Touro Law Review

Volume 37 | Number 2 Article 20

2021

Does Due Process Have an Age Limit? Why the Law Concerning the Parental Right to Freedom of Intimate Association in the Relationship with an Adult Child Is a Mischaracterization of a Circuit Split

Bryan Schenkman
Touro Law Center

DOES DUE PROCESS HAVE AN AGE LIMIT? WHY THE LAW CONCERNING THE PARENTAL RIGHT TO FREEDOM OF INTIMATE ASSOCIATION IN THE RELATIONSHIP WITH AN ADULT CHILD IS A MISCHARACTERIZATION OF A CIRCUIT SPLIT

*Bryan Schenkman**

I. INTRODUCTION

It would not be an understatement to acknowledge the profound impact that the formation and preservation of deep interpersonal relationships can have in shaping an individual's morals, values, knowledge, life choices, and overall happiness.[1] Generally, the relationship between a parent, or a parental figure, and a child, is one of the most influential relationships in a person's life.[2] Typically, the parent-child relationship will commence at birth, continue throughout the years the child is considered a minor, and remain long after the child reaches the age of majority.[3] However, throughout the entire existence of the relationship, the nature of the parent-child relationship will naturally evolve as the child ages. From the moment of birth through the age of minority, a child will

* Bryan M. Schenkman is a recent graduate of Touro College Jacob D. Fuchsberg Law Center and former Managing Editor of the Touro Law Review. He dedicates this Note to his grandmother, Rhoda Damsky, who passed away while he was in the process of drafting this Note.

[1] Debra Umberson, and Jennifer Karas Montez, *Social Relationships and Health: A Flashpoint for Health Policy*, JOURNAL OF HEALTH AND SOCIAL BEHAVIOR, vol. 51, no. 1 suppl., 54 (2010).

[2] Eleanor Maccoby, *Parenting and its Effects on Children: On Reading and Misreading Behavior Genetics*, Volume 51, ANNUAL REVIEW OF PSYCHOLOGY, 3 (2000).

[3] Kira Birditt, ET AL., *Tensions in the Parent and Adult Child Relationship: Links to Solidarity and Ambivalence*, PSYCHOL AGING, 2 (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2690709/pdf/nihms-94367.pdf.

generally be reliant on a parent for nurture, guidance, and care.[4] Gradually, the relationship evolves as the child ages and becomes less reliant on the parents or parental figures.[5] However, while the relationship between a parent and a minor child may be inherently different from the relationship between a parent and an adult child, should it also be presumed that the strength of the bond and level of intimacy in the parent-child relationship changes as well? Currently, it would appear as though the law is divisive on the answer to that question.

It would not be far-fetched to characterize the issue of whether the relationship between a parent and an adult child should be afforded constitutional protection under the right to freedom of intimate association, as "a circuit split." While the United States Supreme Court has previously found that the right to freedom of intimate association affords parents a constitutionally protected liberty interest in the relationship with their children, Supreme Court precedent is limited to cases involving the relationship between a parent and a minor child.[6] Indeed, a case involving the question of whether a parent has a constitutionally protected liberty interest in the relationship with an adult child would present a novel issue at the Supreme Court level. Yet, although there is a lack of Supreme Court precedent, several circuits in the United States Circuit Courts of Appeal have decided the issue of whether the relationship between a parent and an adult child is entitled to constitutional protection. While the Second, Ninth, and Tenth Circuits have found that the right to freedom of intimate association affords parents a constitutionally protected liberty interest in the relationship with their adult children,[7]

---

[4] Romana Kaleem, *Towards the Recognition of a Parental Right of Companionship in Adult Children Under the Fourteenth Amendment Substantive Due Process Clause*, 35 SETON HALL L. REV. 1121, 1146-48 (2005).

[5] *Id*.

[6] *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that the due process clause protects parents' right to raise their children "establish a home"); Stanley v. Illinois 405 U.S. 645, 651 (1972) (holding that parents have the fundamental right to companionship with their children and to make decisions concerning the care, custody, and control of their children); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (discussing that parents have a "fundamental constitutionally protected liberty interest in the care, custody, control and management of their children.").

[7] *See, e.g.*, Patel v. Searles, 305 F.3d 130, 136 (2d Cir. 2002); Smith v. City of Fontana, 818 F.2d 1411, 1418 (9th Cir. 1983) *overruled on other grounds* by

the First, Third, Seventh, Eleventh, and District of Columbia Circuits, have yet to find that a parent was deprived of a cognizable constitutionally protected liberty interest in cases where the child was an adult.[8]

Indeed, based on the decisions by the United States Circuit Courts of Appeals, it would appear that the circuits disagree as to whether a parental liberty interest exists in relationships between parents and adult children. Yet, even in the absence of Supreme Court precedent, it is apparent, based upon Supreme Court's interpretation of the right to freedom of intimate association, and the Fourteenth Amendment, that a child's age should not be a dispositive factor nor even a consideration, in determining whether a parent-child relationship should be entitled to receive constitutional protection. Additionally, based on the decisions of the United States Circuit Courts of Appeals, the lack of uniformity among the circuits as to whether a parent has a constitutionally protected liberty interest in the relationship with an adult child is a mischaracterization of a circuit split. In other words, the purported circuit split is not the result of divergent opinions among the circuits as to whether a parental liberty interest in the relationship with an adult child exists.

The First, Third, Seventh, Eleventh and District of Columbia Circuits' findings that the parents did not suffer an unconstitutional deprivation of their right to freedom of intimate association was not due to the child's age, barring the existence of a parental liberty interest. Rather, it is due to the fact that state actors' conduct did not rise to the level of an unconstitutional deprivation.[9] However, even

---

Hodgers-Durgin v. d la Vina, 199 F.3d 1037, 1041 n.1 (9th Cir. 1999); Trujillo v. Bd. of Comm'rs of Santa Fe Cty., 768 F.2d 1186, 1188-91 (10th Cir. 1985).

[8] *See, e.g.*, Ortiz v. Burgos, 807 F.2d 6, 10 (1st Cir. 1986); McCurdy v. Dodd, 352 F.3d 820, 830-31 (3d Cir. 2003); Russ v. Watts, 414 F.3d 783, 791 (7th Cir. 2005); Butera v. District of Columbia, 235 F.3d 637, 656 (D.C. Cir. 2001); Robertson v. Hecksel, 420 F.3d 1254, 1259 (11th Cir. 2005).

[9] *See Ortiz*, 807 F.2d at 10 (holding that the court would not extend a due process violation from a "government action directly aimed at the relationship between a parent and young child to an incidental deprivation" the relationship between a parent and an adult child); *see also McCurdy*, 352 F.3d at 830 (holding in part that,"[it] would stretch the concept of due process too far if we were to recognize a constitutional violation based on official actions that were not directed at the parent-child relationship.); *Russ*, 414 F.3d at 790 (holding that a finding of a constitutional violation based on official actions that were not directed at the parent-child relationship would "stretch the concept of due process far beyond the guiding principles set forth by the Supreme Court.").

the Second, Ninth, and Tenth Circuits would have likely reached that same conclusion under those circumstances.[10] Thus, while on its face, it appears that there exists a circuit split as to whether a child's age bars a parent from having a constitutionally protected liberty interest in the relationship with his or her child, no circuit has actually found that a parental liberty interest does not exist based solely on the child's age.[11] Therefore, based on the Supreme Court's interpretation of the right to freedom of intimate association, and the decisions of each of the circuits, a child's age should not be a factor in determining whether a relationship is entitled to constitutional protection and the purported lack of consensus among the United States Circuit Courts of Appeals is a mischaracterization of a circuit split.

This Note argues that, based on the Supreme Court's interpretation of the right to freedom of intimate association, and the decisions of the United States Circuit Courts of Appeals, a child's age should not be a dispositive factor in determining the existence of a constitutionally protected parental liberty interest, and the purported lack of consensus among the circuits is a mischaracterization of a circuit split. This Note proposes that in cases involving the question of whether parents have a constitutionally protected liberty interest in the relationship with their children, the United States Supreme Court and the United States Circuit Courts of Appeals have based their decisions on the strength of the bond in their relationship rather than the child's age. The author describes how the Supreme Court has interpreted the right to freedom of intimate association and how the decisions of each of the circuits have adhered to the Supreme Court's interpretation, while also remaining consistent with one another irrespective of the fact that the cases at the circuit court level resulted in different outcomes.

---

[10] *See Trujillo*, 768 F.2d at 1190 (holding in part that a finding of an unconstitutional deprivation is appropriate only if the state actor's conduct was directed at that right); Moreland v. Las Vegas Metro Police Dep't, 159 F.3d 365, 373 (9th Cir. 1998) (holding that there was no violation of the plaintiffs' right to freedom of intimate association when the police officers accidentally shot and killed the plaintiffs' adult son and brother); Gorman v. Rensselaer County, 910 F.3d 40, 48 (2d Cir. 2018) (holding that a claim under the Due Process Clause for infringement of the right to familial associations requires the allegation that state action was specifically intended to interfere with the family relationship).

[11] *See Ortiz*, 807 F.2d at 10; *McCurdy*, 352 F.3d at 830; *Robertson*, 420 F.3d at 1258; *Butera*, 235 F.3d at 656.

Section II provides an overview of the right to freedom of intimate association and its application in a federal action under 42 U.S.C. § 1983. Section III explores the Supreme Court's interpretation of the right to freedom of intimate association. In Section IV, the author analyzes the Supreme Court's interpretation of the right to freedom of intimate association,and evaluates how the Supreme Court would decide a case involving the question of whether a parent has a constitutionally protected liberty interest in a relationship with an adult child. Section V reviews the cases and the decisions of the United States Circuit Courts of Appeals, addressing the question of whether a parental right to freedom of intimate association exists in the relationship with an adult child. The author will conclude in Section VI, that based on the Supreme Court's interpretation of the right to freedom of intimate association, and the decisions of each of the circuits, a child's age should not be a factor in determining whether a relationship is entitled to constitutional protection, and the purported lack of uniformity between the circuits is mischaracterized as a circuit split as a careful analysis demonstrates that there actually is uniformity among the circuits on this question.

II. OVERVIEW OF THE RIGHT TO FREEDOM OF INTIMATE ASSOCIATION AND ITS APPLICATION IN AN ACTION UNDER 42 U.S.C. § 1983

The right to freedom of intimate association is a "fundamental liberty interest" that is guaranteed and afforded protection to all citizens of the United States under the Due Process Clause of the United States Constitution.[12] Specifically, the "right to freedom of intimate association protects an individual's right to enter into and maintain certain kinds of highly personal relationships from unwarranted state interference."[13] While the right to freedom of intimate association is not expressly enumerated nor recognized as a fundamental right under the United States Constitution,[14] the United States Supreme Court recognized that since "individuals draw much of their emotional enrichment from close ties to others, an individual's freedom and choice to maintain and enter into

[12] *Roberts*, 468 U.S. at 619.
[13] *Id.* at 620.
[14] *Id.*

relationships" is a fundamental liberty interest guaranteed to all citizens and protected by the Due Process Clause of the Constitution.[15] Significantly, the Supreme Court recognized that an individual liberty interest arises from an ability to "freely associate and maintain deep personal relationships with others."[16] The basis behind the Court's reasoning was that the ability to associate and maintain personal relationships not only facilitates societal interaction, but also has an immense impact on shaping an individual's beliefs, values, morals, knowledge, and understanding of not just society, but themselves as well.[17] As a result, since deep interpersonal relationships have a profound impact on shaping an individual's identity, an individual who is not afforded the freedom to enter into and maintain such relationships will essentially have no control over who he or she will become. Thus, it is the ability of an individual to associate with others and form deep personal relationships is what gives rise to the existence of the fundamental liberty interest.[18]

As a constitutionally protected liberty interest, an individual's right to freedom of intimate association is afforded constitutional protection against unwarranted state interference under the Due Process Clause of Fourteenth Amendment to the United States Constitution which states that, "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."[19] In order to hold the states accountable, and ensure the protection of an individual's constitutionally protected rights and liberties, federal law, under 42 U.S.C. § 1983, provides individuals who were unjustly deprived of a constitutionally protected right or liberty a remedy for relief by imposing liability on state actors whose actions result in an unconstitutional deprivation an individual of a constitutionally protected right or liberty.[20] Specifically, 42 U.S.C. § 1983 states that:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

---

[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 619.
[19] U.S. CONST. amend XIV §1.
[20] 42 U.S.C. §1983 (2019).

> or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.[21]

Under 42 U.S.C. § 1983, a plaintiff must satisfy two elements to succeed in an action against a state actor for conduct that unconstitutional deprives the plaintiff of his or her constitutionally protected right or liberty interest.[22] First, the plaintiff, a United States citizen, must demonstrate that he or she possessed, and suffered a deprivation of, a cognizable constitutionally protected right or liberty interest.[23] Second, the plaintiff must demonstrate he or she was unconstitutionally deprived of that constitutionally protected right by a state actor, who was acting in his or her capacity as a state actor, at the time of unconstitutional deprivation.[24] In other words, in order for a plaintiff to satisfy the second prong, a mere demonstration of a deprivation of a constitutionally protected right or liberty interest by a state actor is insufficient. Instead, a plaintiff must demonstrate that the state actor unconstitutionally deprived the plaintiff of his or her constitutionally protected right or liberty interest.[25] Thus, in cases involving an alleged violation of the right to freedom of intimate association, a plaintiff must first demonstrate that a state actor's

---

[21] *Id*.
[22] *Robertson*, 420 F.3d at 1258.
[23] *See* Wilson v. Layne, 526 U.S. 603, 609 (1999).
[24] *See* Daniels v. Williams, 474 U.S. 327, 331 (1986).
[25] *Id., see also* County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998) (discussing that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level sufficient to constitute a due process violation).

conduct impeded the plaintiff's ability to enter into and maintain a highly personal relationship.[26]

Additionally, to satisfy the second element, the plaintiff must prove that the state actor was sufficiently culpable in order for the state actor's conduct to rise to the level of an unconstitutional deprivation.[27] In such a case, the plaintiff must prove that the "state actor intentionally directed his or her conduct at the plaintiff's constitutionally protected relationship."[28] Accordingly, mere negligence, or conduct that only incidentally results in a deprivation of a constitutionally protected relationship on the part of a state actor, is insufficient to satisfy the second element and constitute an intentional deprivation on the part of a state actor.[29] Thus, even if the plaintiff can demonstrate that a state actor's conduct deprived the plaintiff of a constitutionally protected relationship, the plaintiff would not be able to prevail in an action under 42 U.S.C. § 1983 if the conduct "negligently or incidentally deprived the plaintiff" of his or her right to freedom of intimate association.[30]

III. THE SUPREME COURT'S INTERPRETATION OF THE RIGHT TO FREEDOM OF INTIMATE ASSOCIATION

While the Supreme Court has yet to hear a case involving the existence of a parental liberty interest in the relationship with an adult child, the Court has provided guidance on its interpretation of the right to freedom of intimate association. First, the Supreme Court has recognized the right to freedom of intimate association to be a fundamental liberty interest afforded protection to all citizens of the United States under the due process clause of the Constitution.[31] While the right to freedom of intimate association is not expressly enumerated as a fundamental right under the United States

---

[26] *See Trujillo*, 768 F.2d at 1190; *Ortiz*, 807 F.2d at 10; *Gorman*, 910 F.3d at 48; *McCurdy*, 352 F.3d at 828.

[27] *See Daniels*, 474 U.S. at 331 (holding that mere negligence by a state actor does constitute a deprivation under the Due Process Clause of the United States Constitution).

[28] *Trujillo*, 768 F.2d at 1190.

[29] *See, e.g.*, *Daniels*, 474 U.S. at 331; *Lewis*, 523 U.S. at 849; *Trujillo*, 768 F.2d at 1190; *Ortiz*, 807 F.2d at 10; Gorman, 910 F.3d at 48.

[30] *See, e.g.*, *Daniels*, 474 U.S. at 331; *Lewis*, 523 U.S. at 849; *Trujillo*, 768 F.2d at 1190; *Ortiz*, 807 F.2d at 10; *Gorman*, 910 F.3d at 48; *Russ*, 414 F.3d at 790.

[31] See *Roberts*, 468 U.S. at 619

Constitution, the Supreme Court has interpreted the word "liberty" to encompass other rights not enumerated in the Constitution, that have been deemed to be "implicit in the concept of ordered liberty" and "deeply rooted in our nation's history and traditions."[32]

In determining whether a right, not expressly enumerated in the Constitution, is considered to be fundamental and warrant constitutional protection, the Supreme Court has historically based its determination on whether the purported right is deep rooted in our nation's history and tradition.

As a result, the Supreme Court recognized the right to freedom of intimate association to be a fundamental liberty interest, finding an individual's ability to freely associate, and enter into deep intimate relationships with others to be deeply rooted in United States' history and tradition. In fact, in determining whether a relationship is entitled to constitutional protection under the right to freedom of intimate association, the Supreme Court does not limit constitutional protection based on the type of relationship or the status of a relationship.[33]

Instead, the Supreme Court only takes into account the objective characteristics of a relationship to determine whether the relationship is sufficiently intimate to warrant constitutional protection and deeply rooted in our nation's history and tradition such to give rise to the individual liberty interest that warrants affording constitutional protection.[34] As a result, the Supreme Court has recognized a wide range of rights and liberties, in a variety of intimate relationships that it has considered to be deeply rooted in the United States' history and tradition and thus, fall within the scope of constitutional protection under the right to freedom of intimate association.[35] Examples include the right to marry,[36] the right to keep

---

[32] Washington v. Glucksberg, 521 U.S. 702 (1997) (*quoting* Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969)); Moore v. City of East Cleveland, 431 U.S. 494, 504 (1977).

[33] *See Roberts*, 486 U.S. at 620.

[34] *Id.* at 619.

[35] *See Roberts*, 468 U.S. at 620; *see also Stanley*, 405 U.S. at 651 (recognizing unwed father's right to companionship with his child); Loving v. Virginia 388 U.S. 1, 12 (1967) (holding that the freedom to marry was a constitutionally protected liberty interest); *see also* Moore v. City of East Cleveland, 431 U.S. 745, 753 (1982) (discussing that the right to freedom of intimate association was not limited to relationships between "members of the nuclear family" and "the tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with

the family together,[37] the right of companionship,[38] the right to raise one's child,[39] and the right of custody over one's child.[40]

The Court's broad recognition of the different human relationships that may fall within constitutional protection is because of the highly personal nature of the bond formed in a relationship that gives rise to creation of an individual's liberty interest that necessitates affording a relationship constitutional protection under the right to freedom of intimate association.[41] As a result, the objective characteristics the Supreme Court considers to be relevant are "relative smallness, a high degree of selectivity in decisions to begin and maintain affiliation, and seclusion from others in critical aspects of the relationship."[42] Thus, in regard to the types of relationships that would qualify to receive constitutional protection under the right to freedom of intimate association, the Supreme Court has "never felt the need to mark areas of this terrain with any precision,"[43] and has only limited constitutional protection if a relationship does not demonstrate the objective characteristics.[44]

IV. HOW THE SUPREME COURT WOULD EVALUATE A CASE INVOLVING THE EXISTENCE OF A PARENTAL LIBERTY INTEREST IN THE RELATIONSHIP WITH AN ADULT CHILD

While the Supreme Court has yet to hear a case regarding the issue of whether the right to freedom of intimate association exists in a relationship between a parent and an adult child, it is clear that, based on the Supreme Court's interpretation of the right to freedom of intimate association, a child's age alone should not be considered a dispositive factor, or even a consideration, in determining if a

---

parents and children has roots equally venerable and equally deserving of constitutional recognition.").

[36] *See* Loving v. Virginia, 388 U.S. 1 (1967); Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[37] *See Moore*, 431 U.S. at 753.

[38] *See Santosky*, 455 U.S. at 753.

[39] *See* Meyer v. Nebraska, 262 U.S. 390 (1923); Troxel v. Granville, 530 U.S. 57 (2000).

[40] *See Stanley*, 405 U.S. at 651.

[41] *Id.* at 620.

[42] *Id.*

[43] *Id.* at 619.

[44] *See Roberts*, 486 U.S. at 620.

relationship should be entitled to constitutional protection. The Supreme Court has made clear that the right to freedom of intimate association exists, and is afforded constitutional protection, because highly personal relationships, by nature, "give rise to the formation of a personal liberty interest" that necessitates affording a relationship with constitutional protection.[45] Therefore, the right to freedom of intimate association exists due to the fact that highly personal relationships give rise to individual liberty.[46] As a result, if our nation were to adopt a strict limitation and find that a child's age, alone, without due consideration to the personal nature of the relationship, bars the existence of a parental liberty interest, it would remove the very concept of liberty from the question of affording constitutional protection.

Additionally, in determining whether a relationship is entitled to receive constitutional protections, the Supreme Court has historically only considered the objective characteristics of a relationship that it deems demonstrative of giving rise to individual liberty to be relevant.[47] As a result of the Supreme Court's objective approach that focuses on whether a relationship gives rise to the individual liberty interest that entitles a relationship to constitutional protections, the Supreme Court has afforded constitutional protection to a broad range of relationships, and does not limit constitutional protection based on an external characteristic such as a person's age.[48]

However, the fact that age should not be considered a dispositive factor in determining if a relationship should be afforded constitutional protection does not that age is never a relevant consideration. Indeed, a child's age may have an impact on the level of intimacy in a given relationship, if it results in the child no longer maintaining a close and personal relationship with his or her parent. However, even in that case, the dispositive factor in the Court's determination would still not be based on the age of the child but rather, the level of intimacy of the relationship itself..

Additionally, while one may view the absence of Supreme Court recognition of the existence of a constitutionally-protected parental liberty interest in relationship with an adult child as indicative of the Supreme Court's view that the relationship would

[45] *Id.* at 619.
[46] *See id.* at 620.
[47] *See id.* at 620.
[48] *See id.*

not rise requisite level of intimacy necessary to afford it with constitutional protections, the Supreme Court precedent actually indicates the opposite. There is far more evidence that the Supreme Court would support the notion that a relationship between a parent and an adult child would demonstrate the requisite level of intimacy necessary to afford it with constitutional protection in the absence of any contrary or unique circumstances.[49] The Supreme Court "has long recognized the importance of familial relationships."[50] Notably, the Supreme Court has even acknowledged that familial relationships "exemplify the objective characteristics" that give rise to the level of intimacy that warrants affording a relationship with constitutional protection.[51] The court reasoned that familial relationships are generally characterized by factors such as "as relative smallness," and "seclusion from others in the critical aspects of the relationship, which inherently give rise to individual liberty"[52]

Furthermore, based on the Supreme Court's long recognition and support of familial relationships, it is evident that "standardizing" the right to freedom of intimate association by finding that an external characteristic, such as age, bars the existence of a constitutionally protected liberty interest in the relationship between two family members would not be supported by the Supreme Court. For instance, in *Moore v. City of East Cleveland*,[53] the Supreme Court held that the City of East Cleveland's housing ordinance, which contained a definitional section that limited the definition of "family" to only a few categories of related individuals was unconstitutional.[54] There, the City of East Cleveland passed a housing ordinance, which limited the occupancy of a dwelling unit to members of a single family and imposed criminal sanctions on any person who was found to be in violation of the ordinance.[55] Specifically, the city ordinance limited the definition of a family to only the nominal head of the household, his or her spouse, the

[49] *See Roberts*, 468 U.S. at 620; *see also Stanley*, 405 U.S. at 651 (recognizing unwed father's right to companionship with his child); *Moore*, 431 U.S. at 753.
[50] *Santosky*, 455 U.S. at 753.
[51] *Roberts*, 468 U.S. at 620.
[52] *Id.*
[53] 431 U.S. 494 (1977).
[54] *Id*. at 496.
[55] *Id*.

unmarried children of the head of household or the spouse, and parents of the nominal head of the household or the spouse.[56]

In that case, Ms. Moore resided in an East Cleveland home with her son, Dale, Sr., and Dale, Sr.'s child, Dale, Jr. Following the death of Ms. Moore's daughter, Ms. Moore's other grandson, John, came to live with his grandmother, uncle and cousin.[57] The City of East Cleveland, after discovering that the two grandchildren were cousins, issued Ms. Moore a notice of violation stating that her grandson, John, was an illegal occupant and directed her to comply with the ordinance.[58] After Ms. Moore refused to remove her grandson from her home, the City filed criminal charges against Ms. Moore for violating the City's ordinance.[59] At trial, Ms. Moore was found guilty of violating the City's ordinance, and sentenced to five days in jail and fined twenty-five dollars.[60]

The Ohio Court of Appeals affirmed Ms. Moore's conviction, and after the Ohio Supreme Court denied review of her appeal, Ms. Moore appealed to the Supreme Court contending that the City of East Cleveland's ordinance was unconstitutional.[61] The Supreme Court held in favor of Ms. Moore, finding that the City's ordinance violated her constitutional right to live together with her family.[62] In its decision, the Supreme Court rejected the City's contention that the constitutional right to keep the family together should only apply to members of the nuclear family, finding that such a restriction on a constitutionally protected liberty interest would force the Court "to close its eyes to the basic reasons why certain rights associated with the family are accorded shelter under the Fourteenth Amendments due process clause."[63]

Additionally, the Court reasoned that, although it had not previously recognized the existence of a constitutionally protected liberty interest in the relationships between extended family members, since the Court has "long recogni[zed] that freedom of personal choice and matters of family life is one of the liberties

---

[56] *Id*. at 552 n.2.
[57] *Id*. at 497.
[58] *Id.*
[59] *Moore*, 431 U.S. at 497.
[60] *Id*.
[61] *Id*. at 497-98.
[62] *Id*. at 506.
[63] *Id*. at 501

protected by the due process clause," any decision to limit constitutional protection in the context of family rights "at the first convenient arbitrary boundary" –such as between members of the nuclear family— would be inconsistent with the Due Process Clause.[64] Instead, the Supreme Court found that the appropriate limits on due process "come not from drawing arbitrary lines, but rather from careful respect for the teachings of history."[65] As a result, since the Supreme Court has long recognized the importance of familial relationships and familial relationships are deep rooted in our nation's tradition, the constitution prevented the city from enacting a law that set forth a definition that prevented family members from exercising their fundamental right to live together.[66] Thus, since the relationship between members of an extended family demonstrates the close ties and bonds necessary to afford constitutional protection under the right to freedom of intimate association, the Supreme Court found that irrespective of the degree of kinship, the choice of relatives to live together may not lightly be denied by the state.[67]

Based on the Supreme Court's decision in *Moore v. City of East Cleveland* that recognized the existence of an extended family member's constitutionally protected liberty interest to keep the family together,[68] the Supreme Court would find in favor of the existence of a parental liberty interest in the relationship between an adult child. First, as was made clear by the Court's decision in *Moore*, due to the Supreme Court's long recognition of familial relationships, a mere lack of Supreme Court precedent does not serve to bar nor imply the nonexistence of constitutionally protected liberty interest between two family members.[69] Instead, the Supreme Court's long recognized that familial relationships and family life are deeply rooted tradition of our nation.[70] As a result, the Court's recognition demonstrates that, even in the absence of Supreme Court precedent, there is an established presumption that the relationship between two families

[64] *Moore*, 431 U.S. at 501-04.
[65] *Id*. at 503.
[66] *Id*. at 504.
[67] *Id*. at 505-06.
[68] *Id*. at 506.
[69] *See Moore*, 431 U.S. at 504
[70] *Id*. at 504

members is entitled to constitutional protection in the absence of the relationship demonstrating any characteristics indicating the contrary.

Second, since the Supreme Court found any arbitrary boundary imposing a limitation on familial constitutional rights is inconsistent with the due process clause,[71] it is likely that the Supreme Court would reject the notion that a bright light standard based on a child's age alone would serve to bar the existence of a parental liberty interest. Third, since the Supreme Court has held that the constitutional right to keep the family together may not be denied by the state, any attempt by a state to pass a law that interferes with that right will be held unconstitutional.[72] Thus, since it is likely that if a state or local government imposed an ordinance that prevented a parent and an adult child from living together, the law would likely be found to be in contravention with the Supreme Court's decision in *Moore*. As a result, the Court has impliedly found that a child's age does not bar the existence of a parental liberty interest as any finding to the contrary would pose an unworkable standard based on the Supreme Court's decision in *Moore*.

The Court has also further acknowledged its support of affording constitutional protection in familial rights in finding that "freedom of personal choice in matters of marriage and family life to be one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[73] Based on the Supreme Court's continued recognition and support of familial rights,[74] it is evident that the absence of Supreme Court recognition of a liberty of a parental liberty interest with an adult child, its lack of recognition should not be considered to be indicative that Supreme Court would not recognize a parental liberty interest in the relationship with an adult child. Instead, it is far more likely that the Supreme Court has not recognized the existence of a parental liberty interest on grounds that such a case has never been heard before it. The lack of Supreme Court guidance should not serve as evidence to support the notion that the Supreme Court intended to limit the right to relationships between a parent and a minor child.

Moreover, based on the Supreme Court's long and continued support of familial rights, in addition to its interpretation of the right

---

[71] *Id*. at 502.
[72] *See id*. at 506.
[73] *Santosky*, 455 U.S. at 753.
[74] *Id.*

to freedom of intimate association, suggests is that the Supreme Court would support a finding of a parental liberty interest in the relationship with an adult child. Thus, based on the Supreme Court's interpretation of the right to intimate association, so long as the relationship between a parent and an adult child demonstrates the objective characteristics, such "as relative smallness," and "seclusion from others in the critical aspects of the relationship" that have been recognized by the Supreme Court to give rise to individual liberty.[75]

V. A MISCHARACTERIZATION OF A CIRCUIT SPLIT

While it would appear that there exists a split among the United States Circuit Courts of Appeals as to whether a parent has a constitutionally-protected liberty interest in the relationship with his or her adult child, the denotation of a circuit split is actually a mischaracterization. In other words, although on its face, it would appear as though the circuits have been divided as to whether a child's age serves to bar a finding of a parental liberty interest,[76] the child's age has never been a dispositive factor in the circuit courts' decisions. For instance, in *Russ v. Watts*,[77]the Seventh Circuit overturned its prior decision, *Bell v. City of Milwaukee*,[78] and found that the parent of a twenty-two-year-old child did not suffer an unconstitutional deprivation following a chase and subsequent altercation with law enforcement that resulted in his son's death.[79]

However, the Seventh Circuit's decision to overturn *Bell* was not due to an erroneous finding of the existence of cognizable constitutionally protected parental liberty interest with an adult child. In *Bell*, the Seventh Circuit found that the law enforcement officer's conduct unconstitutionally deprived the father of his right to freedom

---

[75] *See Roberts*, 468 U.S. at 620 (the Court also recognized characteristics also included "a high degree of selectivity in decisions to begin and maintain the affiliation, to reflect the considerations that have given rise to the intrinsic element of personal liberty.").

[76] *See, e.g.*, *Ortiz*, 807 F.2d at 10; *McCurdy*, 352 F.3d at 830-31; *Russ*, 414 F.3d at 791; *Butera*, 235 F.3d at 656; *Robertson*, 420 F.3d at 1259; *Patel*, 305 F.3d at 136; *Smith*, 818 F.2d at 1418, *overruled on other grounds* by Hodgers-Durgin v. d la Vina, 199 F.3d 1037, 1041 n.1 (9th Cir. 1999); *Trujillo*, 768 F.2d at 1188-89.

[77] 414 F.3d at 791.

[78] 746 F.2d 1205 (7th Cir. 1985).

[79] *Id.* at 784.

of intimate association.[80] There, the father brought an action against the City of Milwaukee alleging that law enforcement officers deprived him of his right to maintain the relationship with his twenty-three-year-old son after his son, following an altercation with law enforcement, suffered fatal injuries.[81] Indeed, while the facts of *Russ v. Watts* are analogous to those of *Bell*, the Seventh Circuit did not find the decision in Bell, which found in favor of the existence of the liberty interest. Instead, the Seventh Circuit overturned *Bell* because the *Bell* court found for the plaintiff in a section 1983 action in the absence of a state actor intentionally depriving the plaintiff of his right to liberty.[82] Significantly, in *Russ*, the Seventh Circuit compared its decision in *Bell* with the decisions of the other circuits which decided cases involving a parental liberty interest under the right to freedom of intimate association.[83] Notably, the Seventh Circuit acknowledged that the distinction between *Bell* and the standard of other circuits was that *Bell* permitted a parent to prevail under 42 U.S.C. § 1983 when the state actor's conduct negligently or incidentally resulted in the deprivation.[84]

The Seventh Circuit also noted a distinct difference between the standard established in *Bell* and the Supreme Court's standard and that "the Supreme Court has recognized violations of the due process liberty interest in the parent-child relationship only where the state took action specifically aimed at interfering with that relationship."[85] Thus, in view of the decisions of the Supreme Court, and its sister circuits, since under any standard, finding a constitutional violation based on official actions that were not directed at the parent-child relationship would "stretch the concept of due process far beyond the guiding principles set forth by the Supreme Court," the Seventh Circuit decided to overturn its prior decision *Bell*.[86]

However, while the Seventh Circuit overturned *Bell*, on the basis that it was too broad in application as it did not require a finding of intent, the Seventh Circuit made it clear that its decision would "not establish an absolute rule" that would bar the existence of a

[80] *Id.* at 1239.
[81] *Id.* at 1215.
[82] *Id.*
[83] *Id.* at 791.
[84] *Id.* at 788.
[85] *Id.* at 788 (*quoting Daniels*, 474 U.S. at 331).
[86] *Id.* at 790.

parental liberty interest in the relationship with an adult child.[87] As a result, the Seventh Circuit's decision to overturn *Bell* was not the result of an erroneous finding of the existence of a parental liberty interest in the relationship with an adult child, but *Bell*'s allowing a plaintiff to recover under 42 U.S.C. § 1983 in the absence of an intentional deprivation by a state actor.[88] Thus, while a parental liberty interest in the relationship with an adult child no longer exists in the Seventh Circuit, it is clear that the reason is not due to the child's age or a different standard than its sister circuits and the Supreme Court.[89]

Yet, arguably, even circuits which have recognized the existence of a constitutionally protected parental liberty interest with an adult child, would have reached the same conclusion as the Seventh Circuit, in *Russ*, under those circumstances. For instance, in *Trujillo v. Board of Commissioners of Santa Fe County*,[90] the Tenth Circuit affirmed the judgment of the United States District Court for the District of New Mexico, which dismissed the plaintiffs' action for a failure to allege a constitutionally protected right that would entitle the plaintiffs to relief under 42 U.S.C. § 1983.[91] There, the plaintiffs, the mother and sister of the deceased, brought an action under 42 U.S.C. § 1983 alleging that the wrongful death of their adult son and brother deprived them of their right to freedom of intimate association.[92]

The Tenth Circuit held that the plaintiffs both "had a constitutionally protected liberty interest in the relationship with their son and brother."[93] In its decision, the Tenth Circuit acknowledged the Supreme Court's broad recognition of liberty interests in familial relationships[94] and how such relationships, "by their nature, involve

---

[87] *Russ*, 414 F.3d at 791.
[88] *Id.*
[89] *Id.*
[90] 768 F.2d 1186 (10th Cir 1985).
[91] *Id.* at 1187.
[92] *Id.*
[93] *Id.* at 1189.
[94] *See, e.g.*, *Moore*, 431 U.S. 494 (holding that a zoning ordinance could not prohibit a grandmother from living with her grandsons who are cousins); Smith v. Organization of Foster Families, 431 U.S. 816 (1977) (holding that foster parents have a liberty interest in the relationship with foster children); *Roberts*, 468 U.S. at 619 (holding that freedom of intimate association protects associational choice as well as biological connection).

deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life."[95] Based on the Supreme Court's broad recognition of the existence of constitutionally protected liberty interests in familial relationships, the Tenth Circuit reasoned that both the mother and the sister had a constitutionally protected liberty interest in their relationships with the deceased.[96]

However, while the Tenth Circuit held that the mother and sister had a constitutionally protected liberty interest in their relationship with the deceased, the Tenth Circuit affirmed the judgment of the District Court, and dismissed the action for the plaintiffs' failure to include an allegation of the state actor's intent in their complaint demonstrating that the state actor possessed the level of intent necessary to give rise to an unconstitutional deprivation under 42 U.S.C. § 1983.[97] In its decision, the Tenth Circuit rejected the Seventh Circuit's decision in *Bell*, believing that the Seventh Circuit's decision was inconsistent with Supreme Court precedent as, "their [the Seventh Circuit's] rationale would permit a section 1983 claim by a parent whose child is negligently killed in an automobile accident with a state official" but would not permit a plaintiff, who is not an immediate family member, to recover under 42 U.S.C. § 1983, when a state actor deliberately acted to deprive the plaintiff of his or her right to freedom of intimate association.[98] As a result, the Tenth Circuit affirmed the decision of the United States District Court of the District of New Mexico, and dismissed the plaintiffs' action finding that a state actor's conduct will rise to the level of an unconstitutional deprivation of an individual's right to freedom of intimate association under 42 U.S.C. § 1983, "only if the state actor's conduct was directed at that right."[99]

Thus, while the Tenth Circuit found that, based on Supreme Court's broad recognition of the existence of constitutionally protected liberty interests in familial relationships, the mother and sister had a constitutionally protected liberty interest in the relationship with their adult son and brother, the Tenth Circuit found

---

[95] *Id.* at 1188 (*quoting Roberts*, 468 U.S. at 619).
[96] *Id.* at 1188-89.
[97] *Id.* at 1191.
[98] *Id.*
[99] *Id.*

the Seventh Circuit's decision in *Bell* to be inconsistent with Supreme Court precedent for imposing a bright line limitation on the types of relationships that would be entitled to receive constitutional protection.[100] Additionally, the Tenth Circuit also rejected the Seventh Circuit's decision in *Bell*, since it permitted a plaintiff to recover under 42 U.S.C. § 1983 in the absence of a state actor demonstrating the requisite level of intent, deemed to give rise to an unconstitutional deprivation under Supreme Court precedent.[101] Therefore, while a parental right to freedom of intimate association does not exist in the Seventh Circuit, the decision to overturn *Bell v. City of Milwaukee*, is not due to a circuit split as to whether a parental liberty interest exists in the relationship with an adult child, but rather that the Seventh Circuit's decision overturned a standard that was not only inconsistent with the precedent of other circuits, but also with that of the Supreme Court.

IV. CONCLUSION

Based on the Supreme Court's interpretation of the right to freedom of intimate association, and the decisions of each of the circuits, a child's age should not be a factor for determining whether a relationship is entitled to constitutional protection, and the purported lack of uniformity among the circuits is a mischaracterization of a circuit split.

Based on the Supreme Court's interpretation of the right to freedom of intimate association, a child's age should not be considered a dispositive factor in determining the existence of a parental liberty interest. While the relationship between a parent and an adult child may be inherently different from the relationship between a parent and a minor child,[102] there is no disputing that the relationship between a parent and an adult child is a familial relationship. Significantly, the Supreme Court has long recognized the importance of familial relationships, and has continuously afforded constitutional protection in cases involving the question of whether a relationship between family members is entitled to constitutional protection under the right to freedom of intimate

[100] *Id.*
[101] *Id.*
[102] Romana Kaleem, *supra* note 4, at 1146-48.

association.[103] This is due to the fact that the Supreme Court has found the inherent nature of relationship between family members to exhibit the objective characteristics that it has deemed to give rise to the requisite level of intimacy necessary to warrant constitutional protection.[104]

Furthermore, since the relationship between a parent and an adult child is a familial relationship, the mere fact that the Supreme Court has yet to hear a case involving existence of a parental liberty interest in the relationship with an adult child should not bar the existence of such a right. The Supreme Court has consistently held that when right or liberty interest is considered to be fundamental, it is entitled to the constitutional protections of the Fourteenth Amendment's Due Process Clause.[105] Accordingly, the Supreme Court has also found that a right is fundamental when it is considered to be deeply rooted in our nation's history and traditions.[106] Significantly, the Supreme Court has found that familial relationships are deeply rooted in our nation's history and tradition.[107] Thus, since the relationship between a parent and an adult child is a familial relationship, deeply rooted in our nation's history and tradition, the only basis to deny the existence of a parental liberty interest with an adult child would be the mere fact that the Supreme Court has yet to hear a case involving a child over the age of majority. Yet, such a reason to deny the recognition of a parental liberty interest in the relationship with an adult child would be inconsistent with Supreme Court precedent as Supreme Court precedent has made it clear that any decision to limit constitutional protection in the context of familial rights "at the first convenient arbitrary boundary" would be inconsistent with the due process clause of the Constitution.[108]

While there is a purported "split" amongst the United States Circuit Courts of Appeal as to whether a parental liberty interest exists in the relationship with an adult child, the decisions have been mischaracterized as such. In cases involving the right to freedom of intimate association between a parent and an adult child, the Second, Ninth, and Tenth Circuits found that the parents had cognizable

---

[103] *Moore*, 431 U.S. at 501-04.
[104] *Roberts*, 468 U.S. at 620.
[105] *Moore*, 431 U.S. at 501-04.
[106] *Id.*
[107] *See id.*
[108] *Id.*

constitutionally protected liberty interest, while the First, Third, Seventh, Eleventh and District of Columbia Circuits did not find that the parents suffered an unconstitutional deprivation of a cognizable constitutionally protected liberty interest.[109] As a result, the decisions of the circuits do not demonstrate a circuit split but rather decisions that were decided on other grounds based on the specific circumstances of each case.

However, based on the decisions from each of the circuits, it appears as though the divergent outcomes amongst the circuits are due to the fact that the circuits have a different opinion as to whether parents have a constitutionally protected liberty interest in the relationship with their children. While the First, Third, Seventh and Eleventh and District of Columbia Circuits did not find that the parents suffered an unconstitutional deprivation of a cognizable constitutionally protected liberty interest, the decisions were not based on the child's age but rather due the fact that the state actor did not demonstrate the requisite level of intent for the parents to prevail in an action under 42 U.S.C. § 1983.[110] As a result, it does not appear that the circuits are split on whether a parental liberty interest exists in the relationship with an adult child.

While the recognition of a constitutionally protected parental liberty interest in the relationship with an adult child may pose questions as to how the courts throughout the United States will be able to adopt a workable standard for determining cases where a state actor is alleged to have deprived a parent of his or her relationship with an adult child, it is likely that the answers already exist in Supreme Court precedent. Indeed, while there are certain parental liberty interests that are protected under the right to freedom of intimate association, would not be applicable to the relationship between a parent and an adult child,[111] it is likely that recognition of a

[109] *Patel*, 305 F.3d at 136; *Smith*, 818 F.2d at 1418, *overruled on other grounds* by *Hodgers-Durgin*, 199 F.3d at 1041 n.1; *Trujillo*, 768 F.2d at 1188-91; *Ortiz*, 807 F.2d at 10; *McCurdy*, 352 F.3d at 830-31; *Russ*, 414 F.3d at 791; *Butera*, 235 F.3d at 656; *Robertson*, 420 F.3d at 1259.

[111] Based on the nature of the relationship between a parent and an adult child it is likely other parental liberty interests such as the right of a parent to rear his or her child, the parental right to exercise custody over his or her child, the parental right to make decisions concerning the care custody and management of a his or her child, and the parental right to make decisions concerning the care custody and control of his or her child would not be conducive to the parent-child relationship.

parental liberty interest in the relationship with an adult child would be recognized by the Court under the constitutional right to keep the family together and the parental right of companionship.

Imposing an arbitrary distinction based on a person's age to bar the existence of a fundamental liberty interest that is deep-rooted in our nation's tradition would only serve to bar individual liberty. Thus, not only would the recognition of a parental liberty interest in the relationship with an adult child be consistent with the Supreme Court's interpretation of the right to freedom of intimate association, but it would serve to ensure that our nation's laws, and constitutional rights, would reflect our nation's values and traditions. The recognition of the right to freedom of intimate association in the relationship between a parent and an adult child would not only serve to reflect our nation's history and traditions, but the very concept of liberty itself.