed in on the scope of the liberty interest that parents have in rearing their children.⁸² Though the precise limits of the Court’s decision are unclear because no position garnered a majority, at least six members of the current Court recognized that a parent has a fundamental liberty interest in controlling the care and custody of her child, and these Justices agreed that this liberty interest is expansive enough to include a parent’s right to make decisions concerning the visitation and association of her child.⁸³

74. *Prince*, 321 U.S. at 166.

75. *Id.* at 166, 170.

76. *The Constitution and the Family*, *supra* note 14, at 1351.

77. *Ginsberg*, 390 U.S. at 639.

78. *Id.*

79. *Wisconsin v. Yoder*, 406 U.S. 205, 234-36 (1972).

80. *Id.*

81. *Id.* at 213-14.

82. 530 U.S. 57 (2000) (plurality opinion).

83. *Id.* at 66 (2000) (plurality opinion); *id.* at 77 (Souter, J. concurring); *id.* at 80 (Thomas, J., concurring).

Writing on behalf of the plurality, Justice O'Connor found a Washington state law that allowed "any person" to petition the state courts for child visitation rights at "any time" to be unconstitutional *as applied*.⁸⁴ The state court had relied on the law to grant more expansive visitation rights to a child's paternal grandparents than the child's mother wished.⁸⁵ Justice O'Connor identified the "interest of parents in the care, custody, and control of their children" and concluded that the state court's decision had impermissibly intruded on this interest.⁸⁶

Both Justices Thomas and Souter concurred in the judgment. Justice Thomas found the Washington statute to be facially unconstitutional based on the Court's precedent in *Pierce*, and he chastised the plurality and Justice Souter for failing to apply the strict scrutiny standard to strike down the law.⁸⁷ In Justice Thomas's view, the state failed to articulate a legitimate—much less a compelling—interest for interfering with the parent's right regarding visitation with third parties.⁸⁸ Justice Souter similarly found the Washington statute to be facially unconstitutional. He found the statute to be impermissibly broad because it allowed a judge to grant visitation rights to "any person" who petitioned the court "at any time," based solely on the "best interest standard."⁸⁹ The statute completely disregarded a fundamental right, and therefore, Justice Souter concluded, it was unconstitutional.⁹⁰

Justice Stevens took a different approach. Though he would have remanded the case to the Washington Supreme Court to construe the statute in a manner consistent with due process, he importantly defined what he perceived to be the precise component of the parental liberty interest at issue.⁹¹ Justice Stevens concluded: "My colleagues are of course correct to recognize that the right of a parent to maintain a relationship with his or her child is among the interests included most often in the constellation of liberties protected through the Fourteenth Amendment," resting this conclusion on the Court's earlier precedents on child-rearing.⁹²

84. *Id.* at 67-68 (plurality opinion).

85. *Id.* at 60 (plurality opinion).

86. *Id.* at 65.

87. *Id.* at 80 (Thomas, J., dissenting).

88. *Id.*

89. *Id.* at 77-79 (Souter, J., concurring).

90. *Id.*

91. *Id.* at 86 (Stevens, J., dissenting).

92. *Id.* at 86-87.

2. The Rights of the Natural Father

The constitutional right to rear one's child unfettered by unnecessary governmental interference is not an automatic right vested in a parent by virtue of blood relation.⁹³ While the parental liberty interest exists outside the confines of the marital unit, something more than a biological connection must be shown before the Court will provide constitutional protection to a parent's right to "the companionship, care, custody, and management of his or her child."⁹⁴ Unlike the Supreme Court's decisions involving state regulations and parental liberty interests, the cases that examine the rights of a natural father are the decisions that are best suited to consider the full scope of the parental liberty interest.

In the 1972 case *Stanley v. Illinois*, the Supreme Court first addressed the scope of the constitutional protection afforded to a child's natural father who was not married to the mother.⁹⁵ Under Illinois law, the children of unwed fathers became wards of the state upon the death of the mother.⁹⁶ When the mother of the three children involved in *Stanley* died, the state denied the children's biological father custody, declared the children wards of the state, and placed them with court-appointed guardians.⁹⁷ In striking down the statute, the Court noted that "[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."⁹⁸ The Court described the right at issue as that of a parent in the "companionship, care, custody, and management of his or her children."⁹⁹

Six years later the Court expounded on its *Stanley* decision in *Quilloin v. Walcott*.¹⁰⁰ In that case, the Court considered the constitutionality of Georgia's adoption laws as applied to deny a father the authority to prevent adoption of his illegitimate child.¹⁰¹ The

93. See, e.g., *Quilloin v. Walcott*, 434 U.S. 246, 253-56 (1978) (holding that absent extra-biological ties to his child, a father was due only minimal procedural due process regarding the adoption of the child by the child's stepfather).

94. *Stantosky v. Kramer*, 455 U.S. 745, 753 (1982).

95. 405 U.S. 645, 646-47 (1972).

96. *Id.* at 646.

97. *Id.*

98. *Id.* at 651.

99. *Id.* at 657. The Court also invalidated the statute as violative of the Equal Protection Clause of the Fourteenth Amendment because only an unwed father was deprived of the right to rear his children, whereas the unwed mother was presumed to be fit. *Id.* at 658.

100. *Id.* at 247.

101. *Id.* at 247.

child's natural father never married the child's mother or established a home, and the father had only on occasion visited his child.¹⁰² When the child's mother married, the stepfather sought to adopt the child, with the mother's consent. The natural father, however, attempted to block the adoption.¹⁰³ The Supreme Court held that "under the circumstances of this case appellant's substantive rights were not violated."¹⁰⁴ Though recognizing the rights of the parents established in *Meyer*, *Stanley*, *Prince*, and *Yoder*, the Court held that those rights are not vested in a father who had never sought actual or legal custody of his child.¹⁰⁵ The Court refused to break up a family unit already in existence.¹⁰⁶

In *Lehr v. Robertson*,¹⁰⁷ the Court flushed out precisely when a parent is afforded constitutional protection to rear her children free from undue governmental interference.¹⁰⁸ The Court held that "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the due process clause [sic]."¹⁰⁹ Such a right requires more than the "the mere existence of a biological link."¹¹⁰ Under this rule, the plaintiff was not deprived of liberty within the definition of the Due Process Clause, because he never supported and rarely saw his child for the two years between her birth and the adoption proceeding initiated by her stepfather.¹¹¹

Most recently, in *Michael H. v. Gerald D.*, the Court considered the constitutionality of a California law which created an irrebutable presumption that the husband was the father of any child born into an

102. *Id.* at 251

103. *Id.* at 247

104. *Id.* at 254.

105. *Id.* at 255.

106. *Id.*

107. 463 U.S. 248 (1983).

108. Between the decisions in *Quilloin* and *Lehr*, the Court considered a similar claim in *Caban v. Mohammed*, 441 U.S. 380 (1979). This case, while addressing the constitutional right of a natural father to rear his children, was decided on equal protection grounds. In *Caban*, the Court invalidated a state law that permitted only the unwed mother, not the unwed father, to block an illegitimate child's adoption. *Id.* at 393-94. Both dissenting opinions, however, addressed the question of when constitutional protection is afforded under the Due Process Clause. Both Justice Stewart and Chief Justice Burger suggested that constitutional protection is afforded when the parent establishes an enduring relationship with the child. *Id.* at 395-96 (Stewart, J., dissenting); *id.* at 414 (Stevens, J., dissenting).

109. *Lehr*, 463 U.S. at 261 (internal citation omitted).

110. *Id.*

111. *Id.* at 262-63.

existing marriage.¹¹² The plaintiff in this case fathered a child while living with a woman who was separated from, but later reconciled with, her husband, and the plaintiff sought to establish paternity and visitation with his child.¹¹³ The decisions in *Stanley*, *Quilloin*, and *Lehr* suggested that the plaintiff's biological connection, coupled with a demonstration that he assumed the responsibilities of rearing his child, would accord the plaintiff a constitutional right to rear his child. As one commentator explained, "if the clock had been stopped at any time within the . . . twenty years" preceding the *Michael H.* decision, "the plaintiff would have prevailed."¹¹⁴ However, a plurality of the court, led by Justice Scalia, held that the plaintiff did not have a constitutional interest in his natural daughter, even if he could meet the rule established in *Lehr*.¹¹⁵ In reaching this result, Justice Scalia narrowly framed the liberty interest at stake as the right of a natural father to assert parental rights over a child born into a woman's existing marriage with another man.¹¹⁶ In the plurality's view, *Stanley*, *Quilloin*, and *Lehr* provided no support for the plaintiff's constitutional claim.¹¹⁷ Justice Scalia viewed those cases as standing for the historic respect and sanctity traditionally accorded to the relationships that develop within the unitary family.¹¹⁸ After such interpretation of the case law, Justice Scalia held that the asserted right was neither grounded in tradition nor contemporary values.¹¹⁹

Scalia garnered the support of three other Justices for his entire opinion, with the exception of a single footnote. In that footnote, Scalia wrote only for himself and Chief Justice Rehnquist, declaring, "We refer to the most specific level at which relevant tradition, protecting, or denying protection to, the asserted right can be identified."¹²⁰ In two separate opinions, five justices specifically rejected Scalia's pronouncement of how the Court has identified (or, perhaps, should identify) the tradition implicated by the asserted

112. 491 U.S. 110, 113 (1989) (plurality opinion).

113. *Id.* at 113-15.

114. Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 34 (1992).

115. *Michael H.*, 491 U.S. at 124 (plurality opinion).

116. *Id.*

117. *Id.* at 122-24.

118. *Id.* at 123.

119. *Id.* at 126.

120. *Id.* at 127 n.6; see Rutherford, *supra* note 114, at 35-36 (discussing possible interpretations of Justice Scalia's footnote); Elizabeth A. Hadad, Comment, *Tradition and the Liberty Interest: Circumscribing the Rights of the Natural Father*, Michael H. v. Gerald D., 56 BROOK. L. REV. 291, 314-323 (1990) (criticizing Justice Scalia for failing to recognize contemporary morals in his definition of the liberty interest at stake).

interest.¹²¹ Justice Brennan believed that, in this case, the Court should have focused on the tradition of unwed fathers rearing their children.¹²² Clearly, once the right and tradition were defined in such a manner, the Court's decision in *Stanley* would have been dispositive in deciding the case in favor of the plaintiff.¹²³

That a majority of the Court directly repudiated the validity of Justice Scalia's footnote in *Planned Parenthood of Southeastern Pennsylvania v. Casey* adds additional strength to Justice Brennan's dissent in *Michael H.* In *Casey*, the Court noted: "It is also tempting....to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. . . . But such a view would be inconsistent with our law."¹²⁴ The *Michael H.* plurality may have defined tradition too narrowly, and consistent with the *Casey* decision, Justice Brennan's dissent may be closer to the standard mandated by due process as set forth in *Casey*.

3. Zoning and the Non-Nuclear Family

The cases set out in the preceding two subsections carved out a liberty interest in the narrow confines of the nuclear family with minor children. Confronted with the changing realities of the "typical" American family, many questions remain regarding the scope of the Due Process Clause outside the nuclear family. The Court on one occasion has shown a willingness to expand the protection of the Fourteenth Amendment to include the extended family. In *Moore v. City of East Cleveland*, the Supreme Court invalidated a city zoning ordinance that prohibited a grandmother from residing with two grandchildren who were cousins but permitted a grandmother to reside with two grandchildren who were siblings.¹²⁵ East Cleveland attempted to defend the zoning ordinance by arguing that the Court's prior holding in *Village of Belle Terre v. Boraas* was dispositive on the issue.¹²⁶ *Belle Terre* upheld the constitutionality of a zoning ordinance that prohibited three or more persons unrelated by blood or marriage

121. *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring in part) (joined by Justice Kennedy); *id.* at 138-141 (Brennan, J., dissenting) (joined by Justices Marshall and Blackmun).

122. *Id.* at 138-44 (Brennan, J., dissenting).

123. *Id.*

124. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992) (internal citation omitted).

125. *Moore v. City of East Cleveland*, 431 U.S. 494, 496-506 (1977) (plurality opinion).

126. *Id.* at 498.

from living in the same single family house.¹²⁷ However, the Court found *Belle Terre* to be inapposite.¹²⁸ The ordinance at issue in that case affected only unrelated persons.¹²⁹ Unlike the ordinance at issue in *Belle Terre*, East Cleveland's ordinance intruded on family life, and the Court invalidated the statute because it believed that the right of family members to live together was fundamental, even if the family was extended, as opposed to nuclear.¹³⁰

Speaking for the plurality, Justice Powell argued that "the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, . . . supports a larger conception of the family [than the nuclear family]."¹³¹ For both Justices Powell and Brennan, the extended family was functionally equivalent to the nuclear family, since both units fulfilled similar needs and were deeply rooted in history and tradition.¹³² It is through both the nuclear and extended families that "we inculcate and pass down many of our most cherished values, moral and cultural."¹³³ Moreover, the extended family is vitally important in times of adversity for providing mutual sustenance and maintaining or rebuilding a secure home life.¹³⁴ Accordingly, Justice Powell remarked that "unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case."¹³⁵ In this regard, the decisions in *Yoder*, *Ginsberg*, *Pierce*, and *Meyer* provided support for the conclusion that "the choice of relatives in this degree of kinship to live together may not lightly be denied by the State."¹³⁶

127. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

128. *Moore*, 431 U.S. at 499.

129. *Id.*; *Belle Terre*, 416 U.S. at 2.

130. *Moore*, 431 U.S. at 499 (plurality opinion).

131. *Id.* at 505.

132. KEYNES, *supra* note 18, at 174.

133. *Moore*, 431 U.S. at 503-04.

134. *Id.* at 505.

135. *Id.* at 501.

136. *Id.* at 505-06. Only Justices Brennan, Marshall, and Blackmun followed Powell's analysis. With three Justices dissenting, the statute was invalidated because Justice Stevens concurred on the grounds that the ordinance had no substantial relation to any state interest and violated the plaintiff's property rights. *See id.* at 520-21 (Stevens, J., concurring in the judgment). This suggests that one may not possess the right to reside with extended family if she does not own, but rents or leases, her home.

III. THE CIRCUITS SPLIT: DO PARENTS HAVE A CONSTITUTIONAL RIGHT TO THE COMPANIONSHIP OF THEIR ADULT CHILDREN?

The issue of whether the Due Process Clause affords a parental interest in companionship with an adult child is unresolved. The Supreme Court twice had the opportunity to rule on this issue; however, it opted not to do so, holding on both occasions that certiorari had been granted improvidently.¹³⁷ With no explicit guidance from the Supreme Court, circuits have come down on both sides of the issue.¹³⁸ Compounding the constitutional question in these decisions is the fact that such claims generally do not arise in a more typical substantive due process manner, in which courts address the constitutionality of a state regulation that allegedly infringes on a purported due process right.¹³⁹ Instead, this issue has arisen in the context of tort suits brought under 42 U.S.C. § 1983, where the plaintiff alleges that the defendants, acting under the color of state

137. *Jones v. Hildebrant*, 550 P.2d 339 (Colo. 1976), cert. dismissed 432 U.S. 183 (1977); *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981), cert. dismissed 456 U.S. 430 (1982).

138. *Compare Standberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986) (discussed further *infra* Part III.A.2) and *Trujillo v. Bd. of County Comm'rs of Santa Fe County*, 768 F.2d 1186, 1188-89 (10th Cir. 1985) (discussed *infra* in note 141) and *Bell v. City of Milwaukee*, 746 F.2d 1205, 1245 (7th Cir. 1984) (discussed *infra* Part III.A.1) with *McCurdy v. Dodd*, 352 F.3d 820, 829 (3d Cir. 2003) (discussed *infra* Part III.B.3) and *Butera v. District of Columbia*, 235 F.3d 637, 656 (D.C. Cir. 2001) (discussed *infra* Part III.B.2) and *Ortiz v. Burgos*, 807 F.2d 6, 7 (1st Cir. 1986) (discussed *infra* Part III.B.1).

139. A constitutional tort appears to bear little resemblance to the typical substantive due process case. Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 224-25 (1984). Substantive due process is typically invoked as a defense against criminal prosecutions or similar government actions. *Id.* at 223. However, certain claims for damages under section 1983 can be viewed as a substantive due process claims because the plaintiff also challenges the constitutionality of government action. *Id.* Professors Wells and Eaton argue that there are two differences between constitutional tort damages and traditional substantive due process, neither of which are strong enough to overshadow the similarities between them. *Id.* at 224-26. First, in the typical substantive due process case, the plaintiff invokes substantive due process as a defense to threatened government action. *Id.* at 225. However, in the tort context, the plaintiff has already been injured, and his remedy is damages. *Id.* The difference, then, is that in the typical case the plaintiff is kept whole, whereas in the constitutional tort case, the plaintiff is made whole. *Id.* Second, in the more typical due process case, the state "seeks to impose some obligation on the individual in further of the public good." *Id.* The individual in response argues that the Due Process Clause "includes the right of autonomy in personal decisionmaking and the right of families to be free of certain forms of state regulation." *Id.* The court's job is to choose between the state's justification for the regulation and the individual's claim of personal or familial autonomy. *Id.* at 226. By contrast, in the tort context, "the government actor has already injured the individual in some way." *Id.* The individual does not seek to invoke personal or familial autonomy as a "counterweight to governmental discretion." *Id.* Instead, he argues that the government has already invaded his liberty. *Id.* Here, Wells and Eaton argue, the task of the court is to "identify the circumstances in which these interests warrant constitutional protection." *Id.*

law, deprived her of her constitutional right to enjoy the companionship of her adult child. Before considering the merits of such section 1983 claims, the circuits have engaged in the threshold inquiry of “whether the plaintiff has alleged the deprivation of an actual constitutional right at all.”¹⁴⁰

In Part A, this Section analyzes the decisions of two circuits—the Seventh and Ninth—which have answered the threshold question in the affirmative, holding that the Due Process Clause of the Fourteenth Amendment protects a parent’s interest in the companionship of her adult child and that such a deprivation is actionable under section 1983.¹⁴¹ In Part B, this Section looks to the decisions in the First, D.C., and Third Circuits holding that no such right exists in the Constitution.

A. Expanding Substantive Due Process: The Seventh and Ninth Circuits Protect the Relationship Between a Parent and Her Adult Child

In recognizing that a parent’s interest in the companionship of her adult child is constitutionally protected against unnecessary state interference, courts generally have relied on Supreme Court precedent on due process protection for the family.¹⁴² While both the Seventh and Ninth Circuits agree that the Due Process Clause protects a

140. *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *see, e.g., Butera*, 235 F.3d at 646; *McCurdy*, 352 F.3d at 825-26.

141. The Tenth Circuit, in *Trujillo*, 768 F.2d at 1188-89, also found the right of a parent to enjoy the companionship of her adult child to be grounded in the Constitution. However, because the Tenth Circuit rested its opinion on First Amendment grounds, *Trujillo* falls outside the purview of this Note. The *Trujillo* court based its decision on the Supreme Court’s decision in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). *Id.* at 1188. In *Jaycees*, the Court explained that the First Amendment recognized that “choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the state,” and the Tenth Circuit believed that this included family relationships. *Id.* at 617-18; *Trujillo*, 768 F.2d at 1188. The court held, unlike the *Bell* court, that the First Amendment protection was broad enough to include not only the relationship between parent and child but also the relationships among siblings. *Trujillo*, 768 F.2d at 1189-90; *Bell*, 746 F.2d at 1244-47. While recognizing the underlying constitutional right, the court held that the plaintiffs were unable to recover under section 1983 because they failed to allege that the defendants intended to interfere with their intimate relationship with the decedent. *Trujillo*, 768 F.2d at 1190.

142. *Bell*, 746 F.2d at 1242-53; *Mattis v. Schnarr*, 502 F. 2d 588, 590, 593-95 (8th Cir. 1973) (relying mainly on the U.S. Supreme Court’s decisions in *Griswold v. Connecticut* and *Meyer v. Nebraska* to hold that “ ‘parenthood is a substantial interest of surpassing value and protected from deprivation without due process of law’ -- a fundamental legal right”) (internal citation omitted); *Myers v. Rask*, 602 F. Supp. 210, 211-13 (D. Colo. 1985) (relying on numerous Supreme Court cases to find that parents have a constitutionally protected right to the continued life of their 18-year-old son). For a more thorough discussion of the Supreme Court precedent upon which these courts based their rulings, *see supra* Part II.B.

parent's interest in the companionship of an adult child, the two circuits differ as to both the underpinnings and scope of that right. The Seventh Circuit has read Supreme Court precedent as providing that a parent's right in the companionship, care, custody and control of her child does not cease once the child reaches some defined age of adulthood.¹⁴³ Therefore, the Circuit permits a parent to sue for the deprivation of her right to rear her child, even if that child is, for instance, twenty years of age. The Ninth Circuit, on the other hand, rejects the contention that Supreme Court precedent constitutionally protects a parent's right to rear a child once the child reaches adulthood, but it has found that precedent recognizes the parent-child relationship as so fundamental that the state cannot arbitrarily interfere with it, even when the child is an adult.¹⁴⁴

1. The Seventh Circuit's Approach: Defining the Scope of the Recognized Right to Rear a Child

The Seventh Circuit's seminal decision *Bell v. City of Milwaukee* provided constitutional protection for the relationship between a parent and her adult child.¹⁴⁵ On February 2, 1958, two Milwaukee City police officers, Thomas Grady and Louis Krause, stopped Bell in his car, apparently in the mistaken belief that Mr. Bell fit the description of a man wanted for armed robbery.¹⁴⁶ Upon seeing the officers, Mr. Bell jumped out of his car and began to run.¹⁴⁷ The two officers pursued Bell and at one point, yelled "halt" and fired several warning shots in the air.¹⁴⁸ Bell did not heed the officers' warnings and continued to flee. Grady and Krause then commandeered a car and pursued Daniel Bell. Upon approaching Daniel Bell, both officers exited the car and proceeded on foot with their revolvers in their hands.¹⁴⁹ Grady mounted a snow bank and yelled at Bell to stop running.¹⁵⁰ Bell ran toward a house, and Grady, running ahead of Krause, caught up with Bell. With a loaded revolver in his right hand, Grady extended his right hand to grab Bell by the

143. *Bell*, 746 F.2d at 1245 ("[W]e are unpersuaded that a constitutional line based solely on the age of the child should be drawn.").

144. *Standberg v. City of Helena*, 791 F.2d 744, 748 & n.1 (9th Cir. 1986).

145. 746 F.2d 1205 (7th Cir. 1984).

146. *Id.* at 1215. It was suggested that Grady and Krause, both of whom were Caucasian, began to pursue Daniel Bell because he was African-American. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

shoulder, and as he did so, the revolver discharged, fatally hitting Daniel Bell in the back.¹⁵¹

Following the shooting, Grady and Krause engaged in a cover-up of the incident.¹⁵² They placed a knife in Daniel Bell's hand and concocted a fictional account of the event.¹⁵³ Grady and Krause claimed that, when Daniel Bell jumped out of the automobile, he yelled to them, "You won't catch me, I'm a holdup man," and that he was armed with the knife.¹⁵⁴ Both officers maintained that Grady was some distance from Bell when the gun discharged.¹⁵⁵ However, this statement conflicted with another policeman's report of the incident, which estimated that the shooting occurred at a close range.¹⁵⁶ In 1978, Krause told the District Attorney that he and Grady had lied about what occurred during the Bell shooting in 1958.¹⁵⁷ Krause wore a wiretap and engaged Grady in conversation over the telephone, where Grady admitted to planting the knife but maintained that the shooting was accidental.¹⁵⁸

In 1979, Daniel Bell's father, Dolphus Bell, instituted an action under 42 U.S.C. § 1983 alleging that the death of Daniel Bell deprived him of his constitutionally protected liberty interest in continued association with his child.¹⁵⁹ Dolphus Bell alleged that the City of Milwaukee, Grady, and two former members of the Milwaukee police department, acting under the color of state law, deprived him of this right without due process of law, thus entitling him to damages under section 1983.¹⁶⁰ In finding such a liberty interest to be included in the Due Process Clause and permitting the section 1983 action to be maintained, the Seventh Circuit examined the Supreme Court's decisions outlining the "parameters of the constitutional protection afforded the parent-child relationship."¹⁶¹ Though Daniel Bell was twenty-three years old when he was killed, the Court expressly refused to draw "a constitutional line based solely on the age of the

151. *Id.*

152. *Id.* at 1215-22.

153. *Id.* at 1216

154. *Id.*

155. *Id.*

156. *Id.* at 1218.

157. *Id.* at 1223.

158. *Id.*

159. *Id.* at 1224. Dolphus Bell was actually deceased at the time the claim was brought. His estate brought the claim on his behalf. *Id.* The Seventh Circuit held that Dolphus Bell's section 1983 claims survived his death under Wisconsin statutory and case law. *Id.* at 1241-42.

160. *Id.* at 1224.

161. *Id.* at 1243.

child.”¹⁶² The Court found that, under the facts of the case, Dolphus Bell’s interest “in the companionship, care, custody, and management” of the child did not magically disappear once Daniel Bell reached adulthood.¹⁶³ The Court noted that, at the time of his death, Daniel Bell was unmarried and had no children and that Dolphus Bell was “his immediate family.”¹⁶⁴ Moreover, there was substantial testimony as to the warm and close relationship between Daniel and Dolphus Bell.¹⁶⁵

The Seventh Circuit’s holding in this case does not carve out a new fundamental right; rather, the court attempted to define the scope of the parental liberty interest established in *Myers*, *Pierce*, *Yoder*, and *Troxel*. The court concluded that a parent’s liberty interest in the companionship and care of her child does not cease at some arbitrary date, such as a statutorily-defined age of adulthood. In this vein, the court’s holding is in line with the more generally accepted, though contested, practice of allowing a parent to sue under section 1983 for the deprivation of her right to rear her child.¹⁶⁶

That the *Bell* court defined the scope of a parent’s right to rear her child without creating a new liberty outside that right is supported by the court’s refusal to extend constitutional protection to the relationship among siblings. The court denied the section 1983 claim brought by Daniel Bell’s siblings, premised on the deprivation of their purported constitutional interest in the companionship of their brother.¹⁶⁷ No Supreme Court precedent spoke directly to the claim the siblings brought.¹⁶⁸ The court noted that, while some Supreme Court decisions have protected the family unit, the vast majority of cases focused on “the parent’s constitutional right to raise, associate with, and to make decisions affecting the family.”¹⁶⁹ The court

162. *Id.* at 1245.

163. *Id.* at 1245 (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

164. *Id.*

165. *Id.*

166. For cases permitting redress under section 1983 claims for injuries to parties whose family members have been killed as a result of official state action, thus recognizing constitutional protection of an individual’s fundamental right to the companionship of her family, see *Estate of Bailey v. York County*, 768 F.2d 503 (3d Cir. 1985); *Mattis v. Schnarr*, 502 F.2d 588 (8th Cir. 1974); *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961); *Jones v. McElroy*, 429 F. Supp. 848 (E.D. Pa. 1977); *Smith v. Wickline*, 396 F. Supp. 555 (W.D. Okla. 1975); *Galiindo v. Brownell* 255 F. Supp. 930 (S.D. Cal. 1966); *Espinoza v. O’Dell*, 633 P.2d 455 (Colo. 1981). *But see, e.g., White v. Talboys*, 573 F. Supp. 49, 51 (D. Colo. 1983) (holding the opposite); *Jackson v. Marsh*, 551 F. Supp. 1091, 1094 (D. Colo. 1982) (same); *Ealey v. City of Detroit*, 375 N.W.2d 435, 442 (Mich. 1985) (same).

167. *Bell*, 746 F.2d at 1245-47.

168. *Id.* at 1245.

169. *Id.*

admitted that *Moore*, which protected the right of the extended family to live together,¹⁷⁰ provided some support to the siblings' claim, but without more analogous precedent, it refused to protect as constitutional the relationship between siblings.¹⁷¹

The *Bell* court found the time at which the parent-child relationship loses constitutional protection to be dependent on various factors. First, a court should assess whether or not a child is still a member of his parent's family. In looking at this factor, a court should look at whether the child has married and whether the child has children of his own. If the child has not formed his own family unit, the parents presumably still possess their constitutional interest in the upbringing of that child. Second, the *Bell* decision suggests that an examination of the nature of the parent-child relationship is also necessary in determining whether a parent has a cause of action under section 1983 for the deprivation of the parent-child relationship. The court looked at the warm relationship between Dolphus and Daniel Bell. Perhaps other inquiries into the nature of the parent-child relationship would focus on not only the emotional relationship but also the financial relationship between parent and child.¹⁷²

Though the *Bell* court did not specify how lower courts should apply these factors in determining whether the parent-child relationship is constitutionally protected, at least one district court in the Seventh Circuit believed that the determinative issue is whether the child became a part of another family unit.¹⁷³ In *Russ v. Watts*, the Northern District of Illinois considered whether parents could bring a section 1983 claim for the deprivation of their relationship with their adult son, Robert Russ.¹⁷⁴ Robert Russ was shot and killed

170. *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (plurality opinion); see also discussion *supra* Part II.B.3.

171. *Bell*, 746 F.2d at 1246-47.

172. Because many children remain financially dependent upon their parents into adulthood, the financial relationship may be an important consideration under the standard enunciated in *Bell*. *Id.* at 1244-45. That children remain dependent on their parents into adulthood is reflected in the federal tax structure. See I.R.S., PUBLICATION 501: EXEMPTIONS, STANDARD DEDUCTIONS, AND FILING INFORMATION 14-18 (2003). For instance, if a child (or other dependent) is between nineteen and twenty-four years of age, a full-time student for some part of each of five months during the year, does not file a joint return with a spouse, meets citizenship requirements, earns less than \$2,800 in the year, and receives half of his support from his parent (or another claiming him as a dependent), then his parent may claim him as a tax exemption on her federal income taxes.

173. *Russ v. Watts*, 190 F. Supp. 2d 1094, 1099 (N.D. Ill. 2002).

174. *Id.* at 1096. The decision never mentions the age of Robert Russ, though it is clear from the court's application of *Bell* that Russ is an adult: "the only appreciable difference between Russ and the decedent in *Bell* is that six months prior to his death, Russ impregnated a woman." *Id.* at 1099.

by a Chicago police officer during a traffic stop.¹⁷⁵ The defendants moved for summary judgment on the basis that Vera Love and Isaac Russ did not have standing to bring this suit because they had failed to allege a constitutional violation.¹⁷⁶ In so doing, the defendants asked the district court to overturn the Seventh Circuit's holding made 18 years earlier in *Bell*.¹⁷⁷ Citing the binding effect of *Bell* in the Seventh Circuit, the district court noted that "to answer the question of standing in the instant case, the court must determine whether Russ had become part of another family unit."¹⁷⁸ Russ was a college student, unmarried, and lived at home when not attending college.¹⁷⁹ The defendants asserted that Robert Russ was no longer part of his parents' family unit, as he had conceived a child before his death.¹⁸⁰ The district court held that Robert Russ was still part of his parents' family unit.¹⁸¹ The court noted that the only "appreciable difference between Russ and the decedent in *Bell* is that six months prior to his death, Russ impregnated a woman."¹⁸² Robert Russ and the mother of his child had not formed their own family unit.¹⁸³

2. The Ninth Circuit's Approach: The Constitutional Right to Companionship Exists Outside the Right to Rear One's Child

Two years after the Seventh Circuit's decision in *Bell*, the Ninth Circuit held in *Standberg v. Helena* that the Due Process Clause of the Fourteenth Amendment protected the interest of a parent in the companionship of her adult child.¹⁸⁴ On June 7, 1981, Edward Standberg was arrested for driving a motorcycle without a license.¹⁸⁵ He was taken to a police station and placed in a jail cell.¹⁸⁶ Thirty minutes following his detainment, Edward Standberg was found dead, hanging from the jail cell ceiling.¹⁸⁷ His parents filed an action against the City of Helena, the Chief of Police, the police

175. *Id.* at 1096.

176. *Id.* at 1098.

177. *See id.* (recounting defendants' argument that courts have held contrary to *Bell*).

178. *Id.* at 1099.

179. *Id.* at 1098.

180. *Id.* at 1098-99.

181. *Id.* at 1099.

182. *Id.*

183. *Id.*

184. *Standberg v. City of Helena*, 791 F.2d 744 (9th Cir. 1986).

185. *Id.* at 746.

186. *Id.*

187. *Id.*

dispatchers, and all officers on duty that evening.¹⁸⁸ The Standbergs alleged that the death of their 22-year-old son deprived them of two rights protected by the constitution.¹⁸⁹ First, they alleged that the action of the defendants deprived them of their right to rear Edward Standberg.¹⁹⁰ The Standbergs premised this right as implicitly protected by the Ninth¹⁹¹ and Tenth¹⁹² Amendments.¹⁹³ Ruth and Howard Standberg also alleged that the death of their son deprived them of their Fourteenth Amendment rights to the society and companionship of their son.¹⁹⁴

The Ninth Circuit held that the parents' interest in directing the upbringing of their son was not implicated because Edward Standberg was twenty-two years old at the time of his death and no longer a minor; therefore, Ruth and Howard Standberg "had not been deprived of any constitutional right to parent."¹⁹⁵ Nevertheless, the parents were still free to claim "a violation of their fourteenth amendment due process rights in the companionship and society of

188. *Id.*

189. *Id.* at 746, 748.

190. *Id.* at 746.

191. The Ninth Amendment of the Constitution provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. Some believe that the Ninth Amendment serves as a source of substantive rights, much like the Due Process Clause of the Fourteenth Amendment. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 34-41 (1980); CHARLES L. BLACK, JR., *DECISION ACCORDING TO LAW: THE 1979 HOLMES LECTURES* 43-50 (1981). The Ninth Amendment had been mentioned infrequently in Supreme Court decisions until it became the subject of analysis by several Justices in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Justice Douglas, writing for the court, cited to the text of the Ninth Amendment to support the contention that the right to privacy (which included the right of married couples to use contraception) could be found in the penumbras of the First, Third, Fourth, and Fifth Amendments, and the right was protected by one or a complex of Amendments, despite the absence of a specific reference in the text of the Constitution. *Id.* at 484-85. Justice Goldberg, concurring, devoted several pages to the Amendment: "[T]he Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive." *Id.* at 492. For a collection of articles on the Ninth Amendment, see *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* (Randy E. Barnett, ed., 1989).

192. The Tenth Amendment of the Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Some commentators believe that the Ninth and Tenth Amendments work in tandem. See Norman Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. REV. 787, 806, 808-810 (1962). Norman Redlich argues: "The Ninth and Tenth Amendments . . . provide a formula for protecting the individual against both the federal and state governments in the enjoyment of these [fundamental, unenumerated] rights" through the Fourteenth Amendment. *Id.* at 808-09.

193. *Standberg*, 791 F.2d at 748-49,

194. *Id.* at 748.

195. *Id.* at 748 n.1.

the decedent without asserting such rights in conjunction with the ninth and tenth amendment."¹⁹⁶

The Ninth Circuit, therefore, held that the parental right to the companionship of an adult child exists independently of the right to rear one's child. Such a conclusion is reinforced by the court's subsequent decision in *Smith v. City of Fontana*.¹⁹⁷ In *Smith*, the adult and minor children of the decedent sued the City of Fontana and various police officers, under section 1983, for the deprivation of their constitutionally protected right to the companionship of their father.¹⁹⁸ Two officers, responding to a call concerning a domestic quarrel, approached Rufus Smith in his parking lot, struck him in the groin and face, and ultimately shot him in his back.¹⁹⁹

Facing these facts, the court observed that a parent of a minor child is allowed to recover under section 1983 when state interference "threatened not only the parents' interest in the companionship of their children, but also the parents' constitutionally protected interest in raising their children."²⁰⁰ When a child claims constitutional protection for her relationship with a parent, however, it is not premised on the right to care, custody, and control, but only on a companionship interest.²⁰¹ The Ninth Circuit thus found the familial companionship interest to be constitutionally protected in *Smith*. It relied predominantly on its previous decision in *Standberg*, concluding that a parent of an adult child still maintains a companionship interest in her child, even though she no longer maintains her right to rear the child.²⁰²

The *Standberg* holding rests on a notion fundamentally different from the Seventh Circuit's decision in *Bell*. To the *Standberg* court, it is the virtue of a family relationship, and not the parent's interest in rearing her child, that gives rise to the substantive due process violation.²⁰³ Because of the manner in which the Ninth Circuit premised its decision, it logically follows that it is irrelevant whether or not the child has entered another family unit or remains part of his parents' family. In the Seventh Circuit's view, such an inquiry is

196. *Id.* at 748.

197. 818 F.2d 1411 (9th Cir. 1987).

198. *Id.* at 1417-18.

199. *Id.* at 1414.

200. *Id.* at 1418. Two previous Ninth Circuit decisions permitted a parent to recover under section 1983 for the deprivation of their right to rear their children. *Kelson v. City of Springfield*, 767 F.2d 651 (9th Cir. 1985); *Morrison v. Jones*, 607 F.2d 1269 (9th Cir. 1979).

201. *Smith*, 818 F.2d at 1419.

202. *Id.*

203. *Id.* at 1419.

needed to ascertain whether a parent still had an interest in “the companionship, care, custody, and management” of her child.²⁰⁴ Unlike the Seventh Circuit, however, the scope of the Ninth Circuit’s holding does not automatically foreclose a suit brought by the parent of an adult child who has married and/or has children of his own.

B. Rejecting the Interest: The First, D.C., and Third Circuits Hold that the Due Process Clause Does Not Protect a Parent’s Interest in the Companionship of Her Adult Child

The First, D.C., and Third Circuits have rejected the contention that the Due Process Clause of the Fourteenth Amendment protects a parent’s interest in the companionship of her adult child. All three circuits agree that the threshold inquiry as to whether a constitutionally protected liberty interest exists must be answered in the negative. Unlike the Seventh Circuit, these Circuits interpret the parental liberty interest defined by the Supreme Court to apply only to minor children. They reject the Ninth Circuit’s formation of a companionship interest outside the childrearing context. The First and Third Circuits additionally assert that there can be no substantive due process violation when the conduct is not aimed at a parent’s relationship with her adult child.

1. The First Circuit’s Approach: Precedent and Public Policy Guide Against Expanding Substantive Due Process

In *Ortiz v. Burgos*, the First Circuit refused to recognize a parental liberty interest in the companionship of an adult child.²⁰⁵ In that case, Jose Ortiz was fatally beaten by guards while an inmate of the Guayama Regional Detention Center in Puerto Rico.²⁰⁶ Jose’s mother sued under section 1983 for the deprivation of her companionship interests with her son. The decedent’s stepfather and siblings proffered a similar claim, alleging that the defendants denied them of their constitutional right to the companionship of their stepson and brother, respectively.²⁰⁷ The district court granted the defendant’s motion for summary judgment as to the stepfather and siblings, but it permitted the mother’s claims to go forward.²⁰⁸ The

204. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1246 (7th Cir. 1984).

205. 807 F.2d 6 (1st Cir. 1986).

206. *Id.* at 7.

207. *Id.*

208. *Id.*

mother ultimately recovered \$20,000 on her personal claim.²⁰⁹ The stepfather and siblings appealed the dismissal of their claims.²¹⁰ Though the First Circuit only assessed the claims brought by the stepfather and siblings, it explicitly stated that the claim brought by the mother similarly would have failed.²¹¹

The First Circuit first looked to Supreme Court precedent in determining that the liberty interest the stepfather and siblings' asserted in this case could not be established.²¹² The court defined the Supreme Court precedent as falling within two categories. First, as a matter of substantive due process, the Court has protected only certain, particularly private, family decisions from governmental interference. Citing *Griswold*, *Pierce*, and *Moore*, the court argued that these "cases do not stand for the proposition that family relationships are, in the abstract, protected against all state encroachments, direct or indirect."²¹³ The precedent focused on choice, suggesting that the constitutional right is one of preemption and that family members have the right, when confronted with the state's attempt to make choices for them, to choose for themselves.²¹⁴ The court then summarily concluded that the right the plaintiffs asserted "d[id] not involve such a choice."²¹⁵ Moreover, in past cases involving parental rights, the Supreme Court had been "concerned with preventing governmental interference with the rearing of *young children*."²¹⁶ The *Ortiz* court recognized that a parent's constitutional interest lies in both controlling the child's upbringing and in retaining the custody and companionship of the child.²¹⁷ However, the plaintiff's relationship with her child was not accorded this constitutional protection since Jose Ortiz was older than twenty-one years of age at his death and thus was not a minor.²¹⁸

The First Circuit next looked to Supreme Court precedent indicating that a Fourteenth Amendment liberty interest is implicated only when the state seeks to change or affect the relationship of parent and child in furtherance of some legitimate state interest.²¹⁹

209. *Id.*

210. *Id.*

211. *Id.* at 7, n.1.

212. *Id.* at 7-8.

213. *Id.* at 8.

214. *Id.*

215. *Id.*

216. *Id.* (emphasis added).

217. *Id.* (citing *Lassiter v. Dep't of Soc. Serv.*, 453 U.S. 18, 38-39 (1981) (Blackmun, J., dissenting)).

218. *Id.*

219. *Id.*

The court explained: “[W]e think it significant that the Supreme Court has protected the parent only when the government directly acts to sever or otherwise affect his or her legal relationship with a child.”²²⁰ Here, the court characterized the parental relationship as “only incidentally” affected.²²¹ The court refused to characterize government action that incidentally affects the parent-child relationship as giving rise to a constitutional violation, though it did recognize that other courts had taken such a step.²²²

The First Circuit also believed that logic and equity warned against “erect[ing] a new substantive right upon the rare and relatively uncharted terrain of substantive due process.”²²³ The court suggested that recognition of such a liberty interest would constitutionalize adjudication in a myriad of situations the court considered inappropriate for due process scrutiny.²²⁴ Under such a regime, for example, parents potentially would have an action for a child’s alleged wrongful incarceration or wrongful discharge from a state job that forced her to seek employment in another part of the country. Defining and limiting liberty interests in such an area would be not only exceedingly difficult but also duplicative of state tort actions for wrongful death.²²⁵

2. The D.C. Circuit’s Approach: The Parental Liberty Interest is Protected Only for Parents of Minor Children

The Circuit Court for the District of Columbia, in *Butera v. District of Columbia*, declined to recognize a parental liberty interest in the companionship of an adult child.²²⁶ The court held like the First Circuit in *Ortiz*, that such an interest is not protected by the Due Process Clause of the Fourteenth Amendment. In *Butera*, the decedent, Eric Butera, telephoned the D.C. Police Department to provide information about a highly publicized triple homicide that had occurred some months earlier at a Starbucks coffee shop.²²⁷ He informed Detective Anthony Patterson that, while purchasing or using crack cocaine, he twice had overheard someone talking about the

220. *Id.*

221. *Id.*

222. *Id.* at 9.

223. *Id.*

224. *Id.*

225. *Id.*

226. 235 F.3d 637 (D.C. Cir. 2001).

227. *Id.* at 641.

Starbucks murders.²²⁸ Lieutenant Brian McAllister and Sergeant Nicholas Breul were assigned to the Starbucks investigation and decided to stage an undercover drug purchase at the house where Butera had overheard the conversation.²²⁹

Butera, who was thirty-one years old, agreed to assist the officers with the undercover operation, and the officers planned the operation to resemble Butera's previous visits to the house as closely as possible.²³⁰ Butera was to meet the officers no more than fifteen minutes after he was dropped off at the house.²³¹ The officers assured Butera that they would watch him carefully and ensure that he would not be harmed.²³² Once Butera approached the house, however, the officers parked their vehicles in such a manner that they were unable to see Butera when he attempted to enter.²³³

Thirty minutes after Butera was dropped off, uniformed officers unconnected with the investigation appeared in response to a civilian call reporting an unconscious person in the rear walkway of the house.²³⁴ Ten minutes after seeing those uniformed officers arrive, the officers with whom Butera had worked heard a dispatcher report that a man was down in the alley behind the house Butera had attempted to enter.²³⁵ Butera had never gained entry to the house; rather he was robbed and stomped to death in the alley.²³⁶

Eric Butera's mother sued the District of Columbia and the police officers who engineered the undercover operation, both on her own behalf and on behalf of her son's estate, alleging that they recklessly failed to provide adequate protection for her son.²³⁷ In the district court, the jury returned verdicts against the defendants and awarded Terry Butera \$70,530,000 in compensatory damages and \$27,570,000 in punitive damages.²³⁸ Of this award, \$34,000,000 was awarded for Terry Butera's section 1983 action premised on the deprivation of her parental liberty interest of the companionship of her adult son.²³⁹

228. *Id.* at 641-42.

229. *Id.* at 642.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 643.

235. *Id.*

236. *Id.*

237. *Id.* at 640.

238. *Id.* at 641.

239. *Id.* at 644 n.4.

In overturning the district court's verdict, the D.C. Circuit noted that the Supreme Court has not addressed directly whether a parent possesses a constitutionally protected interest in the companionship of an adult child.²⁴⁰ Nonetheless, the precedent in the D.C. Circuit and other circuits suggested that no such right exists.²⁴¹ The plaintiff relied primarily on the D.C. Circuit's opinion in *Franz v. United States*,²⁴² as well as the Seventh Circuit's decision in *Bell*.²⁴³ The court believed that *Franz*, as well as the Supreme Court cases *Franz* cited, focused on "securing the rights of parents to have custody of and to raise their *minor* children in a manner that develops 'parental and filial bonds free from government interference.'"²⁴⁴ In looking at *Franz* and the Supreme Court precedent, the court found "nothing in Supreme Court case law to indicate an intention to extend these concerns in support of a constitutional liberty interest in a parent's relationship with her adult son."²⁴⁵

Futhermore, the D.C. Circuit explicitly rejected the Seventh Circuit's contention in *Bell* that the same precedent cautioned against drawing lines based solely on the age of the child.²⁴⁶ The court believed that different constitutional treatment is warranted when the parent-child relationship involves two adults because, as a child grows older, his dependence on his parents "for guidance, socialization, and support gradually diminishes."²⁴⁷ Similarly, the strength and importance the emotional bond between the child and his parents usually decreases.²⁴⁸ Because the differences in a child's relationship with his parents during childhood and adulthood is "sufficiently marked to warrant sharp constitutional treatment," the court held

240. *Id.* at 654.

241. *Id.*

242. In *Franz v. United States*, federal officials relocated and changed the identities of a divorced mother and her minor children pursuant to the Federal Witness Protection Program, with "the effect of severing the ongoing relationship between the children and their natural father." 707 F.2d 582, 585 (D.C. Cir. 1983). The children's father sued the United States on statutory and constitutional grounds, alleging a violation of his constitutionally protected right to his children's companionship. *Id.* In holding that such a right existed, the *Franz* court acknowledged "the profound importance of the bond between a parent and a child to the emotional life of both." *Id.* at 599. The court expressed "skepticism" at governmental interference with a parent's right to "shape the development" of his children and to be intimately involved in the "rearing of his offspring." *Id.* at 597-99.

243. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1243-44 (7th Cir.1984). For an indepth discussion of *Bell*, see *supra* Part III.A.1.

244. *Butera*, 235 F.3d at 655 (emphasis in original).

245. *Id.* at 655.

246. *Id.* at 655-56.

247. *Id.* at 656.

248. *Id.*

that “a parent does not have a constitutionally-protected liberty interest in the companionship of a child who is past minority and independent.”²⁴⁹

3. The Third Circuit’s Approach: Clearing Up the Ambiguity

The Third Circuit’s decision in *McCurdy v. Dodd* resolved the ambiguity within the circuit regarding whether a parent’s relationship with her adult child is constitutionally protected.²⁵⁰ During the fifteen years prior to *McCurdy*, many district courts within the Third Circuit had adopted the Seventh Circuit’s view of the parental liberty interest and allowed parents of adults to assert independent substantive due process claims when government conduct injured their adult children.²⁵¹ Because the Third Circuit had cited the *Bell* opinion in a footnote in *Estate of Bailey by Oare v. County of York*,²⁵² district courts mistakenly believed that the *Bell* holding had become law in the circuit.²⁵³ In *Estate of Bailey*, the Third Circuit noted: “We follow the Seventh Circuit’s decision in *Bell v. City of Milwaukee* . . . in holding based on these precedents that a parent whose child has died as a result of unlawful state action may maintain an action under section 1983 for the deprivation of liberty.”²⁵⁴ However, in *McCurdy* the Third Circuit rejected the parental liberty interest described in *Bell*, holding instead that a parent’s interest in the companionship of her adult child is not a fundamental liberty interest.²⁵⁵

McCurdy centered on the shooting death of Donta Dawson.²⁵⁶ On the night of October 1, 1998, two Philadelphia police officers, Kirk Dodd and Christopher DiPasquale, spotted Donta Dawson sitting alone in a parked car and pulled up alongside the vehicle.²⁵⁷ The officers asked Dawson what he was doing and whether he needed assistance.²⁵⁸ Dawson looked away from the officers and said

249. *Id.*

250. *McCurdy v. Dodd*, 352 F.3d 820, 828-30 (3d. Cir. 2003).

251. See e.g., *Pable v. Colebrookdale Township*, 227 F. Supp. 2d 361, 381 (E.D. Pa. 2002); *White v. City of Philadelphia*, 118 F. Supp. 2d 564, 567 (E.D. Pa. 2000); *Estate of Cooper v. Leamer*, 705 F. Supp. 1081, 1087 (M.D. Pa. 1989); *Agresta v. Sambor*, 687 F. Supp. 162, 164 (E.D. Pa. 1988).

252. 768 F.2d 503 (3d Cir. 1985).

253. See cases cited *supra* note 251.

254. *Estate of Bailey*, 768 F.2d at 509 n.7 (internal citation omitted).

255. *McCurdy*, 352 F.3d at 828-30.

256. *Id.* at 821.

257. *Id.* at 822.

258. *Id.*

nothing.²⁵⁹ Thereafter, Officer Dodd approached the driver's side window of Dawson's car, again inquiring if Dawson needed assistance.²⁶⁰ This time, Dawson looked at Dodd, shrugged his shoulders, and turned away but did not respond verbally.²⁶¹

Both officers then started screaming at Dawson, demanding that he raise his hands, and punctuated their demands by using obscenities.²⁶² After Dawson did not respond, DiPasquale drew his weapon.²⁶³ Dodd reached into the driver's side window of Dawson's car and removed the key from the ignition.²⁶⁴ Dodd quickly backed away from the window and informed DiPasquale of his belief that Dawson had a gun.²⁶⁵

The officers continued screaming at Dawson to raise his hands.²⁶⁶ When Dawson finally began to move his left arm, Officer DiPasquale fired at Dawson, fatally injuring him.²⁶⁷ A subsequent investigation revealed that Dawson had no gun.²⁶⁸ Bobby McCurdy, the father of the decedent, sought recovery for a violation of his constitutional right to the companionship of his 19-year-old son, pursuant to section 1983.²⁷⁰

The Third Circuit held that a companionship interest between a parent and her adult child was not constitutionally protected. First, the court construed Supreme Court precedent on the parental liberty interest as protecting the right of parents to make critical childrearing decisions concerning the care, custody, and control of minors.²⁷¹ While the court acknowledged that the *Stanley* Court included "companionship" of a child within that right, it denied that such a definition changed the substantive due process framework, which limited the parental liberty interest to decision-making regarding the care, custody, and control of minor children.²⁷² By framing the right in this manner, the *McCurdy* court held that the parental liberty interest naturally terminates "at the point at which a child begins to assume

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

270. *Id.* at 822-23.

271. *Id.* at 829 (citing *Troxel v. Granville*, 530 U.S. 57, 66 (2000)).

272. *Id.* at 827 (citing *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972)).

that critical decision-making responsibility for himself or herself."²⁷³ The Third Circuit attempted to define the contours of the parental liberty interest and concluded that the interest generally will cease at the point at which the child legally becomes an adult.²⁷⁴ In certain circumstances, however, the legal age of adulthood might not be the point at which the child is "emancipated."²⁷⁵ The court suggested that even if the child is older than eighteen, a parent may still possess her parental liberty interest in that child if she is not yet emancipated.²⁷⁶

Like the *Ortiz* court, the Third Circuit was hesitant to extend Due Process to situations in which the action at issue was not deliberately directed at the parent-child relationship. The court found support for this interpretation in the Supreme Court's statement in *Daniels* that the due process guarantee historically has been applied only to "*deliberate* decisions of government officials to deprive a person of life, liberty, or property."²⁷⁷ The Third Circuit cited the *Ortiz* decision for further support.²⁷⁸ Though Officer DiPasquale's action may have been deliberate, it was directed solely at Donta Dawson.²⁷⁹ He considered neither Cynthia Dawson nor Bobby McCurdy when he fired the fatal shot.²⁸⁰

IV. RESOLVING THE SPLIT: A TWO-TIERED APPROACH TO THE PARENTAL LIBERTY INTEREST

This Section attempts to resolve the threshold constitutional question that has divided the circuits: whether a parent has a protected liberty interest in the companionship of an adult child. This Section argues that the Court should resolve the issue by defining and extending the scope of the parental liberty interest established in its precedent dealing with childrearing,²⁸¹ the rights of the natural father,²⁸² and the definition of the family unit.²⁸³ The parental liberty interest should vary in scope based on the two stages of a child's life. The interest would be at its full extent during a child's minor years, and it would necessarily contract once the child becomes an adult.

273. *Id.* at 829.

274. *Id.*

275. *Id.* at 830.

276. *Id.* at 830-31.

277. *Id.* at 827 (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986)) (emphasis in original).

278. *Id.*

279. *Id.* at 829-30.

280. *Id.*

281. See *supra* Part II.B.1.

282. See *supra* Part II.B.2.

283. See *supra* Part II.B.3

Such a two-tiered approach to the parental liberty interest reflects the changing reality of the parent-child relationship as the child matures into adulthood. It also reflects the necessary constitutional balance between the parental liberty interest and the individual liberty and autonomy interests of the child.

Part A of this Section discusses the scope of the parental liberty interest. It first defines the parental liberty interest, arguing that companionship is an included right. Part A concludes by discussing the scope of the parental liberty interest as redefined by a two-tiered approach. Part B looks to the legal tradition concerning a parent's relationship with her adult child. It first examines the Supreme Court precedent on familial autonomy and argues that the established familial rights would mean little if the state were constitutionally permitted to act to destroy the parent-child relationship once a child reaches maturity. Part B also provides a cursory review of the legal tradition of according special rights to and imposing obligations on parents and adult children because of their special relationship. Finally, Part C explores the practical application of the two-tiered approach it proposes and addresses potential criticisms that may arise.

A. Defining the Scope of the Parental Liberty Interest

1. Defining the Constellation of Rights

The Supreme Court has attempted to define the scope of the parental liberty interest on several occasions. Generally, the interest is defined in terms of a constellation of rights. However, the Court has not consistently included the same rights each time it has defined the interest. In particular, the Court's inclusion of companionship as a component of the parental liberty interest has varied. The *Stanley* Court defined the right as "the interest of a parent in the companionship, care, custody, and management of his or her children."²⁸⁴ In *Troxel*, by contrast, the Court defined the constellation more narrowly: "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."²⁸⁵ This treatment has led some commentators to suggest that the parental liberty interest, even in regard to a minor child, does not include a right to companionship.

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

285. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion).

The problem of the varying definitions of the parental liberty interest is compounded by the fact that Supreme Court precedent tends to focus on the right of parents to make decisions regarding their children's upbringing.²⁸⁶ These cases arise where the state seeks to make decisions about issues such as a child's education, instead of leaving those decisions to the parent's discretion.²⁸⁷ Because of this focus, lower courts have interpreted the interest as extending no further than "the right of parents to make critical child-rearing decisions concerning the care, custody, and control of minors."²⁸⁸

Yet to exclude companionship from the constellation of rights belies Supreme Court precedent that has expressly included companionship as a component of the parental liberty interest. The Court has repeatedly reaffirmed that companionship is a separate and distinct aspect of the parental liberty interest. As noted above, for example, the *Stanley* Court included companionship among the constellation of the parental liberty interest,²⁸⁹ and that definition of the interest has been cited repeatedly in the Court's subsequent cases considering the Constitution and the family.²⁹⁰ Furthermore, even while dissenting in *Troxel*, Justice Stevens explained: "My colleagues are of course correct to recognize that the right of a parent to maintain a relationship with his or her child is among the interests included most often in the constellation of liberties protected through the Fourteenth Amendment."²⁹¹

The difficulty in deciphering the precise scope of the Court's decisions on the parental liberty interest also stems from the fact that it is impossible, in the context of a minor child, to separate the companionship interest from the other parental liberty interests. It is likely for this reason that the Court has spent little time delineating whether companionship is included in the constellation of the parental liberty interest.

Some argue that the right of companionship only exists to the extent of a parent's ability to direct the upbringing of her child.²⁹² As

286. For a discussion on the Supreme Court's precedent on the parental rights to childrearing, see *supra* Part II.B.1.

287. See *Pierce v. Society Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

288. *McCurdy v. Dodd*, 352 F.3d 820, 829 (3d. Cir. 2003).

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

290. See, e.g., *Troxel*, 530 U.S. at 66 (plurality opinion); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Quilloin v. Walcott*, 434 U.S. 246, 247 (1978).

291. *Troxel*, 530 U.S. at 86-87 (Stevens, J., dissenting).

292. For cases holding that a plaintiff has not been deprived of the right to companionship with her minor child when a state actor kills her child, see, for example, *White v. Talboys*, 573 F.

such, a parent would be unable to exercise her liberty interest if the state acted to deprive her of the companionship of her child. Thus, one might argue that the parental interest in companionship is really no more than the liberty to exercise liberty. However, such a characterization of the interest degrades the normative value of familial companionship. To reduce the right to companionship to the liberty to exercise liberty fails to recognize the family unit as a source of emotional support, love, and nurture. It defines the parent-child relationship in perfunctory and utilitarian terms.

Indeed, the Court's decisions in *Stanley*, *Quilloin*, and *Lehr* illustrate that the Court considers the right of companionship to exist alongside, not subordinate to, a parent's interest in the control, custody, and care of her child.²⁹³ In these cases, the fathers were not merely contesting a state regulation which interfered with their right to make decisions regarding their children's schooling or religion, as in *Meyer* and *Pierce*.²⁹⁴ Instead, they were contesting state regulations which completely divested them of their right to parent.²⁹⁵ In these cases, therefore, the Court had the opportunity to consider more thoroughly the entire scope of the parental liberty interest, rather than make ad hoc determinations about the constitutionality of specific state regulations.²⁹⁶ Accordingly, in *Stanley*, the Court first included companionship among the collection of parental rights. Over a decade later, the *Lehr* Court reaffirmed that when a father forges a relationship with his child, "his interest in personal contact with his child acquires substantial protection under the due process clause."²⁹⁷

2. Defining the Scope of the Parental Liberty Interest

The constellation of rights included in the parental liberty interest—companionship, care, custody, and management—should be seen as varying at the two stages of a child's life. In the first stage, the parent possesses the full constellation of the parental liberty interest. This stage exists until the point where the child reaches adulthood in the constitutional sense, which may not be the same as the statutorily-defined age of maturity. In the second stage, the parent

Supp. 49, 51 (D. Colo. 1983); *Jackson v. Marsh*, 551 F. Supp. 1091, 1094 (D. Colo. 1982); *Ealey v. City of Detroit*, 375 N.W.2d 435, 442 (Mich. 1985).

293. *Lehr v. Robertson*, 463 U.S. 248 (1983); *Quilloin v. Walcott*, 434 U.S. 246, 247 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972)

294. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

295. See cases cited *supra* note 287.

296. For a discussion of cases in which the court made ad hoc determinations of the constitutionality of a specific state regulation, see *supra* Part II.B.1.

297. *Lehr*, 463 U.S. at 261.

still possesses a liberty interest in the adult child, though the scope of that interest is necessarily more limited than during the first stage. If parents retained the full constellation of the parental liberty interest into a child's adulthood, that interest would directly conflict with the adult child's own constitutional liberty and autonomy. Therefore, only those rights included in the parental liberty interest that have status independent of their role in guarding a child's individual liberties should remain after the child matures into adulthood.

Until a child reaches adulthood in the constitutional sense, a parent should possess the full bundle of the parental liberty interest. Children, though they possess constitutional rights, are accorded lesser constitutional protection for their individual rights.²⁹⁸ Indeed, the Court has recognized that the "the constitutional rights of children cannot be equated with those of adults."²⁹⁹ This limitation exists for three reasons: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in childrearing.³⁰⁰ In her role managing and maintaining custody over her child, the parent should be viewed as the steward or bearer of her child's constitutionally protected liberties.

It is at the point when the individual reaches adulthood in the constitutional sense that the first tier of the parental liberty interest yields to the narrower second tier. While theoretically simple, the practical determination of when a child fully attains her individual rights, and thus becomes an adult in the constitutional sense, is difficult. The Supreme Court has never explicitly addressed the precise point at which one possesses the full gamut of constitutional rights. The Court has made clear, however, that the decision should

298. See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (recognizing "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing"); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."). Judicial decisions involving children are especially difficult to interpret and, as a group, fail to reflect a coherent understanding of the essential issues at stake. While as a general proposition, children do possess lesser constitutional protections than adults, at times the Court has relied on the centrality of autonomy to contemporary notions of personhood and has protected children's rights just as it protects the rights of adults in comparable situations. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511-14 (1969) (recognizing First Amendment rights of high school students); *In re Gault*, 387 U.S. 1, 30-31 (1967) (extending constitutional protection to children in delinquency proceedings).

299. *Bellotti*, 443 U.S. at 634.

300. *Id.* at 634-639.

not be made in terms of an arbitrary age: "Constitutional rights do not mature and come into being magically when one attains the state-defined age of majority."³⁰¹ Certainly, the three articulated reasons why children are accorded lesser protection of their individual rights provide the starting point in assessing the age of constitutional majority. Therefore, a child may be deemed an adult in the constitutional sense when she becomes less vulnerable, when she can make critical decisions for herself, and when her parent relinquishes the role of childrearing.³⁰² The inquiry is akin to state determinations of emancipation, and like those proceedings, there may be a rebuttable presumption that an individual is an adult in the constitutional sense at the statutorily-defined age of majority.³⁰³

The scope of the parental liberty is determined solely by whether a child has reached adulthood in the constitutional sense. Even though a child may reach the state-defined age of majority, the full constellation of the parental liberty interest may remain intact if the child remains peculiarly vulnerable and/or unable to make informed, mature decisions. A clear example would be the case of a mentally retarded child. Though the child may be older than eighteen years of age, her parents would still retain the full scope of their parental liberty interest if they so desired. In such a case, the parental liberty interest in companionship would extend to a child who is statutorily defined as an adult.³⁰⁴

The more difficult question, however, is assessing whether the parental liberty interest exists past the point where the child possesses the full gamut of his constitutional liberties, and if it does, what the scope of that interest should be. Some of the rights typically included within the parental liberty interest would be at odds with the constitutional notion of individual liberty and autonomy.³⁰⁵ The

301. *Danforth*, 428 U.S. at 74.

302. See *supra* note 298 and accompanying text.

303. See, e.g., *Kathleen L.H. v. Wayne E.H.*, 523 A.2d 977, 978 (Del. Fam. Ct. 1987); *Newburgh v. Arrigo*, 443 A.2d 1031, 1037-38 (N.J. 1982); *Geiger v. Rouse*, 715 A.2d 454, 458 (Pa. Super. Ct. 1998).

303. Courts may view a child as capable of making these decisions for herself at an age earlier than the statutorily-defined age of majority. See *Bellotti*, 443 U.S. at 643-44 (A pregnant minor is entitled to an abortion if a court finds either: "(1) she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.>").

304. It should be mentioned that the duration of the parental liberty interest in the first tier is very similar to the Third Circuit's definition of the interest in *McCurdy*. See *supra* Part IV.B.3.

305. For instance, the parent of an adult would not have veto power over her child's ability to obtain an abortion. See *Bellotti*, 443 U.S. 622; *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983); Ohio

parental liberty interest in the custody, management, and control of a child would directly and substantially conflict with the adult child's individual liberties. Conflicting aspects of the parental interests must clearly give way to the child once he reaches adulthood in the constitutional sense. However, certain rights within the constellation of the parental liberty interest would not be at odds with the adult child's constitutional rights. The parent's interest in the companionship and care³⁰⁶ of his adult child does not conflict with the child's constitutional liberties, and therefore, the scope of the parental liberty interest in an adult child should entail these rights. Indeed, many of the other constitutional rights regarding family life would make little sense if the parent was accorded no constitutional protection for the relationship with her adult child.³⁰⁷ Moreover, this nation has expressed a profound respect for the parent-child relationship, and that tradition does not cease once the child reaches adulthood. Therefore, the parent maintains an interest in the companionship of her adult child.

The existence of the parental liberty interest in the narrower second stage should be interpreted much like the parental liberty interest in the first stage. A parent's interest in a relationship with her adult child does not exist by virtue of blood relation.³⁰⁸ In *Lehr*, the Court explained, "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the due process clause."³⁰⁹ Therefore, it follows that a parent's constitutional interest in the companionship of her adult child should be granted constitutional protection only if the parent continues to foster a relationship with that child. In the rare event that a parent's interest in the companionship and care of her adult child would conflict with

v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). Also, the parental right to hospitalize a child, even against the child's wishes, would quite clearly conflict with an adult's right to refuse medical treatment. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 623-24 (1979); *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 281-82 (1990).

306. In this respect, the right to "care" encompasses the ability to provide needed assistance to, to be concerned or to be interested in an adult child. It should not be equated with providing watchful oversight, charge, or supervision, which would be included in the first tier of the liberty interest.

307. See *infra* Part V.B.1.

308. See *Quilloin v. Walcott*, 434 U.S. 246, 253-56 (1978) (upholding a statute that prevented an unwed father from blocking the adoption of his child).

309. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

the child's constitutional right, the parental liberty interest would necessarily yield.

B. Looking to Tradition

1. Reading the Precedent

It would be ironic, on the one hand, to recognize the constitutional right to procreate,³¹⁰ to supervise the upbringing of children,³¹¹ to retain custody of one's illegitimate children,³¹² and to live in the same residence with one's family members of choosing,³¹³ but on the other hand to deny parents constitutional protection for their interest in the companionship of their adult child. These fundamental liberties mean nothing if the state can act to destroy the right to enjoy the family bond. To protect families from lesser intrusions into family life, yet allow the state to destroy the family relationship altogether, would drastically distort the concept of ordered liberty protected by the Due Process Clause.³¹⁴

That the Due Process Clause protects a parent's liberty interest in the companionship of her adult child is supported by Supreme Court cases protecting one's choice in reproduction. State action that impedes on a parent's companionship with an adult child interferes with the fruition and fulfillment of the fundamental right to procreate. To the extent one views reproduction as an important human choice, it should recognize the individual's desire to extend her bloodline beyond her own life, stretching into her child's adult years.

Indeed, it is something more than the mere privacy of the act that prompted the Court to protect procreation. Certainly, Justice Douglas questioned the enforceability of a Connecticut law that prohibited married couples from using contraception by considering the privacy that surrounded the possibility of government intrusion

310. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

311. See *supra* Part II.B.1.

312. See *supra* Part II.B.2.

313. See *supra* Part II.B.3.

314. See *Myres v. Rask*, 602 F. Supp. 210, 213 (D. Colo. 1985) ("It would be ironic indeed to recognize, on the one hand, the constitutional rights to marry, to procreate, to supervise the upbringing of children, to retain custody of one's illegitimate children, and to live in the same residence with one's 'family,' but on the other hand, to deny parents constitutional protection for the continued life of their child.") (citations omitted).

316. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (holding that the right of a married person is protected by the penumbras of the Bill of Rights.)

into the bedroom.³¹⁶ However, if *Griswold v. Connecticut* and *Eisenstadt v. Baird*³¹⁷ were driven merely by the intimacy of sexual conduct, the Court in *Lawrence v. Texas*³¹⁸ would have had grounds to hold that all sex between consenting adults is a fundamental right. However, the *Lawrence* Court instead overturned the Texas law prohibiting homosexual sodomy on mere rational basis review—the standard of review the court deploys for all rights not deemed to be fundamental.³¹⁹

Instead, the focus of *Griswold* and *Eisenstadt* is the right “to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”³²¹ It is the privacy of determining whether to have a child, not the privacy of the sexual act that may produce the child, that was afforded constitutional protection in *Griswold* and *Eisenstadt*.

In *Skinner v. Oklahoma*, the Court struck down an Oklahoma statute that provided for compulsory sterilization of persons convicted three times of felonies showing “moral turpitude” but did not apply to such white collar crimes as embezzlement.³²² The Court objected to the distinction between crimes involving moral turpitude and white collar crimes,³²³ but it emphasized that its reasons for applying strict scrutiny was that the statute involved “one of the basic civil rights of man.”³²⁴ The Court observed that “[m]arriage and procreation are fundamental to the very existence and survival of the race.”³²⁵ It was because the state preempted one’s choice of whether or not to procreate—not his ability to engage in sexual relations—that the court considered probative in *Skinner*.

It was thirty-five years later, in *Roe v. Wade*, that the court again considered the decisional aspect of whether to bear or beget a child.³²⁶ In this case, the Court also took notice of the lifelong impact of having a child. Justice Stewart noted that the interests of a woman in deciding whether or not to carry a fetus to term involves the “giving

317. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

318. 539 U.S. 558 (2003).

319. *See id.* at 568.

321. *Eisenstadt*, 405 U.S. at 453 (citing *Stanley v. Georgia*, 394 U.S. 557 (1969); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)).

322. 316 U.S. 535, 536 (1942).

323. *Id.* at 538-39.

324. *Id.* at 541.

325. *Id.*

326. *Roe v. Wade*, 410 U.S. 113, 170 (1973).

of her physical and emotional self during pregnancy and the interests that will be affected *throughout her life* by the birth and raising of a child."³²⁷

The Supreme Court's decision in *Moore v. City of East Cleveland* also provides significant support for establishing a parental liberty interest in the companionship of an adult child.³²⁸ In *Moore*, the Court expressed willingness to protect family relations from unnecessary state infringement outside the confines of the traditional nuclear family.³²⁹ On a broad level, the *Moore* decision supports that the Due Process Clause may extend to the liberty interest at issue, or at the very least, that the Court does not see the Due Process Clause as protecting only family relations involving parents and minor children.

Indeed, when one begins to look at the contours of the Court's decision in *Moore*, the case provides even greater support for holding that a parent has a fundamental liberty interest in the companionship of her adult child.³³⁰ Though the Court defined the liberty interest in *Moore* as the freedom to structure a household with various relatives, the claimed interest was, in essence, the freedom to associate and develop intimate relations with one's family members.³³¹ So phrased, the *Moore* decision honors the family as a unit that provides emotional support and opportunities for intimacy and self-expression. It also suggests that such a familial bond is not exclusive to a parent and her minor child.³³² Cohabitation enhances the companionship interest.³³³

The *Moore* Court, however, chose to base the tradition on economic necessity, the intergenerational transmission of family values, and the prevalence of extended family households among racial and ethnic minorities.³³⁴ Yet greater attention to familial bond and companionship would have made the decision more defensible and easily distinguishable from *Village of Belle Terre v. Boraas*.³³⁵ As noted earlier, the *Belle Terre* decision upheld a zoning ordinance that forbade groups of three or more unrelated persons from sharing a

327. *Id.* at 113 (Stewart, J., concurring) (emphasis added).

328. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion).

329. For a more thorough discussion of *Moore*, see *supra* Part II.B.3.

330. Ira Lupu makes a very similar argument with respect to *Moore v. City of East Cleveland*. Lupu, *supra* note 23, at 1051-54. He argues that *Moore* makes more sense from the viewpoint of protecting human intimacy. *Id.* The argument in this Part of the Note borrows heavily from Lupu.

331. *See id.* at 1051.

332. *See id.*

333. *See id.*

334. *Id.*

335. *See id.*

single-family residence.³³⁶ While the unrelated individuals seeking to cohabitate in *Belle Terre* may have been seeking companionship, it is the intimacy of the familial bond and the profound legal tradition for the family that readily distinguishes the two cases.³³⁷

2. The Family in the Law

Like the Supreme Court's decisions on familial autonomy, legislatures and common law concepts of the family have recognized the importance of a parent's relationship with her adult child and the role of that relationship in broader society. Even a cursory review of this tradition reflects the special rights and responsibilities created by virtue of the parent-child relationship. Congress, for instance, has recognized this reality in the Internal Revenue Code.³³⁸ An individual is eligible for an exemption in the computation of her taxable income for the care and support of a dependent, even if that dependent resides in a separate household.³³⁹ Included in the definition of a dependent is an adult child's care of his or her parents, and a parent's support of an adult child who is a student and under twenty-four years of age.³⁴⁰

336. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

337. *Lupu*, *supra* note 23, at 1051-52.

338. The tax code provides that "the term 'dependent' means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer (or is treated under subsection (c) or (e) as received from the taxpayer):

- (1) A son or daughter of the taxpayer, or a descendant of either,
- (2) A stepson or stepdaughter of the taxpayer,
- (3) A brother, sister, stepbrother, or stepsister of the taxpayer,
- (4) *The father or mother of the taxpayer, or an ancestor of either,*
- (5) A stepfather or stepmother of the taxpayer,
- (6) A son or daughter of a brother or sister of the taxpayer,
- (7) A brother or sister of the father or mother of the taxpayer,
- (8) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law of the taxpayer, or
- (9) An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 7703, of the taxpayer) who, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household." 26 U.S.C. § 152(a) (2004) (emphasis added).

339. *Id.*

340. The tax code defines students as "an individual who during each of 5 calendar months during the calendar year in which the taxable year of the taxpayer begins—

- (A) is a full-time student at an educational organization described in section 170(b)(1)(A)(ii); or
- (B) is pursuing a full-time course of institutional on-farm training under the

State laws of descent and distribution reflect this same understanding. If a decedent dies intestate and without a surviving spouse, her entire estate passes to her children, minor or adult.³⁴¹ Moreover, if the decedent dies without a surviving spouse or children, the estate then passes to any surviving parent, or both parents equally if both are surviving.³⁴² Also, many states have enacted “relative responsibility” laws which impose legal obligations of support on certain individuals. Nearly half of the states impose obligations on children to support their indigent parents, providing a reciprocal duty to the earlier obligation of parents to support their minor children.³⁴³ These laws find their antecedents in a 1601 English statute which created the duty of the child to provide support for his parents.³⁴⁴

C. Addressing Practical Considerations and Responding to Potential Criticisms

In light of the controversy surrounding the expansion of unenumerated rights and the competing arguments for expanding parental rights, the practical effect of the theory proposed in this Note should be addressed. The first subsection of this Part attempts to illustrate how the second tier of the parental liberty interest should be applied and responds to the potential criticisms that the theory may create a proverbial “slippery slope.” The second and final subsection addresses the fallacy behind the argument that because the liberty interest does not involve private decisionmaking, it should not be afforded constitutional protection.

1. The Two-Tiered Theory in Practice

Critics will undoubtedly resort to the familiar “slippery slope” argument in denouncing the establishment of constitutional protections for the relationship between a parent and adult child, no matter how theoretically sound it is. They may argue, as did the First

supervision of an accredited agent of an educational organization described in section 170(b)(1)(A)(ii) or of a State or political subdivision of a State.” 26 U.S.C. §151(c)(4) (2004).

341. *See, e.g.*, UNIF. PROBATE CODE § 2-103 (amended 1993), 8 U.L.A. 83 (Supp. 2004) (adopted in Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, and Utah).

342. *See id.*

343. BERNARD FARBER, FAMILY & KINSHIP IN MODERN SOCIETY 60 (1973) (noting that twenty-one states have adopted such laws).

344. *Id.* at 59.

Circuit in *Ortiz*,³⁴⁵ that to recognize the parent's interest would expose states to suit in a myriad of inappropriate contexts.

One might suggest that the practical effect of the theory proffered in this Note is difficult to discern because litigation of this constitutional issue has arisen in the context of section 1983 suits, not in the more familiar manner where substantive due process is asserted as a defense to criminal prosecution or government action.³⁴⁶ To illustrate how the second tier of the theory may arise in the more familiar substantive due process context, one might consider the following example. Suppose a state enacts a regulation that allows an adult patient at any state-supported hospital to receive as a guest only her spouse and minor children. The parent of such a patient may contest such a law as unconstitutional, claiming it infringes on her fundamental companionship interest. The state may attempt to justify the regulation based on concerns for administrative ease and the preservation of a patient's health by limiting contact with those outside the hospital. In such a case, a court's job would be to determine whether the proffered justifications are compelling and narrowly tailored and therefore overcome the parent's claim of familial autonomy.

Of more practical concern, however, is the possibility that recognizing a parent's constitutional interest in the companionship of an adult child could expose government actors and municipalities to section 1983 liability for a myriad of legitimate actions that unintentionally affect the liberty interest. The First Circuit articulated this criticism in *Ortiz*, asserting that recognition of such an interest could constitutionalize causes of action for a child's wrongful discharge from a state job that forced a child's cross-country move.³⁴⁷ Upon closer inspection, however, these sorts of concerns do not question whether the liberty interest is, in fact, fundamental. Instead, they are more properly understood as questioning whether an actor may violate due process through conduct not aimed at that fundamental interest in the first place. The fact that a killing was accidental as opposed to intentional, or was perpetrated by racial animus as opposed to a desire to end the parent-child relationship, has no bearing on whether the Constitution protects a parent's relationship with her adult child. At most, these factors may be

345. See *infra* Part III.B.1.

346. See Wells & Eaton, *supra* note 139, at 223.

347. *Ortiz v. Burgos*, 807 F.2d 6, 9 (1st Cir. 1986)

relevant in determining whether the hypothetical shooter has engaged in unconstitutional conduct.³⁴⁸

The courts denying constitutional protection of a parent's interest in the companionship of an adult child have reasoned that the Constitution does not protect abstract encroachment on familial relationships but rather protects the right of family members to make important, private decisions from being preempted by the state.³⁴⁹ They point to protection of the decision to procreate, to school one's child in religious as well as secular matters, and to select the family with whom one chooses to live.³⁵⁰ The *Ortiz* court held that a plaintiff's assertion that she has been deprived of her constitutionally protected interest in the companionship of a relative who was fatally beaten by prison guards "does not involve such a choice."³⁵¹ That court, however, seemed to confuse the secondary question of whether a constitutional right has been violated with the question of whether the underlying interest is afforded constitutional protection in the first place.

Undoubtedly, there are circumstances where the state may desire to preempt the decision of a parent and adult child to associate with each other. The hypothetical hospital regulation discussed earlier is one such example.³⁵² Yet it would be an odd result to prohibit the state from preempting familial decisionmaking while allowing the state to act to prevent family members from associating with one another altogether. The liberty to marry, have children, and raise a family mean little if the state may act, constitutionally, to destroy the right to enjoy the family bond. The right to companionship is not ancillary to those liberties but is just as fundamental to the family rights protected by due process.

348. As mentioned at the outset of this Note, courts are split as to whether conduct that is not targeted at the constitutionally protected parent-adult-child relationship violates the Constitution. Indeed, the Supreme Court has held that negligent conduct does not trigger due process, and it remains unresolved how much more culpability than mere negligence would suffice to trigger a substantive due process violation. See *Davidson v. Cannon*, 474 U.S. 344, 347 (1986); *Daniels v. Williams*, 474 U.S. 327, 328 (1986).

349. See, e.g., *Ortiz*, 807 F.2d at 8.

350. *Id.*

351. *Id.*

352. See *infra* discussion p. 148.

V. CONCLUSION

In the Introduction, this Note questioned whether a parent can bring a claim for the deprivation of a constitutionally protected interest in the companionship of her son.³⁵³ In arguing for a two-tiered approach to determine the scope of the parental liberty interest, this Note has provided an answer only to the first prong of the question, concluding that there is a constitutionally protected parental interest in the companionship of an adult child. Under the approach advanced in this Note, the parental liberty interest alters in scope during the two phases of a child's life. During a child's minor years, the parental liberty interest contains the full constellation of rights. The parent of such a minor child has a constitutionally protected interest in the companionship, care, custody, and management of his or her children. The scope of the parental liberty interest, however, fundamentally changes as the child matures in adulthood. Many liberties in the constellation would conflict with the adult child's own constitutional liberty and autonomy. Under the second tier, therefore, the parental liberty interest would extend only to the companionship and care of the adult child, provided that a companionship relationship had been developed before the occurrence of any state action that may have limited it.

Though this Note arguably advances the expansion of substantive due process, and for that reason could be viewed as activist, it can also be viewed as conservative in that it furthers the profound value that American society has placed on the intimacy of family life. The two-tiered approach to the parental liberty interest continues in the tradition of Supreme Court precedent on the family³⁵⁴ and logically flows from the special rights and obligations imposed on individuals by virtue of the relationship of a parent and her adult child.³⁵⁵ This Note also goes further and attempts to honor the normative values of the family that the Court previously has previously been unwilling to acknowledge explicitly. Once one views the family unit not just in utilitarian terms of economic support or

353. See *supra* Part I.

354. For a thorough discussion of Supreme Court precedent on the family, see *supra* Part II.B. See also Part IV.B.1 for a discussion of the implications of precedent on the parental liberty interest.

355. For a discussion on the legal tradition involving parents and adult children, see *supra* Part IV.B.2.

guardian, but as a source for emotional support and nurture, it makes perfect sense to afford constitutional protection to the companionship interest of a parent and her adult child.

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