Denver Law Review

Volume 78
Issue 2 *Tenth Circuit Surveys*

Article 7

January 2000

Vol. 78, no. 2: Full Issue

Denver University Law Review

Vol. 78, no. 2: Full Issue

DENVER UNIVERSITY LAW REVIEW

VOLUME 78

2000-2001

Published by the
University of Denver
College of Law

DENVER UNIVERSITY LAW REVIEW

2000 Volume 78 Issue 2

TENTH CIRCUIT SURVEYS

AGENCY LAW

BARRIERS TO SUCCESSFUL ENVIRONMENTAL AND NATURAL RESOURCES LITIGATION: TENTH CIRCUIT APPROACHES TO STANDING AND AGENCY DISCRETION

INTRODUCTION

Environmental and natural resource plaintiffs that sue federal agencies must overcome two barriers that might prevent a federal court from addressing the merits of their arguments. One is the standing requirement, which assures that a proper plaintiff is before the court.[1] The other is agency discretion.[2] Plaintiffs that sue federal agencies must survive a court's tests regarding whether they should defer to the agency's decisions regarding the merits.[3] If the court decides the agency's approach is in accordance with the law, the environmental plaintiff likely has prepared its case in vain. Plaintiffs face a double-edged sword. They must meet standing requirements to withstand one slice of the sword: a chance for the court to dismiss the case. Plaintiffs then must withstand the second swing: a court's attempt to defer to agency discretion, which could effectively take the controversy away from the court.

These issues are especially important in the U.S. Tenth Circuit Court of Appeals. Due to its jurisdiction over six central and western states—including tens of thousands of acres of federal land and a number of important national parks, it hears many cases involving plaintiffs suing federal agencies over public lands, natural resources, and other environmental issues.[4]

The Tenth Circuit has decided over four hundred cases dealing with standing or agency discretion.[5] Usually, they involved local resource

---

1. Plater, et. al. Environmental Law and Policy: Nature, Law, and Society, 398 (2nd ed. 1998).

2. *Id.* at 430. ("Deference to agencies' legal interpretations is most likely where a legislative scheme seems highly technical, with a wide range of details delegated to the agency's special expertise.").

3. *Id.*

4. The Tenth Circuit includes Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. Yellowstone, Grand Tetons, Rocky Mountain, Zion and Canyonlands National Parks, as well as many national monuments, fall within the jurisdiction.

5. Author's count. Approximately thirty cases were decided at least in part on standing or agency discretion grounds during the survey period of September 1, 1999 to August 31, 2000. *See, e.g.*, Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (Pg. 12, this paper for more detail.)(Nonprofit organization, guide, and rock climbers challenged the National Park Service's approval of Final Climbing Management Plan for Devils Tower National Monument in Wyoming. The plaintiffs argued that climbing restrictions designed to reduce harm to Native American spiritual practices violated the establishment clause of the Constitution. The court held that plaintiffs suffered no injury in fact so lacked standing.); *See also*, Committee to Save the Rio Hondo v. Lucero, 102

users and environmental organizations suing federal agencies over agency decisions about popular local issues.[6] An understanding of the way the court assessed some of these issues might encourage environmental plaintiffs to reevaluate their cases to make sure they can effectively meet standing requirements and resist deference to agency decision-making in the Tenth Circuit.

Three cases concerning high-profile environmental issues exemplify these points.[7] One case addresses standing and two cases address agency discretion.[8] First, a fairly typical standing case, *Bishchoff v. Meyers*,[9] is reviewed. It involves federal-land grazing permits.[10] The Tenth Circuit ruled that the plaintiff did not have standing to bring suit.[11] This case also serves as an introduction to the next cases. The second case, *Wyoming Farm Bureau Fed. v. Babbitt*,[12] concerns a high-visibility endangered species topic: a US Department of Interior decision concerning the fate of endangered wolf reintroduction in Wyoming and Idaho,[13] an issue that has drawn expansive media attention and has inspired challenges by environmentalists, ranchers and other private land owners alike.[14] The plaintiffs argued that the U.S. Department of Interior abused its discretion by creating a wolf-release plan in conflict with what they considered guiding principles of the Endangered Species Act.[15] The court disagreed.[16] The last case, *Southern Utah Wilderness Alliance v. Dabney*,[17] concerns the National Park Service's Backcountry Manage-

---

F.3d 445 (Environmental organization brought a NEPA action against Forest Service's challenging its decision to allow summer use of a ski area in national forest. The Tenth Circuit held that the organization had standing.); *See also*, Public Lands Council v. Babbitt, 167 F.3d 1287 (discretion of agency regarding livestock grazing permits); Mt. Emmons Mining Co. v. Babbitt, 117 F.3d 1167 (unlawful use of agency discretion).

6. *Id.*

7. Bischoff v. Myers, 216 F.3d 1086 (Table) (10th Cir. 2000), Wyo. Farm Bureau Fed. v. Babbitt, 199 F.3d 1224 (10th Cir. 2000), Southern Utah Wilderness Alliance v. Dabney, ___ F.3d ___ (10th Cir. 2000).

8. *Bischoff* is a standing case. *Babbitt* and *Dabney* involve agency discretion.

9. *Bischoff*, 216 F.3d 1086.

10. *Id.*

11. *Id.*

12. *Babbitt*, 199 F.3d 1224.

13. *Id.*

14. *See* National Public Radio, Wolves in Yellowstone, http://search.npr.org/cf /cmn/cmnps05fm.cfm?SegID=69171; *see also*, NATIONAL GEOGRAPHIC, NATIONAL GEOGRAPHIC PARK PROFILES: YELLOWSTONE COUNTRY, 12, 44, 98-99, 182 (1997); for possible reintroductions in Colorado, *see* Theo Stein, *Wolf reintroduction roams closer to Colorado*, Denver Post, February 17, 2001, at A1.

15. *Babbitt*, 199 F.3d. 1224; guiding principles such as an alleged requirement that introduced wolves should not mix with wolves already present in the ecosystem (*see* discussion in this article below, pp. 25-30).

16. *Id.*

17. *Dabney*, 222 F.3d 819.

ment Plan for Canyonlands National Park.[18] Environmental plaintiffs argued that the National Park Service abused its discretion by creating a plan that would allow off-road vehicle use.[19] This case was remanded for clarification of the effects of such use.[20]

I. STANDING

A. *Background*

1. Standing as defined by the US Supreme Court

A basic axiom of federal trial practice is that environmental plaintiffs must meet the "threshold constitutional and statutory tests" of standing to sue.[21] Fundamentally, Article III, Section Two of the Constitution requires that there be a present (or live) "case" or "controversy."[22] Moreover, the plaintiff must show that the defendant caused his injury,[23] and that he has been injured "in fact," usually proven by demonstrated economic injury.[24] Once injury in fact is established, plaintiffs also must meet "prudential limitations" on standing, created by the Supreme Court to allow for judicial discretion to restrict the kinds of parties that can bring suit.[25] One such limitation is that few third-party claims can be

---

18. *Id.*

19. *Id.*

20. *Id.*

21. *See* PLATER *supra* note 1, at 398; standing in state court depends on state law.

22. U.S. CONST. art. III, § 2. Various cases have dealt with this issue, but the first instance of this doctrine occurred when President George Washington wanted the Supreme court's opinion on the United States' neutrality regarding the war between England and France. The court firmly rejected the offer, based on the Constitution's system of checks and balances requiring the Executive Branch to make decisions. *See* HART AND WECHSLER, FEDERAL COURTS 92-93 (4th ed., 1996); *see also*, Raines v. Byrd, 521 U.S. 811, 818 (1997); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998).

23. *See* Linda R.S. v. Richard D., 93 S.Ct. 114 (1972); *see also*, Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997); Warth v. Seldin, 422 U.S. 490, 518 (1975)("It is the responsibility of the complaintant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers."); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990)(Plaintiffs must "allege . . . facts essential to show jurisdiction. If [they] fail to make the necessary allegations [they have] no standing.").

24. *See* PLATER *supra* note 1, at 400-01; Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-1 (1992); for a good summary, *see* Friends of the Earth, Inc. v. Laidlaw Environmental Serv. (TOC), Inc.., 120 S.Ct. 693, 704 (2000) ("A plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely as opposed to merely speculative, that the injury will be redressed by a favorable decision. An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.").

25. *See* PLATER *supra* note 1, at 398-99; *see also* Japan Whaling Assoc. v. American Cetacean Soc'y, 106 S.Ct. 2860 (1986).

heard.[26] Another prudential limitation is that the plaintiff must fall within the "zone of interest" of the statute being challenged.[27] Also, a plaintiff must show that his injuries will be 'cured' by a favorable court decision, a requirement called redressability.[28] Also, many statutes authorize judicial review only if certain requirements are met.[29] For instance, the Administrative Procedure Act allows standing for "persons adversely affected or aggrieved . . . within the meaning of the relevant statute"[30] and when agency action is considered "final."[31]

Environmental cases provide the backbone of the Supreme Court's efforts to refine standing requirements during the last thirty years.[32] *Sierra Club v. Morton*,[33] a quintessential environmental standing case, proved plaintiffs do not necessarily need economic injury to meet the requirements of injury in fact.[34] The Sierra Club hoped to enforce federal conservation laws that allegedly would prevent the Walt Disney corporation from developing a ski resort on national forest lands in the California Sierras.[35] Yet, the plaintiffs did not claim any individual injuries that would satisfy the injury-in-fact requirement. They claimed only a general interest in environmental protection.[36] For example, the Sierra Club did not assert that any of its members camped or hiked in the national forest or otherwise personally benefited from use of the resource.[37] As a result, the US Supreme Court dismissed the organization's suit for lack of standing,[38] but ruled that if it had been shown that any member of

---

26. Except, for example, when an environmental organization plaintiff alleges injuries to its members. *See*, e.g., PLATER *supra* note 1, at 398-99; Sierra Club v. Morton, 405 U.S. 727 (1972).

27. *See* Bennett v. Spear, 117 S.Ct. 1154 (1997); for detailed description, *see* this article below; *see also*, Assoc. of Data Processing Serv. Orgs., Inc. v. Camp. 397 U.S. 150 (1970).

28. PLATER *supra* note 1, at 398-99; *see also* Bennett, 117 S.Ct. 1154 (1997); *see also*, Friends of the Earth, Inc. v. Laidlaw (TOC), Inc., 120 S.Ct. 693 (2000).

29. PLATER *supra* note 1, at 399 ("like 'aggrieved' under §313(b) of the Federal Power Act ... or special citizen-enforcement authorizations for 'any person' who files a 60-day notice (included in many environmental statutes ... they are far more liberal than the Art. III. 'injury' requirement, and override prudential limitations.")); *see also, Sierra Club,* 405 U.S. at 727.

30. PLATER *supra* note 1, at 399 (citing 5 U.S.C. § 702).

31. 5 U.S.C. § 704.

32. As discussed next; A related issue is whether a claim is "ripe" for review; Abbott Lab v. Gardner, 387 U.S. 136, 148-49 (1967)(The purpose of the ripeness requirement "is to prevent the courts, though avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."); Texas v. United States, 523 U.S. 296, 300 (1998)("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.").

33. Sierra Club v. Morton, 405 U.S. 727, 738 (1972).

34. *Id.*

35. *Id.* at 729-730.

36. *Id.* at 731.

37. *Id.* at 735.

38. *Id.* at 741.

the environmental group had suffered an aesthetic injury, that would have satisfied the injury-in-fact requirement.[39] Such aesthetic injuries are non-economic. They occur when a plaintiff cannot enjoy a resource through use or appreciation of it because the resource itself has been degraded.[40] Two conditions must be met: the plaintiff used a resource and it was devalued by the defendant's actions.[41]

U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)[42] broadened the aesthetic injury requirement even further while expanding opportunities for a plaintiff to meet causation requirements as well. A group of Washington, D.C. law students sued the Interstate Commerce Commission over decisions to assess low transport tariffs on raw materials transported by rail.[43] The plaintiffs alleged such low tariffs discourage recycled-material use.[44] The Supreme Court granted standing even though the injury to the students was not "direct and perceptible."[45] The court described the long line of causation from the agency's rate decision to an eventual increase in non-recycled garbage along hiking trails in national parks in the Washington area, and found it met the causation requirement.[46]

Despite the liberalization of standing requirements in *Sierra Club* and *SCRAP*, two cases decided by the Supreme court in the early 1990s, *Lujan v. National Wildlife Federation*[47] (Lujan I) and *Lujan v. Defenders of Wildlife*[48] (Lujan II), raised the standing barrier for environmental plaintiffs. They required that plaintiffs' injuries be real, not speculative.[49] In *Lujan I*, the National Wildlife Federation challenged the federal government's potential parceling-out of public land for mining and logging.[50] The Supreme Court dismissed the case for lack of standing because the two alleged injuries were not sufficiently concrete.[51] Two members of the National Wildlife Federation claimed that they recreated in the vicinity of the lands at issue, but the plaintiff did not live there or actually recreated there.[52] Justice Scalia wrote that these were merely

---

39. *Sierra Club*, 406 U.S. 727 at 738-740.
40. *See id.*
41. *Sierra Club*, 406 U.S. 727 at 738-740.
42. United States v. Students Challenging Regulatory Agency Procedures (*SCRAP*), 412 U.S. 669 (1973).
43. *Id.* at 669-670.
44. *Id.* at 670.
45. *Id.* at 689.
46. *Id.* at 687-690.
47. Lujan v. National Wildlife Federation (*Lujan I*), 497 U.S. 871 (1990).
48. Lujan v. Defenders of Wildlife (*Lujan II*), 504 U.S. 555 (1992).
49. *Id.* at 560-561.
50. *Lujan I*, 497 U.S. 871 (1990).
51. *Id.* at 899-900.
52. *Id.* at 871-872.

generalized grievances—plaintiffs were angry about something that did not directly affect them—and not injuries in fact.[53]

In *Lujan II*,[54] Defenders of Wildlife challenged a Reagan Administration regulation under which that the Endangered Species Act only applies to government agency projects in the United States, not around the world.[55] The plaintiff offered affidavits of two of its members.[56] One had visited Egypt and fell in love with the endangered Nile crocodile, though she did not witness the animal.[57] The other visited Sri Lanka and similarly came back to the United States with great affection for endangered leopard and elephant species, though she had not personally witnessed them.[58] Both were afraid that an Egyptian water-development project connected with the Aswan High Dam would destroy the creatures' habitats, and consequently the animals.[59] Defenders of Wildlife argued that the dam was to be completed in part with U.S. government (USAID) money, thereby forcing Endangered Species Act consideration.[60] The organization claimed its two members would like to go back to see the crocodiles again, but did not know when.[61] Justice Scalia wrote that standing did not exist because the injury alleged was not actual or imminent in the near, concrete future, despite the fact that the plaintiffs sued under the Endangered Species Act's citizen-suit provision:[62]

> It is clear that a person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible—though it goes to the outermost limits of plausibility—to think

---

53. *Id.* at 886.

54. *Lujan II*, 504 U.S. 555 (1992); *see also*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, n.3 (1992) (Seventeen days after Justice Scalia wrote the majority opinion in *Lujan II*, he made a comment in footnote three that clarified a determining factor in *Lujan II*. That is, specific facts must be shown by sworn testimony at the summary judgment stage of trial. He wrote that "Lujan II involved the establishment of injury-in-fact at the summary judgment stage, [and] required specific facts to be added by sworn testimony; had the same challenge to a generalized allegation of injury-in-fact been made at a pleading stage, it would have been unsuccessful.").

55. *Id.*; regulation applied to ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2).

56. *Lujan II*, 504 U.S. at 563.

57. *Id.*

58. *Id.* at 563-564.

59. *Id.* at 563.

60. *Id.* at 562-563; ESA § 7, 16 U.S.C. § 1536(a)(2)(All federal agencies are required "to seek to conserve endangered species and threatened species . . . . [And,] each federal agency shall, in consultation with and with the assistance of the Secretary [of Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species."

61. *Lujan II*, 504 U.S. at 563-564.

62. *Id.* at 566-567; ESA § 11(g) (16 U.S.C.A. § 1540(g)). Perhaps if the members had purchased airline tickets to go back, that would be enough.

> that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist.... It goes beyond that limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has not more specific connection."[63]

Notwithstanding his decisions in *Lujan I* and *II*, Justice Scalia effectively lowered the standing barrier (albeit for plaintiffs who were not environmental groups) by allowing ranchers not interested in preserving endangered species to use the Endangered Species Act's citizen-suit provision in *Bennett v. Spear*.[64] The case involved two ranchers who feared a loss of their water supply because river water was withheld from irrigation due to the presence of an endangered fish.[65] The district court held that the ranchers were not parties who fell within the zone of interest of the act—they opposed species protection rather than supported it.[66] Justice Scalia allowed them standing, though, holding that under the citizen-suit provision of the act, which expands the zone of interest, any person could file suit.[67]

One of the most important recent environmental cases involving standing is *Friends of the Earth, Inc. v. Laidlaw Environ. Serv.*[68] The plaintiff environmental groups, Friends of the Earth, Citizens Local Environmental Action Network and the Sierra Club, sued Laidlaw under the citizen-suit provision of the Clean Water Act.[69] The plaintiffs alleged that the defendant did not comply with its wastewater treatment plant National Pollution Discharge Elimination System permit, and discharged mercury and other toxics exceeding permit limits into South Carolina's North Tyger River.[70] Before the plaintiffs filed suit, the South Carolina Deptartment. of Health and Environmental Control settled with Laidlaw over the same permit violations for $100,000.[71]

The Supreme Court ruled that plaintiff-appellants had standing to sue the defendant chemical company because the group's members suffered injuries that were related to recreational use of the polluted river,

---

63. *Lujan II*, 504 U.S. 555, 566-7. (1992).

64. Bennett v. Spear, 520 U.S. 154 (1997) (If plaintiff cannot meet Endagnered Species Act notice requirements, it may still bring an Endangered Species Act claim under the APA or NEPA).

65. *Id.* at 157.

66. *Id.* at 155.

67. *Id.* at 162-164.

68. Friends of the Earth, Inc. v. Laidlaw Environmental Serv. (TOC), Inc., 120 S.Ct. 693, 704-7 (2000).

69. *Id.* at 696; Clean Water Act citizen-suit provision, 33 U.S.C. §1365(a).

70. *Friends of the Earth*, 120 S.Ct. 693, 696 (2000); Clean Water Act 33 U.S.C. §1342(a)(1).

71. *Friends of the Earth*, 120 S.Ct. 693, 696 (2000).

and the "aesthetic and recreational value" of the river was lessened by defendant's mercury contamination.[72] More importantly, perhaps, the court held that the plaintiffs had standing because civil penalties levied on the defendant (as opposed to more traditional damages paid directly to plaintiffs) redressed plaintiff's injuries by deterring the defendant from polluting.[73]

Here is a summary of important environmental standing highlights. If there is a present controversy and the defendant—a polluter or government agency, for example—has caused the environmental plaintiff's injury, a plaintiff interest group whose members used a resource that was devalued by defendant's actions has injury-in-fact standing, even if aesthetic and recreational values are lessened.[74] Yet, generalized grievances are not enough for injury in fact[75] and the injury must be actual or imminent.[76] Furthermore, plaintiffs must fall within the zone of interest of applicable statutes.[77] Last, fines imposed on parties devaluing the resource might meet the redressability requirement.[78]

2. Pre-survey Period Tenth Circuit Standing Cases

The Tenth Circuit has decided a number of environmental standing cases in recent years. In *Park Lake Resources Ltd. Liability Co. v. U.S. Dept. of Agriculture*,[79] mining groups sued the U.S. Forest Service over its designation of land as a research natural area.[80] The district court affirmed the land designation, and the plaintiff appealed.[81] The Court of Appeals held, in part, that the agency's designation was not final agency action under the Administrative Procedure Act (APA) and therefore the suit was not ready (ripe) for review.[82]

Similarly, in *Colorado Farm Bureau v. U.S. Forest Service*,[83] trade groups sued state and federal agencies, asserting that the agencies' involvement in a Colorado Lynx reintroduction plan violated the APA.[84]

---

72. *Id.* at 704-705 (Injuries included forgoing fishing, picknicking, bird watching, walking, wading, boating, driving, swimming and camping in and near polluted river.).

73. *Id.* at 706.

74. *Sierra Club*, 405 U.S. 727 (1972) and *Friends of the Earth*, 120 S.Ct. 693 (2000).

75. *Lujan I*, 497 U.S. 871, 889 (1990).

76. *Lujan II*, 504 U.S. 555, 563 (1992).

77. *Bennett*, 520 U.S. 154, 162-164 (1997).

78. *Friends of the Earth* at 706-707.

79. Park Lake Resources Ltd. Liability Co. v. U.S. Dept. of Agriculture, 197 F.3d 448 (10th Cir. 1999).

80. *Id.* at 449.

81. *Id.* at 448.

82. *Id.* at 450-452; *see* 5 U.S.C.A. § 704 (An important requirement for review of agency action is that the action be final. Only then is it ripe for review).

83. Colorado Farm Bureau Ass'n v. United States Forest Service, 220 F.3d 1171, 1173 (10th Cir. 2000).

84. *Id.*

The district court dismissed the case, and the groups appealed.[85] The Court of Appeals held that the groups did not have APA standing because the agency's action—involvement with the Lynx introduction plan—was not final.[86] Because APA standing was not established, the court did not assess whether the groups had Article III standing.[87]

In *Baca v. King*,[88] a federal public-lands grazing-lease case, the Tenth Circuit put forth what it considered the minimum constitutional standing requirements.[89] To satisfy the redressability requirement for constitutional standing, the court wrote, the plaintiff must show at least a 'substantial likelihood' that the relief requested will redress the injury claimed.[90] There, standing did not exist because "the loss of the possibility of obtaining a federal lease is not redressable by a favorable decision [of the court]."[91] The court continued: "No court has the power to order the BLM [Bureau of Land Management] or the Department of Interior to grant Mr. Baca another grazing lease, because the very determination of whether to renew grazing permits and whether public lands should even be designated for grazing purposes are matters completely within the Secretary of Interior's discretion."[92]

Tenth Circuit cases have often involved injury in fact.[93] For example, a nonprofit organization, a climbing guide, and rock climbers sued the National Park Service (NPS) over approval of its Final Cimbing Management Plan for Devils Tower National Monument in *Bear Lodge Multiple Use Association v. Babbitt*.[94] They argued that climbing limitations designed to reflect Native American spiritual beliefs violated the establishment clause of the U.S. Constitution.[95] The Wyoming district court allowed adoption of the plan, and the plaintiffs appealed.[96] The Court of Appeals held that the plaintiffs did not suffer injury in fact so lacked

---

85. *Id.* at 1171.

86. *Id.* at 1174.

87. *Id.* at 1173.

88. Baca v. King, 92 F.3d 1031 (10th Cir. 1996).

89. Id. at 1305 (citing Lujan I) "[They] require . . . (1) that the plaintiff "suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not conjectural or hypothetical'; (2) that the injury is "'fairly . . . trace [able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court' "; and (3) that it is "likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"

90. *Id.* at 1306.

91. *Id.* (quoting Mount Evans co. v. Madigan, 14 F.3d 1444, 1451 (10th Cir., 1994) (citing Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 870-871, 875 (10th Cir., 1992))). In both of those cases, the court held that plaintiffs could not sue to make the court force an agency to do something.

92. *Id.*

93. *See* following discussion.

94. Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999).

95. *Id.* at 815.

96. *Id.* at 814.

standing.[97] In *Committee to Save the Rio Hondo v. Lucero*,[98] an environmental group challenged a U.S. Forest Service decision to allow summer use of a National Forest ski area, alleging that the agency did not follow National Environmental Policy Act (NEPA) requirements.[99] The New Mexico district court granted summary judgment for the ski operator intervenor, and the plaintiffs appealed.[100] The Court of Appeals held that the organization had standing to challenge the agency's discretion under NEPA.[101]

Furthermore, in *Wind River Multiple Use Advocates v. Espy*,[102] an environmental group challenged a U.S. Forest Service decision to adopt the Bridger-Teton National Forest Land and Resource Management Plan, which would allow timber management unfavorable to the group.[103] The Wyoming district court found that Wind River lacked standing because the group did not show injury in fact or that any injury would be redressed by a decision in its favor.[104] As an alternative, the district court held that the plaintiff could not win on the merits as a matter of law.[105] "Specifically, the district court held that Wind River had failed to create a material fact issue with respect to whether the Forest Service decision to adopt annual timber harvests below levels authorized by federal law was arbitrary and capricious under the Administrative Procedure Act," held the Tenth Circuit.[106] The plaintiff appealed the decision concerning its lack of standing but did not challenge the ruling on the merits. Because the group did not challenge the merits ruling, the Court of Appeals affirmed.[107] Finally, *Ash Creek Min. Co. v. Lujan*[108] concerned a landowner's suit against the Department of Interior over the agency's plan to exchange coal lands in the state.[109] The Wyoming district court dismissed for lack of standing and the Court of Appeals held that the injury was not redressable.[110]

---

97. *Id.* at 822.
98. Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445 (10th Cir. 1996).
99. *Id.* at 446.
100. *Id.*
101. *Id.* at 452.
102. Wind River Multiple Use Advocates v. Epsy, 85 F.3d 641 (10th Cir. 1996)(unpublished decision).
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. Ash Creek Mining Co. v. Lujan, 969 F.2d 868 (10th Cir. 1992).
109. *Id.* at 870-871.
110. *Id.* at 872-876.

B. *Tenth Circuit: Standing*

1. *Bischoff v. Myers*[111]

In *Bischoff v. Myers*,[112] a very brief, unpublished case, the Tenth Circuit ruled on redressabilty while highlighting agency discretion.[113] The case involved a land transaction and grazing permit transfer.[114] The seller wanted the court to review a Forest Service refusal to reissue their grazing permits to them after the buyer of their land defaulted and quitclaimed the land back to them.[115] The Forest Service determined that the buyer remained the permittee.[116] Forest Service rules require that when land and livestock on it subject to grazing permits is sold, the buyer may obtain grazing permits for the property if the seller surrenders his permit to the Service in favor of the buyer.[117]

The Tenth Circuit found that the Bischoffs lacked standing to bring the action: "The injury they allege, the loss of their grazing leases, is not redressable in court because a court may not order the agency to perform what is a purely discretionary act."[118] The court wrote that its conclusion was required by *Baca v. King*,[119] and *Federal Lands Legal Consortium v. United States*,[120] under which the decision to issue a grazing permit is completely within Department of Interior discretion.[121] In doing so, the court connected redressability, a fundamental standing requirement, to agency discretion.[122]

2. Analysis

While *Bischoff* was decided on redressability grounds,[123] the case is unlike others in which redressability concerns the basic premise that a plaintiff's injury must be cured in some legitimate way by a court deci-

---

111. Bischoff v. Myers, 216 F.3d 1086 (Table)(10th Cir. 2000).

112. *Id.*

113. *Id.* at 1086.

114. *Id.*

115. *Id.*

116. *Bischoff*, 216 F.3d at 1086.

117. *Id.*

118. *Id.*

119. *Baca*, 92 F.3d at 1035-37 (plaintiff lacked standing because court could not order government to renew grazing lease; no "court has the power to order the BLM or Department of Interior to grant . . . another grazing lease, because the very determination of whether to renew granzing permits and whether public lands should even be designated for grazing purposes are matters completely within the Secretary of Interior's discretion."); *see also*, McDonald v. Clark, 771 F.2d 560, 463 (Secretary of Interior has broad discretion in mineral leasing.)

120. 195 F.3d 1190 (10th Cir. 1999)(Secretary of Agriculture has discretion to issue or deny a grazing permit.)

121. *Id.* at 1198.

122. *Bischoff*, 216 F.3d 1086.

123. *Id.*

sion in plaintiff's favor.[124] Here, the court did not have the ability to act in plaintiff's favor because the plaintiffs wanted something that the court simply could not give them: reissued grazing permits.[125] Only the agency, within its expertise and discretion, could issue them.[126] The court was completely unable to provide such relief because purely discretionary agency decisions preclude the court's intervention.[127] In effect, the Bischoffs could appeal to Forest Service decision-makers, but beyond that, they lacked options for relief. This is an explicit example of how standing issues are connected to discretion. More often, as mentioned above in the double-edged sword analogy,[128] a plaintiff might meet standing requirements such as injury in fact only to lose on appeal because the Tenth Circuit defers to the agency's discretion to make the decision in the way it sees fit. The next two cases address this issue.

II. AGENCY DISCRETION

A. *Background*

Agency discretion cases arise when groups challenge the authority under which an agency makes decisions.[129] Usually an agency's action or inaction is challenged as being in conflict with the agency's mandates, typically statutes passed by Congress.[130] Agencies typically have wide-ranging discretion over a variety of issues under their control,[131] but might abuse it by going beyond mandated boundaries.[132] Such abuse might result in environmentally or otherwise unfavorable policies or conditions that plaintiffs seek to change.[133] Controversies especially arise when agency decisions are not clearly out of line with the intent of Congress, but might go against that intent.[134]

B. *Discretion Under Chevron and the APA*

In discretion cases, courts assess whether they should defer to the decision-making power of the agency, often relying on the 1984 Supreme Court case *Chevron USA v. Natural Resources Defense Council*.[135] There, the Court found that the Environmental Protection

124. *See* standing discussion, *supra*.
125. *Bischoff*, 216 F.3d at 1086.
126. *Id.*
127. *Id.*
128. In the introduction to this paper, page 1.
129. *See* PLATER *supra* note 1, at 378-83.
130. *Id.*
131. *Id.* at 379.
132. *Id.* at 380 (Courts analyze such decisions in part by looking at Congressional intent.).
133. *See See* PLATER *supra* note 1, at 381.
134. *Id.* at 378-379.
135. Chevron v. Natural Res. Def. Council, 467 U.S. 837 (1984). *See also,* United States v. Mead Corp. 121 S.Ct. 2164 (2001). This case may become extremely important to practitioners and

Agency's decision to define an air pollution "source" as a "bubble" was within the "reasonable construction" of the statutory term "source" in the Clean Air Act.[136] In doing so, the Court created a two-part conjunctive test that provides a "reasonable construction" analysis.[137]

The Court held, first, that if the intent of Congress is clear regarding the statutory language designed to guide the agency, that intent rules the agency's decision.[138] Second, if Congressional intent is not clear, the court must review the agency's decision with deference, and uphold it if it is based on a "permissible construction of the statute."[139] The agency's interpretation does not have to be the only permissible construction or the result the court would have reached.[140] Furthermore, "when a challenge to agency construction of a [statute] really centers on the wisdom of the agency's policy,"[141] that challenge must fail.[142]

The Court held that federal judges who do not have a public constituency for whom they work must respect the policy choices of agencies that do have a constituency.[143] "[If] Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency."[144]

Another test used by courts reviewing agency decisions is found in the Administrative Procedure Act.[145] The statute, a general operating law controlling federal governmental agencies,[146] provides that the court

---

courts concerned with the Chevron analysis. The decision was rendered slightly before the final edit of this paper. As of October 2001, no other decision has followed Mead's holding, so it is unlcear how far the U.S. Supreme Court's ruling will extend. The Court held that a U.S. Customs Service tariff classification ruling was not entitled to Chevron deference or any lesser deference. The Court held:

> Administrative implementation of a particlular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of comparable congressional intent. The Customs ruling at issue here fials to qualify.

As this ruling stands, environmental and natural resources plaintiffs should examine all administrative rulings that appear to fallunder the guise of informal rulemaking or adjudication to find out whether Chevron applies.

136. *Id.* at 865; *See generally*, Clean Air Act, 42 U.S.C. §§ 7401-7671.

137. *Chevron*, 467 U.S. at 842-843.

138. *Id.* at 842.

139. *Id.* at 843.

140. *Chevron*, 467 U.S. at 843, n. 11.

141. *Id.* at 865.

142. *Id.*

143. *Id.*

144. *Chevron*, 467 U.S. at 843-4.

145. Administrative Procedure Act, 5 U.S.C. §§ 701-706.

146. PLATER *supra* note 1, at Statutory Capsule Appendix, 51 ("The APA is the basic format statute for federal agencies' procedures for making law that affects persons outside the agencies (Title 5), and judicial review thereof (Title 7).").

must inquire as to whether an agency acted within the scope of its authority,[147] complied with proscribed procedures,[148] or acted arbitrarily and capriciously and thus, abused its discretion.[149] Title 7 of the Act "creates a 'generous review provision' that should be given 'a hospitable reception' in the reviewing courts."[150]

C. *Pre-survey Period Tenth Circuit Discretion Cases*

Tenth Circuit environmental cases often hinge on agency discretion.[151] Most often, the court has found that agencies have acted within their discretion.[152] In *Mount Evans Co. v. Madigan*,[153] a company that operated a forest service concession facility and a county that collected sales taxes from it wanted the court to review the Forest Service's decision not to rebuild the facility after it burned down.[154] The court held that the Forest Service's decision was not arbitrary or capricious.[155] In another case, nonprofit and livestock organizations in *Public Lands Council v. Babbitt*[156] challenged Department of Interior regulations regarding public-land livestock grazing.[157] The Court of Appeals held that the Secretary of Interior did not exceed his authority in approving three regulations, but one regulation which allowed permits for the use of public lands for conservation instead of livestock grazing was not authorized by statute.[158]

Similarly, in *Delgado v. Department of Interior*,[159] the agency had discretion (and the court commented on one approach to *Chevron* analysis). Delgado sued the department over a land-use lease and argued that the agency was required to cancel it when a violation of any of the relevant lease regulations occurred.[160] Delgado outlined the language of the guiding regulation: "A lease will be canceled by the Secretary ... if at any time the Secretary is satisfied that the provisions of the lease or of any

147. 5 U.S.C. § 706; *see also*, Camp v. Pitts, 411 U.S. 138, 142 (1973).

148. *Id.*

149. *Id.; see* Motor Vehicle Mfrs Assoc. v. State Farm, 103 S.Ct. 2856 (1983) (limits a court's review under APA's "arbitrary and capricious" test).

150. PLATER *supra* note 1, at Statutory Capsule Appendix, 51 (citing Abbott Lab v. Gardner, 387 U.S. 136 (1967)).

151. *See* the Tenth Circuit standing cases review, *supra*. Many of the plaintiffs sought review of agency discretion.

152. As the following cases express.

153. Mount Evans Co. v. Madigan, 14 F.3d 1444 (10th Cir. 1994).

154. *Id.* at 1447.

155. *Id.* at 1455.

156. Public Lands Council v. Babbitt, 167 F.3d 1287 (10th Cir. 1999).

157. *Id.* at 1289.

158. *Id.* at 1309.

159. Delgado v. Dept. of Interior, 153 F.3d 726 (Table) (10th Cir. 1998) (All page numbers are expressed as single numerals because this is a table case.).

160. *Id.* at 3-4.

regulations . . . have been violated," and argued that *Chevron* analysis should be the basis for the review.[161] The court held *Chevron* inapplicable, writing that it only applies when regulations are challenged because they are allegedly inconsistent with a ruling statute.[162] "When interpreting its own regulation," the court wrote, "an agency is entitled to exercise even broader discretion than it may under the second prong of *Chevron*."[163] Delgado also claimed that the agency decision was arbitrary and capricious.[164] "Our review under this standard is narrow, and we may not substitute our judgment for that of the agency," the court wrote.[165] The court concluded that the agency did not abuse its discretion.[166]

In *Biodiversity Legal Foundation v. Babbitt*,[167] the court again deferred to the agency.[168] There, an environmental group sued the U.S. Fish and Wildlife Service to enforce an Endangered Species Act (ESA) deadline to list an endangered grouse.[169] The Colorado district court granted summary judgment for defendants and the plaintiff appealed.[170] The Court of Appeals decided that the agency's use of listing priority guidance did not violate the Act's requirement that a 90-day deadline be achieved "to the maximum extent practicable."[171]

The court wrote, "At the outset, we note 'Congress delegated broad administrative and interpretive powers to the Secretary' when it enacted the ESA.[172] Although the Service 'must give effect to the unambiguously expressed intent of Congress,' courts must defer to the Service's interpretation of the ESA if Congressional intent is ambiguous or nonexistent and the Service's construction of the statute is a permissible one.[173] A challenge to an agency construction of a statutory provision must fail if, in light of Congress's ambiguity or silence, the agency's action 'is a reasonable choice.'"[174]

---

161. *Id.* at 4-5.

162. *Id.* at 5.

163. *Id.* (citing Valley Camp, 24 F.3d at 1267).

164. *Delgado*, 153 F.3d at 726, 6.

165. *Id.* (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983); *Also*, "[T]he agency need only demonstrate that it considered relevant factors and alternatives after a full ventilation of issues and that the choice it made was reasonable based on that consideration." (citing Lodge Tower Condo. Ass'n v. Lodge Properties, Inc., 85 F.3d 476, 477 (10th Cir. 1996) (quoting Mount Evans Co. v. Madigan, 14 F.3d 1444, 1453 (10th Cir.1994)).

166. *Delgado*, 153 F.3d at 726, 7.

167. Biodiversity Legal Foundation v. Babbitt, 146 F.3d 1249 (10th Cir. 1998).

168. *Id.* at 1257.

169. *Id.* at 1250.

170. *Id.* at 1252.

171. *Id.*

172. *Biodiversity*, 146 F.3d. at 1253 (citing Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995)).

173. *Biodiversity*, 146 F.3d at 1253 (citing Chevron, 467 U.S. 837, 842-43 (1984)).

174. *Biodiversity*, 146 F.3d at 1253 (citing Chevron, 467 U.S. at 866).

In *Maier v. U.S. E.P.A.*,[175] environmental groups challenged the Environmental Protection Agency's (EPA) decision not to include nitrogenous biochemical oxygen demand (NOD) controls for publicly-owned treatment works wastewater in its definition of "secondary treatment" in Clean Water Act regulations.[176] The Court of Appeals found in part that EPA's decision to refuse to include the NOD controls and instead limit NOD with permits was within the agency's discretion under the Clean Water Act.[177]

Furthermore, in *Sierra Club v. U.S. E.P.A.*,[178] environmental groups sought judicial review of the EPA's decision "to exempt counties from selected Clean Air Act (CAA) ozone nonattainment area requirements without first formally redesignating counties as attainment areas."[179] The Court of Appeals held in part that EPA's interpretation of the CAA provisions in such a way was within its discretion and not contrary to the Act.[180]

The Tenth Circuit does not always rule for the agency.[181] In *Mt. Emmons Min. Co. v. Babbitt*,[182] a mining company sued the Department of Interior to make the agency continue processing the company's mining patents application.[183] The Colorado district court granted summary judgment for the agency and the plaintiff appealed.[184] The Court of Appeals held that the agency's discontinuance of application processing was an "unlawful withholding of agency action."[185]

As the cases below further exemplify, arbitrary decision making, decisions without statutory authority, and agency discretion are factors that often govern the court's assessment of other controversial environmental issues.

D. *Discretion Cases from Other Circuits*

Other circuits have dealt with similar environmental cases in which agency discretion was the lynch-pin issue.[186] For example, in *SW Ctr. For Biological Diversity v. Babbitt*,[187] plaintiffs alleged that a goshawk

175. Maier v. U.S. Environmental Protection Agency, 114 F.3d 1032 (10th Cir. 1997).
176. *Id.*
177. *Id.* at 1045.
178. Sierra Club v. U.S. Environmental Protection Agency, 99 F.3d 1551 (10th Cir. 1996).
179. *Id.* at 1553.
180. *Id.* at 1558.
181. As described in the next example.
182. Mt. Evans Mining Co. v. Babbitt, 117 F.3d 1167 (10th Cir. 1997).
183. *Id.*
184. *Id.* at 1168.
185. *Id.*
186. As the following cases indicate.
187. SW Ctr. For Biological Diversity v. Babbit, 215 F.3d 58 (D.C. Cir. 2000).

should be listed under the Endangered Species Act. The district court remanded instructions to the Fish and Wildlife Service to census the hawks.[188] The D.C. Circuit held that Endangered Species Act requirements mandating the service to use "best results" in its decision making does not require it to do surveys, but rather gives the agency discretion to decide what is best.[189] Similarly, in *Defenders of Wildlife v. Bernal*,[190] plaintiffs tried to enjoin the construction of a new school on potential habitat of an endangered owl.[191] The appeals court held that evidence, analyzed by the agency, showed construction would not take the owl, and deferred to that decision.[192]

In *Shenandoah Ecosystem Def. Group v. U.S.F.S.*,[193] plaintiffs wanted to stop proposed logging because an endangered salamander lived on national forest land targeted for timber cutting.[194] The court of appeals held that there was no evidence that the agency's use of discretion was arbitrary or capricious.[195]

In *Wetlands Action Network v. U.S. Army Corps of Engineers*,[196] environmental groups sued the Corps under the Clean Water Act and the National Environmental Policy Act (NEPA), challenging a decision to give a developer a permit to fill wetlands and mitigate the fill by creating an artificial wetland system.[197] The Central California district court granted summary judgment to the groups on their NEPA claims, disallowed the permit, and enjoined the developer from further construction.[198] On appeal, the Ninth Circuit held that the Corps' finding of no significant impact (FONSI) was within its discretion, and not arbitrary and capricious.[199] Similarly, in *Central and SouthWest Services, Inc. v. U.S. E.P.A.*, [200] environmental and industry groups requested review of the Environmental Protection Agency's final rule regulating polychlorinated biphenyls (PCBs).[201] The Fifth Circuit held that the rule was not arbitrary and capricious.[202]

---

188. *Id.* at 59.
189. *Id.* at 59-61.
190. Defenders of Wildlife v. Bernal, 204 F.3d 920 (9th Cir. 2000).
191. *Id.* at 922.
192. *Id.*
193. Shenandoah Ecosystem Def. Group v. U.S.F.S., 194 F.3d 1305 (Table) (4th Cir. 1999).
194. *Id.*
195. *Id.*
196. Wetlands Action Network v. U.S. Army Corps of Engineers, 222 F.3d 1105 (9th Cir. 2000).
197. *Id.*
198. *Id.* at 1110.
199. *Id.* at 1122.
200. Central and SouthWest Services, Inc. v. U.S. E.P.A., 220 F.3d 683 (5th Cir., 2000).
201. *Id.*
202. *Id.*

Moreover, in *Envirocare of Utah, Inc. v. Nuclear Regulatory Com'n*,[203] a radioactive waste disposal facility requested review of a Nuclear Regulatory Commission refusal to grant the plaintiff a hearing and intervention in proceedings to license a third party.[204] The D.C. Court of Appeals held that the agency's interpretation of the Atomic Energy Act to prevent intervention was reasonable.[205] In *Defenders of Wildlife v. Browner*,[206] environmental groups requested review of an EPA decision to issue National Pollution Discharge Elimination System permits to municipalities without numeric limits to satisfy state water-quality standards.[207] The Ninth Cicruit held in part that the EPA had discretion to require that such municipalities comply with state standards.[208]

In contrast, in *Sokol v. Kennedy*,[209] adjacent landowner plaintiffs challenged boundaries set by the National Park Service when it designated a scenic river.[210] The Eighth Circuit held that the agency failed to follow the Wild and Scenic Rivers Act, and that the agency's decision was not within its discretion.[211]

E. *Tenth Circuit*

1. *Wyoming Farm Bureau Federation v. Babbitt*[212]

In *Wyoming Farm Bureau Federation v. Babbitt*,[213] plaintiff ranchers and environmentalists challenged a Department of Interior decision to engineer final rules and a plan that would control the reintroduction of an experimental population of gray wolves into Yellowstone National Park and central Idaho pursuant to the Endangered Species Act (ESA).[214] The plaintiffs argued that the agency abused its discretion in making the rules because the Department did not follow statutory requirements of the ESA.[215] Throughout its opinion, the Tenth Circuit consistently deferred to the agency's interpretation of the ESA and supported the agency's decisions notwithstanding their controversial nature.[216] The court used

---

203. Envirocare of Utah, Inc. v. Nuclear Regulatory Com'n, 194 F.3d 72 (D.C. Cir. 1999).
204. *Id.* at 73-74.
205. *Id.* at 78.
206. Defenders of Wildlife v. Browner, 191 F.3d 1159 (9th Cir. 1999).
207. *Id.* at 1161.
208. *Id.* at 1166-67.
209. Sokol v. Kennedy, 210 F.3d 876 (8th Cir. 2000).
210. *Id.* at 877.
211. *Id.*
212. Wyo. Farm Bureau Fed'n v. Babbitt, 199 F.3d 1224 (10th Cir. 2000).
213. *Id.*
214. *Id.*; Endangered Species Act, 16 U.S.C. § 1529.
215. *Wyo. Farm Bureau Fed'n*, 199 F.3d. at 1224.
216. *Babbitt*, 199 F.3d, at 1228, 1239.

the classic *Chevron* and APA tests to pin down the agency's decisions, analyze them, and affirm them.[217]

The plaintiffs argued that if reintroduced wolves were allowed to combine with wild ones, ranchers (and others) would not be able to identify which wolves have full protected status and which do not under the ESA.[218] Therefore, under the reintroduction rules which would allow such mingling,[219] some wolves could be shot and killed if the animals become a nuisance. Yet, ranchers would not know which ones have protected status, so risk prosecution for shooting the wrong wolf.[220] Also, some environmentalists argued that all wolves, reintroduced or not, should be fully protected.[221]

The Department of Interior established rules for the reintroduction based primarily on ESA Section 10j.[222] Even though a naturally occurring colony of Montana wolves exists that could infiltrate the experimental population,[223] the plan allowed the "taking" (killing) of any wolves if found in the act of killing or wounding livestock, even though on at least a superficial level this seemed to go against the usual ESA restrictions on takings.[224]

The main question before the court was whether the Department of Interior abused its discretion by allowing the experimental population to incorporate naturally occurring wolves.[225] The plaintiffs argued that the ESA requires experimental populations to be wholly separate from natural ones, and that naturally occurring wolves as a result of the rules do not have full protection under the ESA.[226] The plaintiffs also argued that the Department Interior abused its discretion by going against ESA Section 10(j).[227] They argued that since individual, native wolves could enter the experimental population areas, this was an overlap of experimental and current-range wolf populations, prohibited by 10(j)'s requirement that experimental populations be completely separate geographically from nonexperimental populations.[228]

---

217. *Id.* at 1230-1231.

218. Wyo. Farm Bureau Fed'n v. Babbitt, 987 F.Supp. 1349, 1361 (1999).

219. *See* discussion, *supra* p. 25-27.

220. *Id.*

221. *See generally, Babbitt*, 987 F.Supp. 1348 (1999).

222. ESA Section 10(j), 16 U.S.C. § 1539(j).

223. *Babbitt*, 199 F.3d at 1229.

224. *Id.*; *see generally* 16 U.S.C. §§ 1531-1544 (one typically cannot kill an endangered species).

225. *Babbitt*, 199 F.3d, 1224, 1230 ("The crux of this case, and hence this opinion, is the validity of the final rules governing the introduction of a nonessential experimental population of gray wolves in the entirety of Yellowstone and in central Idaho.").

226. *Id.* at 1232.

227. *Id.*; *see* discussion of section 10(j), pages 26-7.

228. *Id.*

The Administrative Procedure Act and *Chevron*[229] governed the court's review of whether the agency stayed within the bounds of its discretion dictated by Congress in the ESA.[230] The court held that it "will set aside the Agencies' factual determinations only if they are unsupported by substantial evidence" that the agency did not meet the Act's requirements.[231]

Applying *Chevron*, the court stated it would give "strict effect to the unambiguous intent of Congress if Congress has clearly spoken to the issue before us."[232] However, the court determined that if Congress was "silent on the issue and has delegated authority over the subject matter to the Agencies, [we will defer] to the Agency's construction unless, in the context of the Act, the Department's construction is unreasonable or impermissible."[233]

The court went on to consider the language of the statute in light of the policy and object of the law.[234] It found that Congress enacted the law generally to "provide for the conservation, protection, restoration, and propagation of species of fish, wildlife, and plants facing extinction."[235]

The court then set forth the relevant portions of the ESA, sections 4(f), 7(a)(1) and 10(j).[236] The court wrote that section 4(f) directs the Secretary of Interior "to develop and implement recovery plans for the 'conservation and survival' of listed species 'unless he finds that such a plan will not promote the conservation of the species.'"[237] In addition, the court wrote, section 7(a)(1) authorizes the Secretary to 'live' trap and 'transplant' (reintroduce) rare species, if necessary, to bring an endangered or threatened species to the point at which the protective measures of the ESA are no longer necessary."[238]

---

229. *Chevron*, 467 U.S. 837 (1984).

230. *Babbitt*, 199 F.3d at 1231 ("Our review of the rules and record is governed by the Administrative Procedure Act, 5 U.S.C. § 706. Essentially, we must determine whether the Agencies: (1) acted within the scope of their authority, (2) complied with prescribed procedures, and (3) took action that was neither arbitrary and capricious, nor an abuse of discretion. (citing *Olenhouse*, 42 F.3d at 1574.) Within this context, we will set aside the Agencies' factual determinations only if they are unsupported by substantial evidence. 'The substantial-evidence standard does not allow a court to displace the [Agencies'] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.' (citing Trimmer v. United States Dep't of Labor, 174 F.3d 1098, 1102 (10th Cir.1999) (quotation marks and citations omitted))".

231. *Babbitt*, 199 F.3d at 1231.

232. *Id.*

233. *Id.* (citing Hoyl v. Babbitt, 129 F.3d 1377, 1387 (10th Cir.1997) (citing *Chevron*, 467 U.S. 837 (1984)).

234. *Babbitt*, 199 F.3d at 1231-32.

235. *Id.*

236. *Id.*; 16 U.S.C. §§1533(f), 1536(a)(1), and 1539(j), respectively.

237. *Babbitt*, 199 F.3d at 1231 (quoting 16 U.S.C. §1533(f)).

238. *Id*

The court then defined the Congressional intent of the ESA.[239] It concluded that Congress enacted section 10(j) to counter agency frustration over political opposition to reintroductions that were thought to conflict with human activity.[240] The court wrote that Section 10(j) gives the Secretary of Interior authority to release any population of endangered species outside its current range as long as "the Secretary determines that such release will further the conservation of such species."[241] Yet, the court found that an experimental population must be "separate geographically from non-experimental populations of the same species."[242] Also, the court held, the agency must determine "whether or not such population is essential to the continued existence" of an endangered or threatened species.[243]

The court further detailed the Congressional intent behind section 10(j):

> Congress hoped the provisions of section 10(j) would mitigate industry's fears that experimental populations would halt development projects, and with the clarification of the legal responsibilities incumbent with the experimental populations, actually encourage private parties to host such populations on their lands.[244] Congress purposely designed section 10(j) to provide the Secretary flexibility and discretion in managing the reintroduction of endangered species. By regulation, the Secretary can identify experimental populations, determine whether such populations are essential or nonessential, and, consistent with that determination, provide control mechanisms (i.e., controlled takings) where the Act would not otherwise permit the exercise of such control measures against listed species.[245]

The court did not agree with the plaintiffs that the agency abused its discretion in designing a reintroduction plan in which native and reintroduced wolves may co-mingle.[246] The court stressed that the ESA does not define the phrase "wholly separate geographically from nonexperimental populations," so does not provide an answer to "whether a reintroduced population of animals must be separate from every naturally occurring individual animal."[247]

---

239. *Babbitt*, 199 F.3d at 1232.
240. *Id.*
241. 16 USC §1539(j)(2)(A).
242. 16 USC §1539(j)(2).
243. 16 USC §1539(j)(2)(B).
244. *Babbitt*, 199 F.3d at 1232 (citing H.R.Rep. No 97-567, at 8 (1982), reprinted in 1982 USCCAN 2807, 2808, 2817; *see also* 16 USC Section 1539(j)).
245. *Babbitt*, 199 F.3d at 1233.
246. *Id.*
247. *Id.* at 1234.

Due to the fact that the statute was unclear the court deferred to the Department of Interior's interpretation.[248] The court held that the agency defines "population" as "a group of fish or wildlife . . . in common spatial arrangement that interbreeds when mature."[249] Furthermore, the court held, "a 'geographic separation' is any area outside the area in which a particular population sustains itself."[250] Therefore, the court found that there was no conflict between the agency's interpretation and Congress' intent of section 10(j), because "the paramount objective of the Endangered Species Act [is] to conserve species, not just individual animals."[251] The court bolstered its reasoning by noting that some endangered species lose protected status when they move across state or international borders.[252]

Next, the court held that the Department of Interior does not have to give full ESA protection to any naturally occurring wolf found within the experimental areas.[253] It wrote that the district court's finding that the final reintroduction rules constituted a "de facto delisting" of naturally occurring lone wolves[254] and denied ESA protection to such wolves and their offspring was erroneous.[255] The Tenth Circuit held that the district court erroneously limited the administrative discretion that Congress put in section 10(j), "ignore[d] biological reality," and issued an opinion that did not fit with the larger purpose of the ESA.[256]

In upholding the Department of Interior's interpretation of the ESA, the Tenth Circuit defined the contours of the Department's discretion regarding its reintroduction plan.[257] It wrote that the Secretary of Interior could define an experimental population to include "imported wolves" and "lone dispersers," because the agency decided this was the best way to recover the species, and nothing in the ESA prevented it.[258] In particular, the court wrote that Section 10(j)'s language requiring geographical separation between experimental, released populations and native ones allows for agency discretion.[259] Furthermore, such language, the court wrote, does not restrict the agency's discretion to define a

248. *Id.*
249. 50 CFR Section 17.3.
250. *Babbitt*, 199 F.3d at 1234 (citing Wyo. Farm Bureau Fed'n v. Babbitt, 987 F.Supp. at 1373).
251. *Babbitt*, 199 F.3d at 1235.
252. *Id.*
253. *Id.*
254. *Babbitt*, 199 F.3d at 1236 (citing the district court); "De facto delisting" means the wolf effectively would be taken off the endangered list and lack protection of the Endangered Species Act.
255. *Babbitt*, 199 F.3d at 1236.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*

population that may include wolves from other geographically separate populations.[260] "Such a narrow interpretation is not supported by the provision or the Endangered Species Act read as a whole," the court wrote.[261]

Moreover, the court stated that Congressional intent gave the agency wide flexibility.[262] Congress gave the agency authority to define an experimental population "'on the basis of location, migration pattern, or any other criteria that would provide notices as to which populations . . . are experimental.'"[263] So, the court said, Section 10(j) really protects the agency's authority "to designate when and where an experimental population may be established," instead of limiting the agency's flexibility.[264]

In further support of its decision to allow agency discretion, the court declared that the restrictive interpretation of the ESA sought by the plaintiffs could undermine the Department of Interior's ability to deal with biological reality.[265] That in turn, the court wrote, could undermine species recovery.[266] Moreover, the court held that a subspecies of the wolf that the plaintiffs claimed exists does not, based on the Department's research.[267] The court applied the arbitrary and capricious standard of review,[268] and deferred to the agency's discretion.[269] Finally, the

---

260. *Id.*

261. *Babbitt*, 199 F.3d at 1237.

262. *Id.*

263. *Id.* (citing H.r. Conf. Rep. No. 97-835, 97th Congl, 2d Sess. at 34 (1982)).

264. *Babbitt*, 199 F.3d at 1237 ("While the protection of individual animals is one obvious means of achieving that goal, it is not the only means. It is not difficult to imagine that sound population management practices tailored to the biological circumstances of a particular species could facilitate a more effective and efficient species-wide recovery, even if the process renders some individual animals more vulnerable. However, neither Congress nor this court are equipped to make that type of species management decision. Recognizing that fact, Congress left such decisions to the Department. We conclude the Department reasonably exercised its management authority under section 10(j) in defining the experimental wolf population by location.").

265. *Babbitt*, 199 F.3d at 1236-37 (citing 59 Fed.Reg. at 60256, 60261) ("(1) There were no reproducing wolf pairs and no pack activity within the designated experimental areas, (2) wolves can and do roam for hundreds of miles, and (3) it would be virtually impossible to preclude naturally occurring individual gray wolves from intermingling with the experimental population.... The Secretary intentionally identified the experimental population as all wolves found within the experimental areas, including imported wolves and any lone dispersers and their offspring. The Department determined it could best manage the wolf reintroduction program to achieve species recovery in this manner. We find nothing in the Act that invalidates this approach by requiring the protection of individuals to the exclusion or detriment of overall species recovery, or otherwise limiting the Department's flexibility and discretion to define and manage an experimental population pursuant to section 10(j).").

266. *Babbitt*, 199 F.3d at 1236.

267. *Id.* at 1239.

268. *See* discussion, *supra*, of Administrative Procedure Act.

269. *Id.* (citing Trimmer, 174 F.3d at 1102; National Cattlemen's Ass'n v. EPA, 773 F.2d 268, 271 (10th Cir.1985) ("Applying the arbitrary and capricious standard of review, we cannot displace the Defendants' choice between two fairly conflicting views, and must defer to the agencies' view on

court held that as long as the agency "took a 'hard look'" at the environmental consequences of the wolf reintroduction, it would not second-guess the agency's environmental impact statement under NEPA.[270]

In conclusion, the Tenth Circuit in classic deference mode held that the Department of Interior had discretion to create its controversial wolf reintroduction plan despite its controversial nature because there was no Congressional intent otherwise.[271]

2. Analysis

Administrative agencies have the requisite resources, grounded in the specialized expertise of their employees, to make final decisions regarding day-to-day issues.[272] The Department of Interior and its subordinate agencies like the Fish and Wildlife Service are certainly examples.[273] In contrast, few, if any, Congresspersons have the knowledge, skill or experience to understand the technical, biological and ecological framework of decisions as critical as whether and how to reintroduce wolves into the northern Rockies.[274] Furthermore, political motivations that might underlie such decision making[275] likely would be a force preventing those in Congress from making unbiased, scientifically objective judgments without regard to influences such as economics, which are not supposed to be taken into account under ESA Section 10(j).[276]

The ESA, like many statutes passed by Congress, gives agencies direction and only provides a framework for guidance.[277] Agencies are left to put the substantive meat on the bones of the statute.[278] When a decision to list an endangered species under the statute is made, a public

---

scientific matters within their realm of expertise. Because this is a scientific matter within the Agencies' expertise, and because there is ample evidence in the administrative record to support the Defendants' position, we uphold their subspecies conclusions.").

270. *Babbitt*, 199 F.3d at 1240.

271. *Id.*

272. *See* PLATER *supra* note 1, at 378. ("Agencies are just that: agents. Their only reason for existence, since they are not provided for in the federal Constitution or most state constitutions, is that the constitutionally created branches of government had too much detailed work to do than they could conveniently do themselves. [They] accordingly delegated some of their powers to standing agents in order to spread the workload and drudgery of performing investigations, day-to-day oversight, and hands-on administrative tasks of running a society.").

273. As agencies of the executive branch.

274. Because few lawmakers are trained experts in those fields.

275. For example, Western, states-rights, frontier-minded Congresspersons interested in protecting ranchers in their states might favor a policy that would limit Endangered Species Act protections for the wolves, while more liberal environmentally minded Congresspersons might prefer stronger restrictions.

276. *See* ESA, Section 10(j), 16 U.S.C. § 1539(j).

277. *See generally* the Endangered Species Act, 16 U.S.C. §§1531-44.

278. *Id.*

comment period is required before the final listing.[279] Yet, if concerned groups like the plaintiffs in *Babbitt* cannot change an agency's mind through commentary and persuasion, they must file suit.

Babbitt arguably is legally and socially important.[280] One commentator provided a context for its importance.[281] Scott Youngblood wrote, "the district court's [ruling] basically states that if naturally occurring . . . wolves are mixed with reintroduced . . . wolves, which are called experimental-nonessential wolves, the reintroduced or experimental-nonessential wolves must be removed."[282] He continued: "Ranchers who are allowed to kill nonessential wolves under certain circumstances[283] will not be able to tell the difference between endangered and nonessential wolves. Thus, ranchers will not be able to determine whether they are allowed to kill a particular wolf. Such a ruling by a federal district court is contrary to the Congressional intent set forth in the Endangered Species Act of 1973 (ESA)." [284] Youngblood went on to say that, "a dispute over an erroneous interpretation of a statutory definition is not a basis for condemning an animal to death."[285] Even some of those generally opposed to wolf reintroduction agree that the Department of Interior plan might work.[286] Youngblood quotes Senator James McClure of Idaho, who opposed reintroductions but recognized "'that a narrowly restrictive reintroduction would be less bad for the livestock industry than an unrestricted wave of natural immigration.'"[287] Youngblood also quotes biologists and wolf experts who agree flexible management plans are needed for reintroduction.[288]

If management plans (or other kinds of plans) require flexibility, and agencies are given court-backed discretion to use or create that flexibility, what can opponents of the plan do if they disagree with a decision made pursuant to this discretion? Opponents of any agency decision—regarding management plans or other issues—confront the same

279. *See* ESA, Section 4, 16 U.S.C. § 1533(b)(5)(B-E).

280. *See* National Public Radio, Wolves in Yellowstone, http://search.npr.org/cf /cmn/cmnps05fm.cfm?SegID=69171; *see also*, NATIONAL GEOGRAPHIC, NATIONAL GEOGRAPHIC PARK PROFILES: YELLOWSTONE COUNTRY, 12, 44, 98-99, 182 (1997); for possible reintroductions in Colorado, *see* Theo Stein, *Wolf reintroduction roams closer to Colorado*, Denver Post, February 17, 2001, at A1.

281. Scott Youngblood, Wildlife Restoration Projects: Hope for Life or a Death Sentence? A Look at the Reintroduction of Wolves to the Northern Rocky Mountains. 40 S. TEX. L. REV. 1045.

282. *Id.* at 1047.

283. *Id.* at 1047, 1047 n. 13 (citing 50 C.F.R. § 17.84(i)(3) (1998) ("Authorizing the killing of wolves under various circumstances such as seeing a wolf attacking livestock on private land, or if carrying a permit, when seeing a wolf attacking livestock on public lands if there are six or more breeding pairs of wolves in the area.").

284. 16 U.S.C. §§ 1531-1544 (1994).

285. Youngblood *supra* note 281, at 1047.

286. *Id.* at 1062.

287. *Id.* at 1066 (quoting Thomas McNamee, The Return of the Wolf to Yellowstone 31, 33 (1997)).

288. Youngblood *supra* note 1, at 1066.

garding management plans or other issues—confront the same question. They might be better prepared to challenge agencies if they conduct some straightforward research and test the agency decision themselves before setting foot into a courtroom.

First, potential plaintiffs should apply the APA's "arbitrary and capricious" test,[289] and the *Chevron* test[290] to the opposed agency decision.[291] Well-prepared plaintiffs should try to predict the Tenth Circuit's interpretation of the challenged decision, using the court's interpretations of prior, similar decisions under the tests. In analyzing the decisions under the tests, potential plaintiffs should read the entire statute in question with particular focus on the Congressional intent that supposedly gives the agency authority and discretion.

As the court did in *Wyoming Farm Bureau*,[292] plaintiffs could find the appropriate House or Senate reports and dissect them carefully to assess the actual intent of Congress. For example, the intent of the ESA arguably is to promote the reintroduction of endangered species so that the ESA does not have to be used anymore.[293] In other words, protecting endangered species today allows populations of those species to grow so that they are no longer endangered.

In that light, when the *Wyoming Farm Bureau* court held that Section 10(j)'s 'wholly separate geographically'[294] language did not force the agency to define a population that may not include wolves from other geographically separate populations, the court was doing what *Chevron* requires.[295] Even though 10(j) clearly states a preference for "wholly separate" populations, the court, looking at the entirety of the statute, allowed the Department of Interior's interpretation to gloss the statutory language.[296] The judges concluded that biological reality (the fact that native wolves and experimental ones might mix, thereby making all of them subject to takings by ranchers, etc.) was the best guiding principle. The Deptartment of Interior should, therefore, be able to release wolves in a way would advance the ESA's fundamental purpose of helping more individuals (not just single ones who risk being shot by ranchers), therefore the species itself, to survive. At the end of the day, the court empha-

289. 5 U.S.C. § 706.

290. *Chevron*, 467 U.S. at 843-844.

291. Moreover, before going to court, plaintiffs should explore every option available to influence the agency's decision, including use of the popular media to draw support for their cause, and emphatic lobbying of the agency.

292. *Babbitt*, 199 F.3d 1224 (2000).

293. *Id.* (As the *Babbitt* court stated in its analysis.).

294. *Babbitt*, 199 F.3d at 1232.

295. *Chevron* analysis allows such permissible construction of the statute. *See Chevron*, 467 U.S. at 842-43.

296. *Babbitt*, 987 F. Supp. at 1371.

sized the importance of fundamental propositions about species recovery that underlie the ESA over the specific statutory language.

Further inquiry into the Tenth Circuit's holdings could lead some potential plaintiffs to conclude that the Tenth Circuit often emphasizes agency discretion found in Congressional intent, even when that intent is not totally clear. For example, if plaintiffs were interested in a grazing permits issue, they could evaluate the Tenth Circuit's preference for deference to agency decisions, highlighted by a case like *Public Lands v. Babbitt*.[297] Alisha Molyneux, who commented on the court's grazing permits trend, wrote, "The court recognized that the judiciary should defer to an agency's decisions concerning how the agency interprets statutory commands. A court is not to substitute its judgment for the policies and decisions effected by an agency. Because the TGA [grazing act] authorizes the Secretary's discretion in issuing grazing permits, the Secretary's authority in making such decisions has been greatly increased by the Tenth Circuit's reading of both Chevron and the TGA."[298]

In conclusion, when confronting a potential court decision that might favor agency discretion, plaintiffs can take prophylactic measures to assure that they use the same guidelines the court does to assess whether agency thinking should prevail. By staying a step ahead of the court, plaintiffs might well avoid a courtroom loss that could have been foreseen.

3. *Southern Utah Wilderness Alliance v. Dabney*[299]

In *Southern Utah Wilderness Alliance v. Dabney*,[300] four-wheel-drive proponents who wanted continued access to a back country road challenged portions of the National Park Service's Backcountry Management Plan (BMP) for Canyonlands National Park in Southeastern Utah.[301] The

---

297. 167 F.3d 1287 (10th Cir. 1999).

298. Alisha Molyneux, *Public Lands Council v. Babbitt: Tenth Circuit Decides that the Taylor Grazing Act "Breathes Discretion at Every Pore"* 20 J. LAND RESOURCES & ENVTL. L. 132.

299. Southern Utah Wilderness Alliance v. Dabney, 222 F.3d 819 (10th Cir. 2000).

300. *Id.*

301. *Id.* at 823; The relevant portion of the BMP (Canyonlands National Park and Orange Cliffs Unit of Glen Canyon National Recreation Area, Backcountry Management Plan, at 13 (January 6, 1995)): "Salt Creek and Horse Canyon four-wheel drive roads in the Needles District will remain open to vehicular traffic, but travel will be by backcountry use permit only. A locked gate at the north end of the road (the location of the current gate) will control access. Day use permits for Salt Creek and Horse Canyon will be limited to ten (10) permits for private motor vehicles (one vehicle per permit), two (2) permits for commercial motor vehicle tours (one vehicle per permit), one (1) or more permits for up to seven (7) private or commercial bicyclists, one (1) or more permits for up to seven (7) pack or saddle stock . . . . All permits are available through the advance reservation system. Unreserved permits or cancellations will be available to walk-in visitors."; For a good overview of increased off-road vehicle use on public lands in the West, *see* Penelope Purdy, *Our scarred land: monitoring ORVs not an easy job*, Denver Post, February 11, 2001 at G1.

plan closed a one-half mile segment of the Salt Creek Road to four-wheel-drive traffic.[302]

The National Park Service (NPS) claimed the BMP's goal was to balance recreation and protection of park resources as a response to increased visitation and the resulting impacts on resources in the park.[303] Before the district court trial, the NPS interpreted its controlling statutory mandate[304] that the agency must prevent "significant, permanent impairment" of resources.[305] During litigation, though, the agency advanced draft policies that stated an even more restrictive interpretation of the National Park Service Organic Act of 1916 (Organic Act),[306] legislation that describes the focus, priorities and goals of the agency.[307] Management of Canyonlands National Park is controlled in part by its enabling legislation.[308]

The district court found that the Organic Act and Canyonlands enabling legislation did not allow the NPS to authorize activities that "permanently impair park resources," and that such impairment would occur if motorized vehicle use were allowed on the road.[309] The court then enjoined the NPS from allowing such use.[310] Interestingly, the NPS did not appeal.[311] Instead, intervenor Utah Shared Access appealed, arguing that the BMP[312] did not violate the NPS's Organic Act,[313] and that the district

---

302. *Dabney*, 222 F.3d at 823.

303. *Id.* at 822.

304. The National Park Service Organic Act of 1916, 16 U.S.C. § 1.

305. *Dabney*, 222 F.3d at 825.

306. *Id.* at 827.

307. *Id.* at 824.; *see* U.S.C. § 1 ("The service thus established shall promote and regulate the use of the Federal areas known as national parks . . . by such means and measures as conform to the fundamental purpose of the said parks . . . which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."); *see also*, 16 U.S.C. § 1a-1 ("The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.").

308. *Dabney*, 222 F.3d at 823; *see* 16 U.S.C. § 271 ("In order to preserve an area in the State of Utah possessing superlative scenic, scientific, and archeologic features for the inspiration, benefit, and use of the public, there is hereby established the Canyonlands National Park . . . ."; *see also* 16 U.S.C. § 271(d)(Canyonlands must be managed in accordance with the purposes of the Organic Act.).

309. *Dabney*, 222 F.3d at 822 (citing Southern Utah Wilderness Alliance v. Dabney, 7 F.Supp.2d 1205 (D.Utah 1998).

310. *Dabney*, 222 F.3d at 822.

311. *Id.*

312. *Dabney* at 823; *see* Canyonlands National Park and Orange Cliffs Unit of Glen Canyon National Recreation Area, Backcountry Management Plan, at 13 (January 6, 1995) ("Salt Creek and Horse Canyon four-wheel drive roads in the Needles District will remain open to vehicular traffic, but travel will be by backcountry use permit only. A locked gate at the north end of the road (the

court abused its discretion by enjoining the BMP's implementation.[314] The agency nonetheless submitted a brief to the appeals court "to advise the court as to the Department's view as to the proper legal construction of the [Organic] Act."[315]

Two questions arose on appeal.[316] One was whether the district court's finding that the BMP violated the Organic Act was correct under *Chevron*.[317] The other was whether the NPS's draft backcountry policies (those regarding whether to allow off-road vehicle use) submitted to the court were sufficiently formal to require *Chevron* deference to the agency's conclusions.[318] First, the court looked to the Administrative Procedure Act for guidance, and wrote:[319] "Informal agency action must be set aside if it fails to meet statutory, procedural or constitutional requirements or if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[320]

Next, the Tenth Circuit utilized the two-part conjunctive *Chevron* test to analyze the NPS's interpretation of the Organic Act and Canyonlands enabling legislation.[321] The court outlined the two steps in *Chevron*, and ruled that the district court erred in resolving the issue under the first inquiry alone, which requires adherence to the intent of Congress if that intent is clear.[322]

The court found the Congressional intent unclear.[323] The Tenth Circuit stated that the Organic Act neither defines the word "unimpaired" or the phrase "unimpaired for the enjoyment of future generations" in the Act.[324] Therefore, because the Congressional intent was unclear, it also was unclear how the "duration and severity of the impairment are to be

---

location of the current gate) will control access. Day use permits for Salt Creek and Horse Canyon will be limited to ten (10) permits for private motor vehicles (one vehicle per permit), two (2) permits for commercial motor vehicle tours (one vehicle per permit), one (1) or more permits for up to seven (7) private or commercial bicyclists, one (1) or more permits for up to seven (7) pack or saddle stock . . . . All permits are available through the advance reservation system. Unreserved permits or cancellations will be available to walk-in visitors.").

313. *Dabney* at 824.

314. *Id.*

315. *Id.* at 822.

316. *Id.* at 825.

317. *Id.* at 826.

318. *Id.*

319. *Id.*

320. *Id.* at 824 (quoting Olenhouse v. Commodity Credit Corp., 42 F.3d 1560 (10th Cir. 1994), and the APA, 5 U.S.C. § 706(2)).

321. *Dabney*, 222 F.3d at 825 ("On appeal, Utah Shared Access argues that the district court erred in resolving the issue under the first Chevron inquiry. Utah Shared Access argues that the district court should have reached the second Chevron inquiry because of ambiguities inherent in the relevant statutes and their application to the issue of vehicular access. We agree.").

322. *Dabney* at 825-26.

323. *Id.* at 826.

324. *Id.*; *see* Organic Act text, note 262.

evaluated or weighed against the other value of public use of the park."[325]

Instead, the court ruled, the district court should have gone on to the second inquiry, whether agency interpretation is based on an acceptable interpretation of the statute in question when the intent of Congress is missing or unclear.[326] The court applied *Chevron*'s step two, whether the Department of Interior's answer was based on "permissible construction of the statute."[327]

The court analyzed the agency's brief, its oral argument, and its supplemental Draft Policies, all of which outlined the agency's position on the Organic Act.[328] The court found that the NPS's philosophical position in these documents differed from the position the agency adopted before the district court, so concluded that "there is currently no valid agency position worthy of deference."[329]

The court stated that although an agency can change its position on the meaning of a statute and still receive *Chevron* deference, a position taken while the litigation is ongoing is not worthy of deference.[330] The court held that the agency's policies were only in draft form and were not finalized or adopted by the agency, so deserved neither *Chevron* deference nor any lesser deference.[331]

Next, the court cited provisions of the Organic Act and the Canyonlands enabling legislation in order to compare them to the NPS's interpretation.[332] The Organic Act describes the NPS's purpose: "... to conserve the scenery and natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[333] Further, the Organic Act prohibits "authorization of activities that derogate park values: 'The authorization of activities ... shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.'"[334] The Canyonlands enabling legislation states that Canyonlands was created done in part to "preserve an area ... possessing superlative scenic, scientific, and arche-

325. *Dabney*, 222 F.3d at 826.
326. *Id.*
327. *Id.* at 827 (citing *Chevron*, 467 U.S. at 843).
328. *Dabney*, 222 F.3d at 827-28.
329. *Id.* at 828.
330. *Id.*
331. *Id.*
332. *Dabney*, 222 F.3d at 824-26.
333. *Id.* at. 825.
334. *Id.*

ologic features for inspiration, benefit and use of the public...."[335] In contrast, the NPS's BMP, designed with agency discretion, allowed permitted vehicle traffic in the backcountry.[336] Such traffic arguably could limit the public's enjoyment of the area and undermine the Canyonlands' preservation

The court reversed the district court's finding, and remanded the case so that the parties' conflicting views regarding the amount of permanent impairment the BMP would cause could be decided.[337] Also, it instructed the lower court to review the NPS's finding of 'temporary impairment'[338] from vehicle use.

The court held that, "on remand, the district court should not limit its analysis under step two of *Chevron* to whether the evidence demonstrates significant, permanent impairment.[339] Rather, it should assess whether the evidence demonstrates the level of impairment prohibited by the [Organic] Act."[340] Also, if the district court found that the agency has formalized and adopted its view on the Organic Act, the agency's decision deserved *Chevron* testing.[341]

In conclusion, the Tenth Circuit ruled that the BMP, created by the agency under its discretion, was not "clearly contrary" to the Organic Act, but remand was needed to find out if the interpretation was reasonable.[342]

4. Analysis

In assessing how an agency like the Park Service should interpret its own guiding Organic Act or other controlling legislation, a plaintiff should consider general trends in how courts and agencies have interpreted such legislation. University of Denver College of Law Professor Fred Cheever wrote: "The National Park Service Organic Act of 1916 declares that the purpose of the national parks is to 'conserve' scenery, 'natural and historic objects' and 'wild life' and provide for their enjoyment 'by such means' as to leave them 'unimpaired for the enjoyment of future generations.' [But,] Congress did not specify by what means the

335. *Id.*
336. *Dabney*, 222 F.3d at 823, 825.
337. *Id.*
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.*
342. *Dabney*, 222 F.3d at 829.

Park Service was to 'conserve' 'unimpaired' the national parks while providing for their 'enjoyment.'"[343]

Congress' failure to provide further guidance has left the door open for natural resources and environmental groups, agencies and the courts to do battle over the *true* meaning of legislation that controls agency action. Ecologically, economically or politically minded parties transformed into visionary plaintiffs might recognize opportunities to shape agency policy lurking in the mucky Congress-speak of statutory language.

Congress passes a vaguely worded guiding statutes in reliance on trust in agencies. Cheever claimed that one reason agency discretion is so bountiful is that mandates originally granted to agencies like the US Forest Service and the US Park Service were so broad they lacked substance.[344] "Paradoxical mandates were a particularly useful form of legislative carte blanche. They appear to have substance because they speak of general values in mandatory terms. However, they do not significantly constrain agency action. Almost anything can be justified between the two poles of 'use' and 'preservation,' extensive clearcuts and swank hotels as well as limitations on rafting access and livestock trains."[345] "The resolution of the paradox required balancing, and balancing traditionally fell within the expert agencies' discretion."[346] Cheever described ways in which "paradoxical agency mandates [have been] used to challenge agency action in court."[347] He wrote that, "the effect of paradoxical mandates reaches beyond cases in which the language of the statutes are at issue and color a range of legal disputes about the balance between preservation and use," citing the Endangered Species Act as an example.[348]

In particular, Cheever suggested a "gap" between what an agency does and what environmental plaintiffs think the agency should do.[349]

---

343. Fredrico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 DENV. U. L. REV. 625, 629.

344. *Id.* at 638.

345. *Id.*; *see generally*, Robin Winks, *The National Park Service Act of 1916: A Contradictory Mandate?* 74 DENV. U. L. REV. 575 (1997).

346. Cheever *supra* note 343, at 638.

347. *Id.* at 641.

348. *Id.* at 642-3. ("Efforts to enforce the act-- mostly in the form of federal court cases brought by environmental groups--have severely curtailed agency discretion in the Forest Service's two most valuable timber producing regions: the forests of the southeast—home of the Red-Cockaded Woodpecker --and the forests of the Northwest, home of the Northern Spotted Owl and various runs of protected salmon. Forest Service timber production has dropped precipitously in recent years and not as a result of agency decisions.").

349. *Cheever* at 643; *See also Chevron*, 467 U.S. at 843-44 (*Chevron's* "gap"; "[If] Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency."); *see also* William J. Lockhart, New Nonimpairment Policy Projected for the National Park System, Environmental Law Reporter, September, 2000 ("It is critical for the NPS to recognize that

Dabney provides a good example. The NPS in their BMP allowed limited back-country vehicle use. The Organic Act and Canyonlands enabling legislation do not mention backcountry vehicle use, but do mention more general principles like preserving park resources and preventing their derogation.[350] Clearly, conceptual or philosophical differences exist between the NPS's notion of limited vehicular traffic and its association with resource preservation and preservation and management vision that absolutely prohibits such traffic for fear of the detrimental effects it might cause. Any number of arguments could be made as to how motorized vehicles simply do not fit under the generalized principles or ideals of the guiding statutes.

Nonetheless, Cheever wrote that when groups bring Organic Act claims against the NPS, the Service usually wins.[351] As an example, he cited *Wilkins v. Lujan,*[352] in which a federal district court used Organic Act language to demonstrate that the NPS had made a "clear error of judgment" in creating a plan to remove wild horses from the Ozark National Scenic Riverway.[353] The Eighth Circuit reversed, using Organic Act language regarding removal of "detrimental" animals to support Park Service discretion.[354] Nonetheless, the lone dissenter said, "I am hard-pressed to find a clearer example of arbitrary and capricious agency action."[355] "While a victory for the Park Service," Cheever wrote, "the decision demonstrates the willingness of judges at both the district and

---

its policies regarding impairments caused by activities approved within the parks will almost certainly also set the bottom line for all protection that may ultimately be established to address impairments from external activities. For this reason, there is a great deal for advocates of park protection to cheer in the proposed draft of the new NPS Management Policies. If applied straightforwardly with a minimum of politically driven compromises, the policies should generate a new regime of more reliable protection against impairments generated by developments and uses within the parks. By the same token, however, if the NPS yields in the adoption or application of these new policies to the inevitable political demands for a freer 'discretionary' hand to 'balance' resource protection against the tourism goals of local promoters, damage to the future of our parks will come not just from the occasional concessions to internal park developments. Policies that permit continued compromise of the NPS' own protective obligations are also virtually certain to invite qualifications or limits that will compromise efforts to address external threats. In short, if the NPS does not set and enforce high standards for control of activities it permits within the parks, it is difficult to imagine any significant success in controlling the increasing threat from activities outside the parks. For this among other reasons, it is especially important to ensure that the standard established for in-park activities is as rigorous as the dictionary definitions of 'impairment' permit.").

350. *See* notes *supra* 307-8, 312.

351. *Id.* at 643.

352. *Id.*, citing Wilkins v. Lujan, 798 F.Supp. 557 (E.D. Mo. 1992), rev'd sub nom. Wilkins v. Secretary of Interior, 995 F.2d 850 (8th Cir. 1993).

353. Cheever *supra* note 343, at 643.

354. *Id.* at 643-4.

355. *Id.* at 644.

circuit level to question Park Service decisions about what 'preservation' means."[356]

Cheever highlighted some cases in which the Park Service has won on its interpretations of its Organic Act, concluding that some of the opinions "[spoke] directly to the balance between use and preservation and the discretion of the Park Service to strike that balance. Snowmobilers and hikers, like the environmental groups and local and state governments that batter the Forest Service, have the power to use the Park Service's ambiguous mandate against it, projecting their values—preservation (in the case of the hikers) or motorized use (in the case of the snowmobilers)—on Congress' ambiguous language."[357] In conclusion, Cheever wrote that, "it would be useful to have agency mission statements that were more than mirrors, reflecting back the values of each interest group on itself. A clearer mission statement, conveying the same message to all interested parties, would not guarantee enhanced agency stature and discretion, but would at least make it possible."[358]

This could save precious litigation time and costs because everyone would be clear about what Congress meant for agencies. On the other hand, clearer mission statements would deny plaintiffs opportunities to exploit the "gaps" between unclear guiding statutory language and agencies' actual decisions. If the NPS's Organic Act clearly allowed something as controversial as four-wheel-drive activity as in *Dabney*,[359] plaintiffs who opposed the plan would lose because the court would have to go no further than step one of the *Chevron* test.[360] Moreover, depending on the political composition of the Congress in power at the time, a less-confusing mission statement might be passed, but a "clearer" version of the NPS's mission statement might vary widely from the arguably pro-conservation notions upon which the National Park Service was originally founded. If such a statement were so clear as to force absolute adherence by the NPS, natural resources and environmental groups would be left to wait for a new Congress to change the statute. Again, under *Chevron*,[361] the agency would be forced to follow the bottom-line intent of Congress, regardless of whether any particular group of legislators were able to fashion reasonably preservationist guidance.

The implications of such 'micromanagement' by Congress take on even more ominous tones. In *Dabney*, for example, if Congress had decided whether four-wheel-drive use should be allowed in the Canyon-

356. *Id.*

357. Cheever *supra* note 343, at 645.

358. *Id.* at 646.

359. As in the previous discussion of *Dabney, supra.*

360. *Chevron*, 467 U.S. at 842-43; If Congressional intent is clear, that is generally the bottom line.

361. As previously discussed.

lands back country, Congress would be doing the jobs agencies were created to do. The NPS depends on its rangers, biologists, statisticians, geologists, engineers and other experts who work on location, collect and analyze data, and provide the basis for scientifically sound policies that balance conservation and recreation in highly informed ways. If Congress tried to accomplish such a balancing, the result would likely be sub-standard in quality because Congress does not have the resources required to responsibly grapple with such minutia.

A case decided in February, 2001 by the U.S. Supreme Court directly addressed this issue.[362] It had the potential to redefine the fundamental constructs of agency discretion. In November, 2000, the Court heard arguments in *Browner v. American Trucking Association*,[363] a case in which the D.C. Court of Appeals stuck down strict Environmental Protection Agency (EPA) limits on smog and soot, regulated under the Clean Air Act.[364] The main issue was "whether the EPA's loose construction of the Clean Air Act rendered the law an unconstitutional delegation of its legislative power."[365]

The EPA must follow and apply the Clean Air Act,[366] which requires the agency to set national air-quality standards "to protect and enhance the quality of the nation's air resources."[367] At the same time, the act requires the agency to base its decisions on the latest scientific knowledge about air pollution.[368] Since the EPA set new, stricter guidelines for limiting smog and soot, it was sued by the trucking industry.[369] The D.C. Circuit agreed that the agency did construe the law too loosely, thereby abusing its discretion.[370]

The Court also decided whether the EPA should do a cost-benefit analysis when deciding air quality standards.[371] Responding to a cross-petition filed by the plaintiffs, the Supreme court agreed to consider

---

362. Browner v. American Trucking Ass'n (this has since become Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001).

363. *Id.*

364. Steve France, *Air of Authority*, A.B.A. J., 33, November 2000; *See generally*, Clean Air Act, 42 U.S.C. §§ 7401-7671.

365. *See* France *supra* note 364, at 33.

366. Clean Air Act, 42 U.S.C. § 7401(b).

367. *Id.*

368. *See* 42 U.S.C. §§ 7401-7671.

369. *See generally, Browner v. American Trucking Ass'n*; Steve France, Air of Authority, ABA Journal, page 33, November 2000; Associated Press, *Justices Study Clean-Air Rules Case*, http://www.nytimes.com/aponline/national/AP-Scotus-Clean-Air.html. ("Some observers believe that if the Supreme court decided the EPA took too much of Congress' power when it set the clean-air rules, it could affect the regulatory power of other federal agencies with broad Congressional mandates.").

370. *Id.*

371. *Id.*

overruling *Lead Industries Assoc. v. EPA*,[372] which held that EPA cannot do a cost-benefit analysis when setting clean air standards absent Congressional language telling it to do so.[373]

The Supreme Court did not overturn the case. If it had, it might have upheld a long-forgotten principle that a D.C. Circuit judge unearthed, the nondelegation doctrine.[374] It tests agency discretion as whether the agency has demonstrated an "intelligible principle" required by the guiding law in making a decision.[375] If the Supreme Court had decided to overturn the case, Congress may have had to give agencies much more specific instructions, thereby limiting agency discretion. Also, the Court could have decided to limit agencies' broad discretionary power even though Congress assigned them only vague mandates (like 'protect the public health') through statutes.[376]

Fortunately for those in favor of agency discretion, a unanimous Supreme Court upheld the EPA's use of discretion to set the stricter pollution guidelines, and decided that the agency does not need to undertake cost-benefit analysis when creating the guidelines.[377] Redefinition of agency discretion on a grand scale now must wait for another day in court or in the Capitol building.

In conclusion, while agencies generally have discretion to make day-to-day decisions based on their areas of expertise, plaintiffs can exploit differences between the often vague language of Congress expressed in statutes that guide the agencies and the agencies' interpretation of those statutes. By keeping in mind the kinds of tests courts use to assess whether decisions are allowed under the agency's discretion, plaintiffs can more effectively hold agencies to statutory standards.

---

372. *Id.*; 647 F.2d 1130 (D.C. Cir. 1980).

373. *Id.*

374. *See* France *supra* note 364, at 33.

375. *Id.*

376. Associated Press, *Justices Study Clean-Air Rules Case*, http://www.nytimes.com/aponline/national/AP-Scotus-Clean-Air.html. ("Some observers believe that if the Supreme Court decided the EPA took too much of Congress' power when it set the clean-air rules, it could affect the regulatory power of other federal agencies with broad Congressional mandates.").

377. Theo Stein, *Clean Air Challenge Rejected*, Denver Post, February 28, 2001, at A1; Robert Greenberger, *Supreme Court Upholds EPA's Authority to Set Standards Under the Clean Air Act*, Wall Street Journal, February 28, 2001 at A2 ("The court held unanimously that the EPA can't consider compliance costs when setting clean-air standards. The court also overturned an appeals court ruling that the EPA usurped Congress' authority in interpreting the 1970 Clean Air Act. The implications of the decision go far beyond clean-air standards. A ruling for the American Trucking Associations, Inc. . . . would have cleared the way for other legal challenges that could have significantly weakened many health and safety rules promulgated by government agencies.").

CONCLUSION

Environmental and natural resources plaintiffs must be certain that they meet standing requirements. Standing is an easy step to overlook when preparing a case that otherwise seems solid. Many requirements, including injury in fact, zone of interest, and redressability, seem on a superficial level easy to meet. Many times they are not. The Tenth Circuit has many avenues by which it might find that the wrong plaintiff has appeared in its hallowed halls. Such a finding results in quick dismissal of an oft-surprised plaintiff.

Once standing is met, the prospect of a Tenth Circuit decision that bows to agency discretion looms. There are a number of avenues by which plaintiffs can prepare for the court's tendency toward such a decision. In effect, plaintiffs should put themselves in the place of the court, assess through the tests provided by the Administrative Procedure Act and *Chevron* how the court might balance factors in the case, then base their strategies on a prediction of the court's approach.

In approaching any case in which agency discretion is at issue, plaintiffs should pay special attention to the overall scope and intent of statutes guiding the agency, especially its controlling legislation. Typically, Congress writes instructions for agencies using a broad pen. Therefore, agencies must make specific, on-the-ground decisions that are based on the broad principles of the statute, but are often arguably discretionary in detail. Plaintiffs can take advantage of the difference between broad, general Congressional intent and specific agency action, and argue that the agencies' decisions did not fall fairly within the scope of the guiding principles. Moreover, plaintiffs should pay special attention to the ways the Tenth Circuit or other courts typically address standing or discretion issues. Finally, plaintiffs must pay attention to cases like *American Trucking* that potentially could undermine agency discretion. Through deliberate and intensive analysis of these points, environmental and natural resource plaintiffs might better avoid a court's acquiescence to agency decisions.

Andrew C. Lillie

COMPUTER LAW

THE CONSTITUTIONAL CONSTRAINTS ON STATE REGULATIONS OF THE INTERNET: *ACLU V. JOHNSON*[1]

INTRODUCTION

What is the Internet? Who controls the World Wide Web? Where are the boundaries in Cyberspace? These are all questions without clear answers. The government has tried to come to terms with a phenomenon that is understood by few and utilized by many. Researchers and scholars alike have attempted to measure the impact of the Internet on society with varying degrees of success. The results of the many attempts to measure the Internet have been unclear simply because there is no accurate way to test the results. Yet, some statistics regarding the impact of the Internet are indeed impressive. For example, one survey estimated that U.S. consumers spent approximately $8.2 billion on online purchases during the 1998 holiday season.[2] The same survey estimated that there were 57,037,000 Internet users as of May 1998.[3] Without doubt this number will have significantly increased by the time this comment is published. The fact remains that the Internet is a medium of both commerce and communication with unknown potential and impact on human society. But with this unique growth comes unique challenges. Nowhere have these challenges been more controversial or more publicly debated than in the American judicial system. Within the last decade, American courts wrestled with the Internet on several occasions. The judicial inquiries primarily focused on the constraints the Constitution imposes on the Internet. These challenges primarily addressed two constitutional concerns: First Amendment guarantees of free speech and the Commerce Clause.

The United States Court of Appeals for the Tenth Circuit recently delivered an opinion on the issue of regulating the dissemination of information over the Internet. In *ACLU v. Johnson*,[4] the court considered the constitutional validity of a New Mexico statute.[5] This decision was one of first impression to the Tenth Circuit. The plaintiffs challenged the New Mexico statute on both First Amendment and Commerce Clause grounds.[6] The court reached its decision to invalidate the New Mexico

---

1. 194 F.3d 1149 (10th Cir. 1999).

2. World Wide Web User Statistics, *available at* http://www.why-not.com/company/stats.htm (last visited March 1, 2000).

3. *Id.*

4. 194 F.3d 1149 (10th Cir. 1999).

5. N.M. STAT. ANN. § 30-37-3.2 (1999) (preliminarily enjoined from enforcement at ACLU v. Johnson, 194 F.3d 1149, 1164 (1999)).

6. 194 F.3d at 1152 (10th Cir. 1999).

statute by relying heavily upon a recent United States Supreme Court decision, *Reno v. ACLU.*[7] The primary challenge to the statute in *Johnson* alleged that the New Mexico statute placed an unconstitutional burden on the First Amendment's free speech guarantees.[8] The Tenth Circuit focused primarily on the First Amendment issue in invalidating the statute. Therefore, the primary concern of this comment is to examine the First Amendment implications of the *Johnson* decision by the Tenth Circuit.

Part I of this comment provides a brief historical context within which the Court recently decided *ACLU v. Johnson.*[9] Part II examines the ramifications of the decision with respect to First Amendment guarantees and future regulation of information distributed over the internet. Part III discusses the application of the Commerce Clause in the context of regulating information distributed over the internet. Finally, Part IV analyzes the future implications of *Johnson* and relevant United States Supreme Court decisions.

I. HISTORICAL BACKGROUND

The recent Tenth Circuit decision in *ACLU v. Johnson*[10] arose in the context of the explosive growth of the internet both as a means of communication and as an instrument of commerce. The phenomenal growth of the Internet attracted the attention of concerned state and federal legislators. Accordingly, the internet also produced constitutional challenges as a by-product of its unprecedented growth.[11] In reaching its decision in *Johnson*, the Tenth Circuit relied heavily upon the United States Supreme Court decision in *Reno v. ACLU* (hereinafter "*Reno II*").[12] This

---

7. 521 U.S. 844 (1997).

8. 194 F.3d at 1153 (10th Cir. 1999).

9. 521 U.S. 844 (1997).

10. 194 F.3d 1149 (10th Cir. 1999).

11. *See* Reno v. ACLU (*"Reno I"*), 929 F. Supp. 824 (E.D. Pa. 1996)(preliminarily enjoining the enforcement of the Communications Decency Act (CDA), 47 U.S.C.A. § 223(a), (b)); Reno v. ACLU ("Reno II"), 521 U.S. 844, 885 (1997) (affirming the United States District Court for the Eastern District of Pennsylvania in granting a preliminary injunction against the enforcement of the Communications Decency Act (CDA), 47 U.S.C.A. § 223(a), (b) (1999)); ACLU v. Reno ("Reno III"), 31 F. Supp. 2d 473 (E.D. Pa. 1999) (affirming a preliminary injunction enjoining enforcement of the Child Online Protection Act (COPA) 47 U.S.C.A. § 231(1999)); ACLU v. Reno ("Reno IV"), 217 F.3d 162 (3d Cir. 2000)(affirming the District Court in *Reno III*);United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (U.S. 2000); PSINet, Inc. v. Chapman, 108 F. Supp. 2d 611 (W.D. Va. 2000) (granting a preliminary injunction against the enforcement of Va. Code Ann. § 18.2-391 (Mich. Supp. 1999) (amended 2000)); Cyberspace Comm., Inc. v. Engler, 55 F. Supp. 2d 737 (E.D. Mich. 1999) (granting preliminary injunction against the enforcement of Michigan law, Pub. Act No. 33 (1999), amending Mich. Comp. Laws § 722.671); Hatch v. Superior Ct., 94 Cal. Rptr. 2d 453 (Cal. App. 4th Dist. 2000) (upholding California law regulating the Internet as Constitutional as applied).

12. 521 U.S. 844 (1997).

case struck down a portion of a federal statute[13] that sought to regulate the dissemination of materials deemed harmful to minors over the Internet.[14] The Court held that the federal statute was unconstitutionally vague and overbroad and that the statute violated the First Amendment guarantee of freedom of speech.[15] Since *Reno II* played a prominent role in the Tenth Circuit's decision in *Johnson*, *Reno II* deserves closer examination.

The Telecommunications Act of 1996[16] promoted the primary Congressional goal to "reduce regulation and encourage the rapid deployment of new telecommunications technologies."[17] This Act contains seven titles, one of which (Title V) is known as the "Communications Decency Act of 1996" (hereinafter *CDA*).[18] On February 8, 1996, twenty plaintiffs filed suit in the United States District Court for the Eastern District of Pennsylvania against the Attorney General of the United States and the Department of Justice.[19] The plaintiffs included the American Civil Liberties Union (hereinafter *ACLU*), Human Rights Watch, Electronic Privacy Information Center and other such potentially effected parties.[20] These plaintiffs challenged the constitutionality of §§223(a)(1) and 233(d) of the CDA.[21] The District Court entered a temporary restraining order against the enforcement of §223(a)(1)(B)(ii).[22]

---

13. The Court struck down a portion of the Communications Decency Act of 1996, located at 47 U.S.C. § 223(a) and 223(d). Section 223(a) stated in pertinent part: "(a) Whoever—(1) in interstate or foreign communications—(B) by means of a telecommunications device knowingly—(I) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication; (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both." Section 223(d) stated in pertinent part: "(d) Whoever—(1) in interstate or foreign communications knowingly—(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication, or (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both."

14. *Reno*, 521 U.S. at 857.

15. *Id.*

16. PUB. L. 104-104, 110 STAT. 56.

17. *Reno*, 521 U.S. at 857 (citing the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. at 56).

18. *Id.*

19. *Id.* at 861.

20. *Id.*

21. *Id.*

22. *Id.*

Twenty-seven additional plaintiffs also challenging the provisions of the CDA subsequently filed a second suit.[23] The two suits were consolidated and evidentiary hearings were held before a three-judge panel.[24] Following these hearings, each judge issued a separate opinion, unanimously holding that the CDA was likely unconstitutional and granting an injunction against its enforcement.[25] The government appealed this decision directly to the United States Supreme Court by invoking §561 of the CDA.[26]

On appeal, the government argued that the District Court erred in finding that the CDA violated both the First and Fifth Amendment of the Constitution.[27] The Supreme Court affirmed the District Court's holding on First Amendment grounds without addressing the Fifth Amendment contentions.[28] The government relied upon *Ginsburg v. New York,*[29] *FCC v. Pacifica Foundation,*[30] and *Renton v. Playtime Theatres*[31] to argue that the challenged provisions of the CDA were constitutional.[32] The Supreme Court distinguished each of these decisions from the present scenario in *Reno II.*[33]

Ginsburg v. New York upheld the constitutionality of a New York statute that prohibited the selling of material that was considered obscene for minors to persons less than seventeen years of age.[34] The case involved the criminal prosecution of a storeowner who sold two "girlie" magazines to a sixteen-year-old boy.[35] The Supreme Court reasoned that obscene materials are not within the area of constitutionally protected speech.[36] However, under the Court's rationale, the "girlie" magazines involved in *Ginsburg* were not obscene for adults.[37] The statute in question did not restrain the defendant from selling such items to persons seventeen years or older.[38] The statute merely required that such material

23. *Id.*
24. *Id.*
25. *Id.* at 862-64. Chief Judge Sloviter concluded that the terms of the CDA were overbroad and could not reasonably be read narrowly. 929 F. Supp. at 853-55. Judge Buckwalter concluded that terms "indecent", "patently offensive", and "in context" in § 223(d)(1) were unconstitutionally vague. 929 F. Supp. at 863-65. Judge Dalzell concluded that the CDA would "abridge significant protected speech." 929 F. Supp. at 867-79.
26. *Id.* at 864.
27. *Id.*
28. *Id.*
29. 390 U.S. 629 (1968).
30. 438 U.S. 726 (1978).
31. 475 U.S. 41 (1986).
32. *Reno,* 521 U.S. at 864.
33. *Id.*
34. *Ginsburg,* 390 U.S. at 633.
35. *Id.* at 631.
36. *Id.* at 635 (citing Roth v. United States, 354 U.S. 476, 485 (1957).
37. *Id.* at 634 (citing Redrup v. State of New York, 386 U.S. 767 (1967).
38. *Id* at 634-35.

not be sold to persons under age seventeen.[39] The Court concluded that the state had an interest in protecting the well being of its children, that the materials in question could reasonably be held to impair the ethical and moral development of minors.[40] Ultimately, the Court held that the statute did not violate any constitutional guarantees.[41]

The *Reno II* Court found several significant facts that differentiated the instant situation from the facts found in *Ginsburg*. First, the *Ginsburg* statute did not prohibit the sale of "girlie" magazines to parents who wished to provide the magazines to their children.[42] However, under the CDA, neither parental consent nor parental participation would avoid the criminal sanctions.[43] Second, the *Ginsburg* statute applied exclusively to commercial transactions[44] while the CDA contained no limitations on the type of speech to which it applied.[45] Third, the *Ginsburg* statute defined materials that were harmful to minors as those "utterly without redeeming social importance for minors."[46] In *Reno II*, however, the CDA provided no such requirement.[47] Finally, the *Ginsburg* statute defined minors as under age seventeen while the CDA defined minors as those under age eighteen.[48] The *Reno II* Court felt that this additional year might be significant in regulating access to indecent materials.[49]

The government also relied upon *Federal Communications Commission v. Pacifica Foundation*[50] (hereinafter *Pacifica*) on appeal in *Reno II*. In *Pacifica*, the Court upheld a declaratory order of the Federal Communications Commission (hereinafter *FCC*), which concluded that an afternoon radio broadcast of a comedic monologue was indecent.[51] The *Pacifica* Court held that the ease of access by children to the broadcast "coupled with the concerns recognized in *Ginsburg* justified special treatment of indecent broadcasting."[52] The *Reno II* Court distinguished the *Pacifica* holding on several grounds. First, the FCC, an agency that regularly regulates radio transmissions, issued the order in *Pacifica*.[53] Further, the FCC regulation concerned a specific broadcast with respect to when, rather then whether, it would be permissible to broadcast such a

---

39. *Id.*
40. *Id.* at 641-45.
41. *Id.*
42. *Reno*, 521 U.S. at 865 (citing *Ginsburg*, 390 U.S. at 639).
43. *Id.* at 865.
44. *Id.* (citing *Ginsburg*, 390 U.S. at 647).
45. *Id.*
46. *Id.* (citing *Ginsburg*, 390 U.S. at 646).
47. *Id.* (citing CDA § 223(a)(1); § 223(d)).
48. *Id.* at 865-66.
49. *Id.* at 866.
50. 438 U.S. 726 (1978).
51. *Reno*, 521 U.S. at 866 (citing *Pacifica*, 438 U.S. at 730).
52. *Id.* at 866-67 (citing *Pacifica*, 438 U.S. at 749-750).
53. *Id.* at 867.

program via radio transmission.[54] In contrast, the CDA prohibitions did not provide for particular times when the dissemination of indecent material would be accepted and the CDA prohibitions are not subject to any government agency control.[55] Second, the Commission's "order was not punitive," while the CDA is punitive in nature.[56] Finally, the Commission's order applied to radio broadcast, a medium of communication that historically limited First Amendment protections.[57] In contrast, the Internet has no such history of regulation.[58] Further, the *Reno II* Court noted that the risk of accidental encounter of indecent material by minors is much more remote on the internet in comparison to radio broadcast due to a series of affirmative steps that are required to access materials on the internet.[59] In light of these factual differences, the Court held that *Pacifica* was not directly applicable to the facts of *Reno II*.[60]

Finally, the government in *Reno II* relied on *Renton v. Playtime Theatres, Inc.*[61] to argue that the CDA was constitutionally sound.[62] The *Renton* Court upheld a zoning ordinance that prohibited adult theaters in residential neighborhoods.[63] The Court upheld this ordinance because its focus was not the offensive nature of the theaters themselves, but rather the "secondary effects" such as crime and deteriorating property values.[64] The *Reno II* Court held that the CDA was not a similar type of "time, place, and manner regulation" as was the ordinance in *Renton*.[65] Rather, the Court held that the CDA was a "content-based, blanket restriction on speech, and as such cannot be 'properly analyzed as a form of time, place, and manner regulation.'"[66] Therefore, the *Reno II* Court held that all three of the government's key precedents were inapposite to the facts before it on appeal.[67]

After reviewing the government's key cases, the *Reno II* Court considered the proper standard of scrutiny to apply in content-based regulation of the internet. The Court noted that "each medium of expression . . . may present its own problems."[68] Additionally, the Court agreed with the District Court's finding that "communications over the Internet do not

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* (citing *Pacifica*, 438 U.S. at 748).
58. *Id.*
59. *Id.*
60. *Id.* at 868.
61. 475 U.S. 41 (1986) (hereinafter *Renton*).
62. *Reno*, 521 U.S. at 864.
63. *Id.*
64. *Renton*, 475 U.S. at 49.
65. *Reno*, 521 U.S. at 868.
66. *Id.* (quoting *Renton*, 475 U.S. at 46).
67. *Id.*
68. *Id.* (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975)).

'invade' an individual's home or appear on one's computer screen unbidden."[69] Thus, the Court recognized the unique characteristics of the internet as a medium of expression. This unique nature became the cornerstone of the Court's analysis and conclusion.

First, the Court considered the claim that the challenged provisions of the CDA were unconstitutionally vague and a violation of the First Amendment. Specifically, the Court addressed the statutory term "indecent"[70] and the statutory phrase "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[71] The Court reasoned that the lack of definition of these terms would "provoke uncertainty among speakers about how the two standards relate to each other . . . ."[72] The effect of the ambiguity and uncertainty surrounding these terms, in combination with the potential criminal consequences that would result from a violation, lead the Court to conclude that this ambiguous legislation was a content-based regulation that would have an "obvious chilling effect on free speech."[73] The government countered by arguing that the CDA was no more vague than the obscenity standard provided in *Miller v. California*.[74]

In *Miller v. California*,[75] the Court set forth a test for obscenity, which still controls today. The *Miller* test provides that:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[76]

The government asserted that because the CDA's term "patently offensive" is one part of the *Miller* test, the CDA could not be unconstitutional.[77] However, the Court found this argument unpersuasive because the *Miller* test contains a crucial requirement that the CDA did not require. The *Miller* test requires that the proscribed materials be "specifically defined by the applicable state law."[78] The Court reasoned that this requirement would reduce the vagueness found in the "patently offen-

---

69. *Id.* at 869 (quoting *Reno I*, 929 F. Supp. at 844 (finding 88)).
70. *As used in* 47 U.S.C.A. § 223(a).
71. *As used in* 47 U.S.C.A. § 223(d).
72. *Id.* at 871.
73. *Id.* at 872.
74. *Reno*, 521 U.S. at 872 (citing *Miller*, 413 U.S. 15 (1973)).
75. 413 U.S. 15 (1973).
76. *Reno*, 521 U.S. at 872 (citing *Miller*, 413 U.S. at 24).
77. *Id.* at 873.
78. *Id.* (quoting *Miller*, 413 U.S. at 24).

sive" standard of the CDA.[79] Yet such a requirement is not contained in the text of the CDA.[80] Therefore, the Court found the CDA to be inherently vague while the *Miller* test provided adequate protections against vague definitions of proscribed speech in content-based regulations.[81]

The *Reno II* Court also briefly considered the other two prongs of the *Miller* test. The Court first addressed the requirement that the material lack "serious literary, artistic, political, or scientific value."[82] The Court noted that in prior applications of this prong of the *Miller* test, the requirement is "not judged by contemporary community standards."[83] Thus, this "societal value" requirement allows courts to set forth a national standard for a "socially redeeming value."[84] The *Reno II* Court took notice that the CDA could not simultaneously adhere to the *Miller* test requirement of applying the "community standards" test as a question of fact, left to a jury, and also provide a uniform national standard of content regulation.[85] As the Court noted in *Miller*, the determination of "what appeals to the 'prurient interest' or is 'patently offensive' are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation."[86] Yet, while the CDA was under Committee consideration in the Senate, the conference reports assert that the "CDA was intended 'to establish a uniform national standard of content regulation.'"[87] The *Reno II* Court concluded that the CDA clearly contrasted with the test set forth in *Miller*, and as a result, it "presents a greater threat of censoring speech that in fact, falls outside the statute's scope."[88] Thus, the CDA was held to be an over-inclusive restriction of speech based upon content.[89]

In construing the CDA as an over-inclusive, content-based restriction, the *Reno II* Court moved to consider the necessary standard of review arising from a challenge to the First Amendment.[90] Precedent clearly dictated the rule that in the consideration of free speech rights of adults, "sexual expression which is indecent but not obscene is protected

---

79. *Id.*
80. *Id.*
81. *See Reno*, 521 U.S. at 874.
82. *Id.* at 873 (quoting *Miller*, 413 U.S. at 24).
83. *Id.* (quoting *Pope v. Illinois*, 481 U.S. 497, 500 (1987)).
84. *Id.*
85. *Id.* at 873, n.39.
86. *Id.* (quoting *Miller*, 413 U.S. 15, 30).
87. *Id.* at n. 39. (quoting S. Conf. Rep. No. 104-230, p. 189, 191 (1996), 142 Cong. Rec. H1145, H1165-H1166 (Feb. 1, 1996)).
88. *Id.* at 874.
89. *Id.*
90. *Id.* at 874-75.

by the First Amendment."[91] The government asserted that it held a legitimate state interest in protecting children from indecent material by the enactment of the CDA.[92] However, under a strict scrutiny test the Court noted that the "burden placed upon adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate state purpose that the statute was enacted to serve."[93] The Court did not explicitly consider whether or not the asserted governmental interest in protecting minor children was indeed a legitimate state interest; rather, it merely assumed that such an interest was legitimate and moved to consider the effects of the statute itself on adult speech.[94]

In evaluating the effects of the CDA, the Court acknowledged that despite its prior recognition of a governmental interest in protecting children from harmful materials,[95] such an interest "does not justify an unnecessarily broad suppression of speech addressed by adults . . . the Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'"[96] The mere fact that the stated purpose of the CDA was to protect children was not conclusive with respect to its Constitutional validity; rather, the Court recognized that its role in such situations was to "make sure that Congress has designed its statute to accomplish its purpose 'without imposing an unnecessarily great restriction on speech.'"[97] The Court agreed with the District Court's factual analysis, which suggested that the over-breath of the CDA would curtail the ability of adults to communicate over the internet.[98] The District Court noted that at the time of trial, no technology existed to provide an effective method for a sender of information to assure that only adults accessed that information.[99] Additionally, the requirement of such age verification systems would be "prohibitively expensive for non-commercial as well some commercial speakers" to implement and utilize.[100]

In the final weighing of the prohibitive effects of the CDA on adult speech against the state's interest in protecting children, the *Reno II* Court ultimately held the challenged terms of the CDA to be facially

---

91. *Id.* at 874 (quoting *Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

92. *Id.*

93. *Id.*

94. *See generally* Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427 (discussing the need for the Supreme Court to more fully consider the asserted government interests in cases involving the regulation of the content of speech, where the protection of children is the stated purpose of the law).

95. *Reno*, 521 U.S. at 875 (citing *Ginsburg*, 390 U.S. at 639; *Pacifica*, 438 U.S. at 749).

96. *Id.* (quoting *Denver Area Ed. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 759 (1996)).

97. *Id.* at 876 (quoting *Denver Area Ed.*, 518 U.S. at 741).

98. *Id.*

99. *Id.* at 876.

100. *Id.* at 877.

over-broad, imposing an undue restriction on the content of speech.[101] In the concluding words of the Court, "government regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interests in encouraging freedom of expression in a democratic society outweigh any theoretical but unproven benefit of censorship."[102]

Since the delivery of the *Reno II* decision, several other federal courts considered similar challenges to state statutes that had substantially similar language and goals.[103] The recent Tenth Circuit decision in *ACLU v. Johnson*[104] is one such case.

II. FIRST AMENDMENT GUARANTEES

A. *ACLU v. Johnson*

1. Facts

The plaintiffs in *ACLU v. Johnson*[105] consisted of a large group of individuals affected by a New Mexico statute[106] that sought to regulate the dissemination of information to minors over the internet. The plaintiffs included the ACLU, Feminist.com, Full Circle Books, OBGYN.net, Santa Fe Online and several others.[107] The defendants were Gary Johnson, the Governor of New Mexico, and Patricia A. Madrid, the Attorney General of New Mexico.[108]

The statute in question sought to criminalize the computerized dissemination of materials harmful to minors.[109] This statute stated in relevant part:

> Dissemination of material that is harmful to a minor by computer consists of the use of a computer communications system that allows the input, output, examination or transfer of computer data or computer programs from one computer to another, to knowingly and intentionally initiate or engage in communication with a person under eighteen years of age when such communication in whole or in part depicts actual or simulated nudity, sexual intercourse or any other

---

101. *Id.*
102. *Id.* at 885.
103. *See* cases, *supra* note 11.
104. 194 F.3d 1149 (10th Cir. 1999).
105. *Id.*
106. N.M. STAT. ANN. § 30-37-3.2 (1999).
107. *ACLU*, 194 F.3d at 1149.
108. *Id.*
109. N.M. STAT. ANN. § 30-37-3.2 (1999).

> sexual conduct. Whoever commits dissemination of material that is harmful to a minor by computer is guilty of a misdemeanor.[110]

The plaintiffs based their initial challenge in the United States District Court for the District of New Mexico on the grounds that the criminal statute regulating the content of material on the Internet violated the First, Fifth, and Fourteenth Amendments as well as the Commerce Clause of the United States Constitution.[111] The plaintiffs sought a preliminary and permanent injunction against the enforcement of the statute in question.[112] The District Court addressed the preliminary issues of standing, the bar against such a suit provided in the Eleventh Amendment, and the necessity for the court to abstain from granting an injunction until the New Mexico Supreme Court had an opportunity to interpret the language of the statute.[113] The District Court held that the plaintiffs had proper standing to bring this suit, the Eleventh Amendment did not bar this suit, and the issue was ripe for judicial review. The District Court granted the plaintiffs' motion for a preliminary injunction, therein prohibiting enforcement of the statute.[114] The defendants appealed this decision.[115]

The decision by the Tenth Circuit considered the appeal brought by the defendants.[116] The defendants argued on appeal that the plaintiffs lacked standing to bring this suit; that the court erred in determining that the plaintiffs were likely to succeed on the merits of their challenge; that the court erroneously held that the plaintiffs would suffer irreparable harm unless the injunction was issued; and that the court reached various other erroneous legal conclusions.[117] The Tenth Circuit ultimately affirmed the District Court's decision to grant the preliminary injunction.[118]

2. Standing

The Court of Appeals first addressed the defendants' challenge to the plaintiffs' standing. The court noted that "standing is a threshold

---

110. N.M. STAT. ANN. § 30-37-3.2 (A) (1999).

111. ACLU v. Johnson, 4 F. Supp. 2d 1024, 1026 (D.N.M. 1998). The First Amendment states in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ." The Fifth Amendment states in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." The Fourteenth Amendment, Section 1 states in relevant part: ". . . [N]or shall any State deprive any person of life, liberty, or property without due process of law . . . ." Article II, Section 8, Paragraph 1,3 states in relevant part: "The Congress shall have Power . . . 3. To regulate Commerce with foreign Nations, and among the several States . . . ."

112. *Id.*

113. *ACLU*, 194 F.3d at 1153.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 1153-54.

118. *Id.* at 1163.

issue,"[119] and in order to establish standing, the plaintiffs "must have suffered an 'injury in fact.'"[120] Thus, in order to demonstrate that they suffered an "injury in fact" the plaintiffs had to show "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[121] The defendants argued that because the statute had not been enforced, the plaintiffs lacked standing.[122] In fact, the statute in question was not effective at the time the plaintiffs brought the suit.[123] Thus, the defendants argued that the plaintiffs had not suffered any "real and concrete threat of prosecution from law enforcement authorities."[124] The court disagreed.[125]

The Tenth Circuit's reasoning on this issue relied heavily upon *Lujan v. Defenders of Wildlife*.[126] In *Lujan*, the Court stated that "[n]o one should have to go through being arrested for a felony, publicly shamed, and pay for a defense only to have a court find that the newly enacted statute is unconstitutional. This can, and should, be determined before such injury occurs."[127] Additionally, the instant court reasoned that the issue in this case was ripe for review.[128] The court stated, "if a threatened injury is sufficiently 'imminent' to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied."[129] Further the court recognized that "customary ripeness analysis . . . is . . . relaxed somewhat . . . where a facial challenge implicating First Amendment values, is brought."[130] Thus, the court reasoned, "in that situation, 'reasonable predictability of enforcement or threats of enforcement, without more, have sometimes been enough to ripen a claim.'"[131] Accordingly, the Court affirmed the District Court's holding

---

119. *Id.* at 1154 (citing Keys v. School Dist. No. 1, 119F.3d 1437, 1445 (10th Cir. 1997)).

120. *Id.* (citing Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1572 (10th Cir. 1995) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

121. *Id.* (quoting *Lujan*, 504 U.S. at 560).

122. *Id.*

123. N.M. STAT. ANN. § 30-37-3.2 (effective date July 1, 1998). The U.S. District Court for the District of New Mexico issued its decision granting plaintiffs' motion for a preliminary injunction against the enforcement of this statute on June 24, 1998. 4. F.Supp. 2d at 1024 (D.N.M. 1998). Thus, the injunction was granted prior to the date that the statute in question was to become effective.

124. *ACLU*, 194 F. 3d at 1154 (citing Defendants' brief at 43).

125. *Id.*

126. 504 U.S. 555 (1992).

127. *ACLU*, 194 F.3d at 1154 (citing *Lujan*, 504 U.S. at 564 n.2).

128. *Id.* at 1155.

129. *Id.* at 1155 (quoting Nat'l Treasury Employees Union v. United States, 101 F.3d 1423, 1428 (D.C. Cir. 1996)).

130. Id. (quoting New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499 (10th Cir. 1995)).

131. *Id.* (citing *Gonzales*, 64 F.3d at 1499 (10th Cir. 1995) (quoting Martin Tractor Co. v. Federal Election Comm'n, 627 F.2d 375, 380 (D.C. Cir. 1980))).

that the plaintiffs had proper standing to bring this suit before the court.[132]

3. First Amendment

The District Court held that the New Mexico statute in question violated the First and Fourteenth Amendments "because it effectively bans speech that is constitutionally protected for adults;" it does not "directly and materially advance a compelling governmental interest;" it is not "the least restrictive means of serving its stated interest;" it "interferes with the rights of minors to access and view material that to them is protected by the First Amendment;" it is "substantially overbroad;" and it "prevents people from communicating and accessing information anonymously."[133] The defendants challenged these findings on appeal by arguing that the statute "can and must be read narrowly, and so narrowed, the statue is constitutional under the authority of *Ginsburg v. New York.*"[134] The court ultimately rejected the defendants' argument and affirmed the findings of the lower court on this issue.[135] In reaching its conclusion, the Tenth Circuit relied heavily upon the recent decision of *Reno v. ACLU (Reno II).*[136]

The United States Supreme Court stated that the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."[137] Further, the Court noted that "sexual expression which is indecent but is not obscene is protected by the First Amendment."[138] Thus, the Court held that although a "compelling" governmental interest existed in "protecting the physical and psychological well-being of minors;" nevertheless, the means chosen by the government must be "carefully tailored" to meet that end.[139] The Court applied this same standard of "strict scrutiny" to the content-based regulation found in *Reno v. ACLU (Reno II).*[140]

In *Reno II*, the Supreme Court held that portions of the Communications Decency Act (CDA)[141] violated the First Amendment.[142] The *Reno*

---

132. *Id.*

133. *Id.* at 1156.

134. *ACLU*, 194 F.3d at 1156 (citing Ginsburg v. New York, 390 U.S. 629 (1968)).

135. *Id.*

136. 521 U.S. 844 (1997).

137. *Johnson*, 194 F. Supp. 2d at 1156 (quoting *Sable* Communications Inc. v. FCC, 492 U.S. 115, 126 (1989)). This is essentially a "strict scrutiny" test utilized where fundamental rights are implicated.

138. *Id.* (quoting *Sable Comm.*, 492 U.S. at 126 (1989)).

139. *Id.* (quoting *Sable Comm.*, 492 U.S. at 126 (1989)).

140. *Id.* (discussing *Reno v. ACLU*, 521 U.S. at 870). *See* discussion of *Reno II*, 521 U.S. 844 (1997), *infra* Part I.

141. 47 U.S.C. § 223(a)(1), (d) (2000).

142. *ACLU*, 194 F.3d at 1156.

II Court concluded that "given the size of the potential audience for most messages...the sender must be charged with knowing that one or more minors will likely view it."[143] Additionally, the Court viewed the potential costs to the many non-commercial users of the internet to verify the age of its viewers would be prohibitive of speech.[144] Thus, the Court held that the CDA placed too heavy a burden on the exercise of protected speech and therefore the challenged provisions were unconstitutionally vague and overbroad.[145]

The Tenth Circuit *Johnson* decision followed essentially the same rationale in determining that the New Mexico statute in question was also unconstitutionally vague and broad. In *Johnson*, the court noted that the similarity between the CDA discussed in *Reno II* and the New Mexico statute currently in question compelled the same result.[146] In *Johnson*, as in *Reno II*, the government argued that the statute in question could and should be construed narrowly.[147] The government in *Johnson* argued that the statute would only apply in situations where an adult sender of a message "knowingly and intentionally" sends a harmful message directly to a minor.[148] Therefore, the statute would not apply to chat rooms or other situations where both adults and children were involved simultaneously.[149] The government, like in *Reno II*, attempted to liken the scenario here to the one faced in *Ginsburg v. New York*.[150] Both the *Reno II* and *Johnson* courts determined the situation in *Ginsburg* to be factually different from the regulations presented in both cases.[151]

In *Ginsburg*, the Court addressed the sale of sexually explicit materials in a face-to-face situation.[152] In contrast, both the *Reno II* and *Johnson* situations involved the dissemination of sexually explicit materials over the Internet. The *Johnson* court agreed with the *Reno II* Court that the regulation of information being disseminated over the internet introduced new problems that more fully, and consequently unduly, restricted the freedom of speech and expression.[153] The *Johnson* court noted that the unique nature of the internet does not allow for accurate, in person age verification prior to the dissemination of sexually explicit materials.[154] Similarly, as noted by the Supreme Court in *Reno II*, the

143. *Reno II*, 521 U.S. at 876.
144. *Id.* at 876-77.
145. *Id.* at 885-86.
146. *Johnson*, 194 F.3d at 1158.
147. *Id.*
148. *Id.*
149. *Id.*
150. 390 U.S. 629 (1968).
151. *Johnson*, 194 F.3d at 1158. *See* discussion of *Ginsburg*, *infra* Part I.
152. *Id.*
153. *Id.*
154. *Id.*

Johnson court recognized that "[t]he Internet does not distinguish between minors and adults in their audience. To comply with the Act, a communicant must speak only in language suitable for children."[155] The chilling effect on the otherwise protected adult speech by both the CDA in *Reno II* and the New Mexico statute in *Johnson*, coupled with the inability of internet information providers to perform physical age verification, led the *Johnson* court to conclude that *Ginsburg* did not apply to content based restrictions of information disseminated via the internet.[156]

Finally, the government in *Johnson* argued that the defenses explicitly provided in the New Mexico statute in question allowed for a narrow reading, thereby saving an otherwise invalid unconstitutional provision.[157] The court disagreed.[158] The defense to which the government referred provided a "good faith" defense.[159] This "good faith" defense essentially allowed parties who disseminated harmful information over the internet to plead an affirmative defense that they took reasonable steps to restrict access to the information by minors.[160] In *Johnson*, the court concluded that these defenses did "not salvage an otherwise unconstitutionally broad statute."[161] This holding was similar to the Supreme Court decision with respect to comparable statutory defenses encountered in *Reno II*[162] and by the district court in *Cyberspace Communications, Inc.*[163] Thus, the statutory defenses for "good faith" efforts by

---

155. *Id.* (citing Cyberspace Comm., Inc. v. Engler, 55 F. Supp. 2d 737, 747 (E.D. Mich. 1999)).

156. *Id.* at 1160.

157. *Id.*

158. *Id.*

159. *Id.* at 1152.

160. N.M. Stat. Ann. § 30-37-3.2(C) (1999). This portion of the statute stated in relevant part:

> (C) In a prosecution for dissemination of material that is harmful to a minor by computer, it is a defense that the defendant has: (1) in good faith taken reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to indecent materials on computer, including any method that is feasible with available technology; (2) restricted access to indecent materials by requiring the use of a verified credit card, debit account, adult access code or adult personal identification number; or (3) in good faith established a mechanism such as labeling, segregation or other means that enables the indecent material to be automatically blocked or screened by software or other capability reasonably available to persons who wish to effect such blocking or screening and the defendant has not otherwise solicited a minor not subject to such screening or blocking capabilities to access the indecent material or to circumvent the screening or blocking.

N.M. Stat. Ann. § 30-37-3.2(C).

161. *Johnson*, 194 F.3d. at 1160.

162. *Id.* (citing *Reno*, 521 U.S. at 882).

163. *Id.* (citing *Cyberspace Comm. Inc.*, 55 F. Supp. 2d at 751). In *Cyberspace Comm. Inc.*, the United States District Court for the Eastern District of Michigan, Southern Division, addressed a challenge to an amendment to a Michigan statute (Pub. Act No. 33 (1999), amending Mich. Comp. Laws § 722.671 et seq.). *Cyberspace Comm. Inc.*, 55 F. Supp.2d at 740. This amendment prohibited the use of computers or the Internet to disseminate sexually explicit materials to minors. *Id.* The plaintiffs sought a preliminary injunction against the enforcement of this amendment, arguing that it violated the First Amendment and the Commerce Clause of the U.S. Constitution. *Id.*

defendants have not been held to provide adequate protections against the otherwise unconstitutional restraint placed upon protected speech in any statutes attempting to regulate the dissemination of indecent materials to minors via the internet.

III. COMMERCE CLAUSE

The *Johnson* court next considered the effects of the New Mexico statute on the Commerce Clause.[164] The defendants argued that the New Mexico statute in question sought to regulate merely intrastate activities; and therefore, the statute did not violate the Dormant Commerce Clause of the Constitution.[165] Again, the court returned to the unique nature of the internet in its analysis. The court noted that the geographic limitations placed upon states' jurisdictional limits in the field of commercial regulation do not easily apply to commerce via the internet.[166] The court stated that given the lack of geographic limitations on the internet, it is impossible to regulate only those communications that occur within the geographic borders of a single state.[167] The statute "cannot effectively be limited to purely intrastate communications over the internet because no such communications exist."[168] As a result, any state statute, including the one in question in *Johnson*, regulates conduct outside the state; and therefore, violates the Commerce Clause limitations of the United States Constitution. Thus, the *Johnson* court held that the New Mexico statute "represents an attempt to regulate interstate conduct occurring outside New Mexico's borders, and is accordingly a per se violation of the Commerce Clause."[169]

Second, the *Johnson* court considered the burden placed upon interstate commerce in comparison to the local benefit.[170] The defendants argued that the state of New Mexico held a significant interest in protecting minors from sexually explicit materials.[171] The court noted that the local benefits to New Mexico were insubstantial.[172] If the court were to read the statute as the defendants proposed, then this statute would affect only one-on-one communications between a New Mexico sender

---

The District Court held that the amendments, if enforced against the plaintiffs, would indeed violate the First and Fourteenth Amendments, and the Commerce Clause of the U.S. Constitution. *Id.* at 753. Thus, the court granted a preliminary injunction against the enforcement of the amendments against the plaintiffs. *Id.* at 754.

164. *Johnson*, 194 F.3d at 1160.

165. *Id.* at 1161.

166. *Id.*

167. *Johnson*, 194 F.3d at 1160. (citing Am. Libraries Ass'n v. Pataki, 969 F.Supp 160, 168-69 (S.D.N.Y. 1997)).

168. *Johnson*, 194 F.3d at 1160. (citing *Am. Libraries Ass'n*, 969 F.Supp at 171).

169. *Johnson*, 194 F.3d at 1160.

170. *Id.*

171. *Id.*

172. *Id.*

and a New Mexico recipient whom the sender knew to be a minor.[173] Additionally, given the fact that this statute could not affect materials sent from international sources, the court reasoned that this statute would "almost certainly fail to accomplish the government's interest in shielding children from pornography on the Internet."[174] Accordingly, the court held that these "limited local benefits '[are] an extreme burden on interstate commerce.' Thus, section 30-37-3.2(A) constitutes an invalid indirect regulation on interstate commerce."[175]

Finally, on the issue of Commerce Clause violation, the *Johnson* court considered the District Court's holding that the New Mexico statute unconstitutionally imposes inconsistent regulations on the internet.[176] The Court of Appeals agreed with the lower court's holding that the statute did indeed impose inconsistent regulation on the internet, and that "the Internet, like . . . rail and highway traffic . . . requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations."[177] Thus, the Court held that the statute violated the Commerce Clause limitations on state actions and was invalid.[178]

A. *Conclusion*

In sum, the Court of Appeals held the New Mexico statute in question was unconstitutional, invalid and unenforceable against the plaintiffs.[179] The Court noted that its discussion of the Commerce Clause challenges was unnecessary, but nonetheless instructive and important.[180] As a result of its holding, the Court of Appeals granted the plaintiffs' requested injunction prohibiting the enforcement of the New Mexico statute.[181]

1. Post-Johnson Decisions

Since the *Johnson* decision from the Tenth Circuit was issued on November 2, 1999, there have been some new developments in this area of Constitutional Law. On October 21, 1998, Congress enacted the Child Online Protection Act (COPA) into law.[182] COPA attempted to "'address[] the specific concerns raised by the Supreme Court' in invalidating the Communications Decency Act (CDA)."[183] The Supreme Court in

173. *Id.* at 1162.
174. *Id.*
175. *Id.* (quoting Am. Libraries Ass'n v. Pataki, 969 F.Supp. 160, 179 (S.D.N.Y. 1997)).
176. *Johnson*, 194 F.3d at 1162.
177. *Johnson*, 194 F.3d at 1162. (quoting *American Libraries Ass'n*, 969 F. Supp. at 182).
178. *Johnson*, 194 F.3d at 1163.
179. *Id.*
180. *Id.* at 1160.
181. *Id.* at 1164.
182. ACLU v. Reno (*Reno IV*), 217 F.3d 162, 166 (3d Cir. 2000).
183. *Id.* at 167 (quoting H.R. REP. NO. 105-775 at 12 (1998).

Reno II, discussed above, previously invalidated the CDA.[184] In comparison to the CDA, COPA specifically addressed the dissemination of material to minors over the internet by commercial persons and /or entities.[185] In enacting COPA, Congress attempted to cure some of the key defects of the CDA, as highlighted in *Reno II*. COPA sought to provide the explicit definitions of the statute's crucial terms.[186] Such explicitly defined terms had the intended effect of limiting the scope of affected materials to the World Wide Web and not the more general internet;[187] limiting the scope of application to solely "commercial purposes;"[188] and limiting the scope to only material deemed "harmful to minors."[189] The phrase "harmful to minors" was defined in the text of COPA and consequently raised some constitutional issues in the judicial considerations that followed the statute's enactment. Congress defined "harmful to minors" with a three-part analysis, which must be found before liability may attach under COPA.[190] The statute further defines a "minor" as a person under the age of seventeen.[191] Finally, COPA provided some affirmative defenses for commercial entities accused of violating the statute.[192] De-

---

184. *See Reno II*, 521 U.S. at 885.

185. COPA, 47 U.S.C. § 231(a)(1)(1998): "Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both."

186. *See Reno IV*, 217 F.3d at 167 (discussing the text of COPA).

187. *Reno IV*, 217 F.3d at n.4 (quoting 47 U.S.C. § 231(e)(1)). "COPA defines the clause 'by means of the World Wide Web' as the 'placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol.'"

188. *Reno IV*, 217 F.3d at n.5 (quoting 47 U.S.C. § 2321(e)(2)(A)). "COPA defines the clause 'commercial purposes' as those individuals or entities that are 'engaged in the business of making such communications.'"

189. *Reno IV*, 217 F.3d at n.5 (quoting 47 U.S.C. § 231(e)(2)(B)). "COPA defines a person 'engaged in the business' as one who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principle business or source of income)."

190. *Reno IV*, 217 F.3d at 168. The three-part test stated:

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) taken as a whole, lacks serious, literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6).

191. 47 U.S.C. § 231(e)(7).

192. *Reno IV*, 217 F.3d at 168 (quoting 47 U.S.C. § 231(c)(1)). The affirmative defenses provided that if a commercial entity "restricted access by minors to material that is harmful to minors" through the use of a "credit card, debit account, adult access code, or adult personal

spite the attempts by Congress to conform COPA to meet the problems raised in *Reno II*, a suit was filed seeking a preliminary injunction against the enforcement of this second congressional attempt to regulate information disseminated over the internet.

On October 22, 1998 the plaintiffs[193] filed an action in the Federal District Court for the Eastern District of Pennsylvania seeking a preliminary injunction against the enforcement of COPA.[194] The plaintiffs claimed that COPA was invalid on its face and as applied to them under the First Amendment by burdening speech which is protected for adults; that it violated the First Amendment rights of minors; and that it is unconstitutionally vague under the First and Fifth Amendments.[195] The District Court held that the plaintiffs were likely to succeed on the merits of their Constitutional claims and granted their request for a preliminary injunction against the enforcement of COPA.[196] The government appealed this ruling to the United States Court of Appeals for the Third Circuit.[197]

The Third Circuit affirmed the District Court's granting of the preliminary injunction.[198] In reaching its conclusion, the Court of Appeals relied heavily upon the findings of fact made by the lower court and it reviewed the District Court's conclusions of law under a de novo standard.[199] The four elements necessary for a preliminary injunction to be warranted include: (1) the reasonable probability of success; (2) whether the movant will be irreparably harmed by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.[200] Clearly, the first of these three elements attracted most of the court's attention in its decision.

First, the court noted that the District Court was correct in finding that since COPA was a content based restriction on speech, it was "presumptively invalid and subject to strict scrutiny analysis."[201] As a result of the necessary strict scrutiny analysis the government was required to

---

identification number...a digital certificate that verifies age...or by any other reasonable measures that are feasible under available technology" then no liability will attach.

193. The list of plaintiffs is too lengthy for full presentation here; the plaintiffs were essentially those that filed suit in *Reno II*, which include the American Civil Liberties Union; Androgyny Books d/b/a A Different Light Bookstores; American Booksellers Foundation for Free Expression; and Artnet Worldwide Corp.

194. ACLU v. Reno *(Reno III)*, 31 F. Supp.2d 473, 476 (E.D. Pa. 1999). COPA was to become effective on November 29, 1998. *Id.*

195. *Reno III*, 31 F. Supp.2d at 477.

196. *Id.*

197. *Reno IV*, 217 F.3d at 165.

198. *Id.* at 181.

199. *Id.* at 172.

200. *Id.* (quoting Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999).

201. *Reno IV*, 217 F.3d at 173 (quoting *Reno III*, 31 F. Supp.2d at 493).

"establish that the challenged statute is narrowly tailored to meet a compelling state interest, and that it seeks to protect its interest in a manner that is the least restrictive of protected speech."[202] Further, the court noted that the Supreme Court has recognized each medium of expression may present unique justifications for government regulation.[203] Yet the Third Circuit differentiated the Internet from other forms of media that were historically subject to government regulations.[204] Unlike other regulated mediums, the Internet did not have a history of regulation nor did it have a limited number of frequencies.[205] Thus, the standard of review for content-based regulation of speech via the Internet presented the Court with a unique and continually developing area of Constitutional Law.

The intrinsic characteristics of the Internet presented the revised "contemporary community standards" test provided in COPA with some unique challenges. Congress attempted to revise the test from the CDA (overturned in *Reno II*) in COPA by adding that "the average person, applying contemporary community standards' would find the work taken as a whole, [to appeal] to the prurient interest.'"[206] It was this revised test that the court found to be in conflict with the inherent nature of the Internet. The court noted that the Internet is not geographically limited;[207] that information is instantaneously available on the Internet as soon as it is published;[208] and that current technology prevents Web publishers from circumventing particular jurisdictions or limiting their site's content "from entering any [specific] geographic community."[209] As a result of these unique characteristics of the Internet, the court concluded that COPA's adoption of the *Miller* "contemporary community standards" test would have an overbroad effect.[210] The court determined this overbroad effect would restrict the constitutionally protected speech of adults to the most stringent standards of the least liberal communities, therein depriving adults of free access to protected forms of speech.[211] Such a stringent limitation to the lowest common denominator has consistently

---

202. *Reno IV*, 217 F.3d at 173 (citing Schaumbern v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980)). The Court noted that this approach was recently confirmed in United States v. Playboy Ent. Group, Inc., 529 U.S. 803, 2000 WL 646196 (U.S. 2000) (discussing the "bleeding" of cable transmissions and holding § 505 of the Telecommunications Act of 1996 unconstitutional as violative of the First Amendment).

203. *Reno IV*, 217 F.3d at n.18.

204. *Id.*

205. *Id.* (quoting *Reno II*, 521 U.S. 844, 868 (1997)).

206. *Reno IV*, 217 F.3d at 174.

207. *Id.* at 175 (quoting *Reno III*, 31 F. Supp. 2d at 482-92).

208. *Reno IV*, 217 F.3d at 175 (citing *American Libraries*, 969 F. Supp. at 166; *Reno III*, 31 F. Supp. 2d at 483).

209. *Id.* (quoting *Reno III*, 31 F. Supp. 2d at 484).

210. *Reno IV*, 217 F.3d at 177.

211. *Id.*

been held to be in violation of the First Amendment in all the preceding *Reno* decisions.

Finally, the court considered whether COPA was "readily susceptible" to a narrowing construction that would make it constitutional.[212] Courts generally recognized two methods of narrowing an otherwise unconstitutionally broad statute: (1) by "assigning a narrow meaning to the language of the statute or; (2) deleting that portion of the statute that is unconstitutional, while preserving the remainder of the statute intact."[213] The court attempted both approaches at the behest of the government. First, the court concluded that in previous applications of the *Miller* "contemporary community standards" test, it was applied on a geographic basis, and therefore could not be read narrowly to present an "adult" rather than a geographic standard in this instance.[214] Second, the court concluded that by striking the contemporary community standards test from COPA would have the effect of rendering the rest of the statute virtually meaningless.[215] The test was held to be an "integral part of the statute, permeating and influencing the whole of the statute" and thus, its removal would not salvage the constitutional remnants.[216] Therefore, the court concluded that COPA was not susceptible to a narrow reading and accordingly it was deemed likely that the plaintiffs would succeed on their constitutional challenge to COPA.[217]

The Third Circuit briefly addressed the remaining two prongs of the preliminary injunction test. First, the court noted that "in a First Amendment challenge, a plaintiff who meets the first prong of the test . . . will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights."[218] Therefore, the court concluded that the second prong was likely met in this situation.[219] Finally, in applying the balancing test required by the third prong, the court concluded that the threats of COPA on constraining constitutionally protected speech far outweighed the damage that would be caused by the denial of the requested injunction.[220] While the court concluded that the District Court properly granted the plaintiff's request for a preliminary injunction

---

212. *Id.* (quoting Virginia v. American Booksellers Ass'n, 484 U.S. 383, 397 (1988)).

213. *Reno IV*, 217 F.3d at 177 (citing Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502 (1985)).

214. *Reno IV*, 217 F.3d at 178. The Court noted that prior decisions have recognized that the nation is simply too large and too diverse for a common standard of "obscene" or "indecent" materials to be adequately defined at a national level. In fact, it was this rationale that lead the Court to develop the "contemporary community standard" in the *Miller* decision (which was based on geographic notions of "community"). *Id.* (discussing *Miller*, 413 U.S. at 30, 33).

215. *Reno IV*, 217 F.3d at 179.

216. *Id.*

217. *Id.*

218. *Id.* at 180 (quoting *Reno I*, 929 F. Supp. 824, 826).

219. *Reno IV*, 217 F.3d at 180.

220. *Id*

prohibiting the enforcement of COPA, this conclusion was not the end of the court's decision.

The final paragraph of the *Reno IV* decision provides some intriguing dicta concerning the future of this area of the law. The Court stated: "we . . . express our confidence and firm conviction that developing technology will soon render the 'community standards' challenge moot, thereby making congressional regulation to protect minors from harmful materials on the Web constitutionally practicable."[221] This statement, which has been reiterated by several of the *Reno* courts in a variety of ways, points to technology as the key solution to Congress' ability to regulate information sent to minors over the Internet. These technological advancements must be able to adequately protect children from material obscene to them, while not placing an undue burden on adult speech not encompassed by the obscenity standards for children in the relevant community. Beyond this, it is unclear what these advancements will entail or to what extent they will be required. In the final analysis, the four *Reno* decisions coupled with the *Johnson* decision blaze an ambiguous trail for both legislators and parents wishing to protect their children from the perceived dangers of the World Wide Web.

IV. ANALYSIS

The ramifications of the *Johnson* decision will be felt both inside of and outside of the Tenth Circuit. Internet business growth rates suggest that dissemination of information via the Internet is the way the world will operate in the 21st Century. As a result, regulation of how information is transmitted over the Internet is a crucial topic facing the legal profession today. Encompassed in any discussion of regulation of the Internet are two broad constitutional issues: First Amendment Rights of individuals and Commerce Clause limits on state powers. The Tenth Circuit decision in *Johnson* was one of first impression for the Circuit, but the decision also followed the Supreme Court's guidance in *Reno v. ACLU.* Additionally, other federal courts appear to be in general agreement with both *Reno* and *Johnson.*[222] The effect of the Tenth Circuit ruling in *Johnson* is twofold.

First, courts have clearly taken notice of the unusual nature of the Internet and have consistently pointed to several unique characteristics of the Internet that effectuate key differences from other mediums of expression. For example, in *Reno IV*, the Third Circuit reviewed the differences between broadcast media, such as television or radio, and the

221. *Id.* at 181.

222. *See generally* Cyberspace Comm. Inc. v. Engler, 55 F. Supp. 2d 737 (E.D. Mich. 1999); American Libraries Assoc. v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997); Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996).

Internet.[223] As a result of its non-geographic structure, the Internet is a unique target of government regulation.[224] The question of the Internet's international character has yet to be adequately addressed by the American courts. However, due to its inherently national character, courts appear to agree that there must be uniform regulation of the Internet, at the national, as opposed to the state level. The balance between regulating the Internet and the continued protection of constitutional rights is an omnipresent challenge to the Congress and the courts. The *Johnson* decision and other similar decisions addressed only the surface of potential conflicts between the regulation of the Internet and the protection of constitutional guarantees. Nevertheless, these preliminary decisions laid an important foundation upon which future courts will build a body of Internet regulation.

Second, the *Johnson* decision affects the balance of power between the states and the federal government. The age-old debate of states' rights versus national rights is inherent in the American system of Federalism. Nonetheless, the potential power that the Internet may soon wield in the stream of commerce and communication is a source of potential conflict between the states and the federal government. State legislatures will certainly want to gain a voice in the development of the Internet to bring the prosperity of the Internet within the state. However, as the courts have suggested, there is a need to regulate the Internet on a national level.

Regulation at the state level would compromise the success of the Internet. A lack of national uniformity in regulating the Internet would likely result in an inability of the Internet to offer the benefits of simultaneous, instantaneous communications and commerce as it currently aims to achieve. Regulation on a state-by-state basis would most likely create a patchwork regulatory system. Such a patchwork system would impede the ability of many Internet services to function in a profitable manner. For example, if New Mexico and Colorado both passed regulations on the dissemination of materials to minors via the Internet; but New Mexico banned all indecent material, while Colorado imposed a less restrictive regulation, how would a company wishing to do business via the Internet in both states act? The company would be forced either to make its entire Internet materials conform to the New Mexico statute, or to choose to avoid doing business in New Mexico altogether.

In contrast, if the Federal government enacted a single, uniform regulation such patchwork regulation would not be of concern to the business wishing to carry on business nationwide via the Internet. The business would be able to access consumers nation-wide without the risk of violating 50 different statutory schemes. Clearly such uniform regula-

223. *Reno IV*, 217 F.3d at 168-69.
224. *Id.* at 169.

tion would provide the greatest benefit to the continued growth of the Internet as a means of commercial activity in the United States.

The central issue remains to what extent does the holding in *Johnson* and other similar decisions have on the future of Internet regulations? The final answer remains to be determined. The only certainty in this field is that attempts to regulate the Internet will continue and the tension between government action and parental choice will likely devolve into a moot discussion when technology catches Constitutional theory. Parental control still remains the best and most likely source of protecting minors from indecent materials, however defined. Until such time as technology offers controls that conform to the constraints of the Constitution, parents must take the lead in assuring that the Internet is a safe place for children to roam.

CONCLUSION

The Internet is clearly a revolutionary new medium of expression. The opportunity for persons to exchange ideas worldwide with the instant click of a mouse is truly unique. The Internet provides for greater communication among people on an infinite range of subjects. This freedom of expression has never before been provided with such a powerful tool. Yet with this advantage comes concern, specifically related to minors accessing materials that are not appropriate for children. This concern has prompted government intervention and regulation. It is this regulation that strikes at the very core of what it means to be "American." The Constitution seeks to protect expression, not simply because it is a noble concept, but more precisely because it is the freedom of expression that drives democracy. Free expression among citizens is the most essential ingredient of a functional and successful democratic society. Thus, it is the opinion of this author that the courts have so far been correct in holding the governmental regulations invalid as violating the most basic principles of the Constitution. Further, it is clear that with the continued growth of technology, parents will be better equipped to prevent their children from accessing material that the parent deems harmful. Removing the power of a parent and placing it in the hands of government is at a minimum troublesome, and the worst, Orwellian. Clearly, the duty to regulate the dissemination of information to minors over the Internet must be left in the sovereign hand of parents, and the parents alone.

Tim Shea

JUVENILE LAW

THE EIGHTH AMENDMENT PROPORTIONALITY ANALYSIS AND AGE AND THE CONSTITUTIONALITY OF USING JUVENILE ADJUDICATIONS TO ENHANCE ADULT SENTENCES

INTRODUCTION

The same justice systems served juveniles and adults until the late nineteenth century when society decided to protect child offenders' innocence.[1] The decision to protect juvenile delinquents was based on the premise that juvenile delinquents could be rehabilitated.[2] The fundamental objective of the juvenile justice system was not to determine the guilt or innocence of the juvenile, but rather to examine how the juvenile became whom he or she is and what can be done in the best interest of the child and the state to save him.[3] Recently, however, public perceptions of increasing crime rates and the belief that rehabilitation-based treatment was neither efficient nor deserved influenced the juvenile justice system to treat "delinquents less as misguided but redeemable individuals and more as a faceless army of pint-sized criminals."[4] For instance, "in the last four years, "there have been a total of six mass killings by juveniles."[5] Throughout the last decade alone, "the number of juveniles committing murder, rape, robbery, and assault has increased by 93 percent."[6] However, in the last decade, fear of rising juvenile crime has pro-

---

1. Randi-Lynn Smallheer, Sentence Blending and The Promise of Rehabilitation: Bringing the Juvenile Justice System Full Circle, 28 HOFSTRA L. REV. 259, 264 (2000). Individuals became more concerned with protecting young offenders rather than punishing them. *Id.* This shift in thinking was based on the belief that the "child's poor living environment, rather than willful behavior, caused juvenile delinquency." *Id.*

2. *See* Danielle R. Oddo, *Removing Confidentiality Protections and the "Get Tough" Rhetoric: What Has Gone Wrong With the Juvenile Justice System?*, 18 B.C. THIRD WORLD L.J. 105, 107 (1998). The commission of crimes by children was not the result of a decision by a morally responsible individual; "rather it was a type of youthful illness which could be treated and the child rehabilitated." *Id.* at 107.

3. *Id.*

4. Lara A. Bazelon, *Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in the Juvenile Court*, 75 N.Y.U. L. REV. 159, 166-69, 175 (2000) (noting that "harsh conditions and lack of services characteristic if youth prisons will not provide preadolescent children, who are at a formative stage in their moral and cognitive development, with the educational and therapeutic services necessary to lead law-abiding and productive lives upon release.").

5. Jennifer A. Chin, *Baby-Face Killers: A Cry for Uniform Treatment for Youths Who Murder, From Trial to Sentencing*, 8 J.L. & POL'Y 287, 302 (1999). Because of this increase, or perception of an increase, in violent crimes committed by juveniles, some critics argue for tougher sanctions on juvenile murders. *Id.* at 302. But how should the juvenile justice system treat juveniles who commit violent crimes but not murder? This is an issue addresses by the Tenth Circuit in Hawkins v. Hargett, 200 F.3d 1279 (10th Cir. 1999). *See infra*, notes 72-109.

duced a wave of legislation affecting juveniles which has stated that "children who commit serious crimes should be treated virtually the same as adults."[7] Also, when a case stays in juvenile court, the records of the proceeding can be disclosed to public officials conducting criminal investigations.[8]

Through an analysis of the Tenth Circuit's treatment of juvenile law and sentencing law, this survey will discuss the sentencing of juveniles with a focus on juveniles' constitutional rights. This survey will also discuss the use of juvenile records in the sentencing of adult criminals. Part I discusses *Hawkins v. Hargett*[9] and the Eighth Amendment proportionality test and its application to juveniles sentenced as adult criminals. Part II examines *United States v. McKissick*[10] and the use of juvenile records in the sentencing of adult criminals. This survey evaluates the recent trend in treating juveniles as adults and the future of the juvenile justice system and juveniles' constitutional rights. This survey does not reflect the entire body of juvenile law.[11]

---

6. Charles J. Aron and Michael S.C. Hurley, Juvenile Justice at the Crossroads, Champion, June 1998, at 1.

7. *See* Gregory Loken and David Rosettenstein. *The Juvenile Justice System Counter-Reformation: Children and Adolescents as Adult Criminals.* 18 QLR 351, 352 (1999). The "get tough" legislation falls into three main categories: transferring more juveniles to the adult criminal justice system, "increasing the severity of juvenile sentences, and reducing the protections of juvenile confidentiality." Oddo, *supra* note 2, at 113. Laws allowing for the transfer of juveniles to adult courts expose the juvenile to longer incarceration periods with an emphasis on retribution. *Id.* Measures have also been taken to increase juvenile sentences for both maximum and minimum sentences. *Id.* at 114. Moreover, many states replaced "traditional confidentiality protections with open proceedings and records." *Id.* at 115. Some of the changes caused by these new confidentiality provisions may include: open proceedings to the public, some access to juvenile records, the release of the juvenile's name and/or picture to the media or general public, and the use of the juvenile's record in adult sentencing procedures. *Id.* at 116. *See, e.g.*, Or. Laws ch. 422, sec. 48, codified at Org. Rev. Stat. Sec. 161.290 (1997) (eliminating completely the defense of "incapacity due to immaturity" for all persons age twelve or older); Kann. Stat. Ann. §§ 38-1602a(a), 1636(a)(1) (West 1998)(making children as young as ten years old subject to discretionary waiver to adult court for any criminal offense); Conn. Gen. Stat. § 46b-124(c-e) (1997)(allowing for the disclosure of the records of juvenile court proceedings to public officials, to the victim, and to "any person who has a legitimate interest in the information.") For a discussion about the transfer process *See infra* note 43.

8. Loken and Rosettenstein, *supra* note 7, at 352.

9. 200 F.3d 1279 (10th Cir. 1999).

10. 204 F.3d 1282 (10th Cir. 2000).

11. This survey addresses decisions about the Eighth Amendment and its application to the sentencing of juveniles and the use of prior juvenile adjudications to enhance adult sentences rendered by the United States Court of Appeals for the Tenth Circuit between September 1, 1999 and August 31, 2000.

I. SENTENCING OF JUVENILES AND THE EIGHTH AMENDMENT PROPORTIONALITY TEST

A. *History of the Juvenile Court System*

Until recently, society treated juvenile offenders with rehabilitation rather than severe punishment.[12] Underlying that trend is the theory that because children are of a tender age, less culpable, and able to change for the better.[13] The juvenile justice system began as part of "the efforts of [p]rogressive reformers at the turn of the century."[14] The reformers anticipated a system that recognized the belief that children were different from adults and needed protection and nurturing rather than absolute accountability.[15] Thus, the juvenile justice system operated under the idea that the state would act as parens patriae of the child and use its judgment to do what is in the best interest of the child.[16]

1. Emergence of Juvenile's Rights

The juvenile justice system originally focused on rehabilitating children because of the belief that children were responsive to treatment and that treatment was essential.[17] Based on these principles, juvenile court proceedings were informal with the fatherly like judge, the friendly probation officer, and the juvenile and his parents having a conference to

---

12. Chin *supra* note 5, at 297. It was thought that a separate juvenile justice system emphasizing rehabilitation would be more beneficial to the child and society. *Id.* The proceedings in this system were less adversarial. *Id.* Juveniles were not offenders, but respondents, and attorney's did not file charges, but instead filed petitions. *Id.* These systems were based on the assumption that children were not criminally responsible for their behavior, and thus, could not be punished like adult criminals. *Id.* at 298.

13. *Id.* at 295-296.

14. Martin L. Forst and Martha-Elin Blomquist. *Cracking Down on Juveniles: Changing the Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB POL'Y 323, 324 (1991). Some commentators suggest that this system developed in response to the shift from a rural society to a urban society which led to accompanying problems of modernization and immigration. *See also* Deborah L. Mills, *United States v. Johnson: Acknowledging the Shift in the Juvenile Court System from Rehabilitation to Punishment*, 45 DEPAUL L. REV. 903, 906 (1996). In an attempt to address these problems, the Progressive reformers offered solutions to incorporating the changes in basic family structure, family functions, and conceptions in childhood and social control. *Id.* at 907.

15. Forst & Blomquist, *supra* note 10, at 324. Essential to the reformers beliefs was the assumption that children were not completely developed physically nor mentally and thus required time to complete their "cognitive, social, and moral development before being expected to shoulder the burden of adulthood." *Id.* "Juveniles were adjudicated 'delinquent' rather than found 'guilty,' and a conviction did not send them to jail. Overall, the goal was to provide juveniles with services to encourage rehabilitation and supervision to help them stay on the right path." Oddo, *supra* note 2, at 107.

16. Sarah M. Coupet, *What to do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality about Youth Offenders in the Constructive Dismantling of the Juvenile Justice System.* 148 U. P.A. L. REV. 1303, 1308 (2000). The concept of parens patriae refers to the role of the state as the custodian of persons who suffer from some form of legal disability; it is this concept that "provides the basis for state laws that protect rather than punish citizens." *Id.*

17. Oddo, *supra* note 2, at 107.

discuss what would be in the child's best interest.[18] But as the number of juvenile offenders increased, providing individualized treatment was not feasible or realistic.[19] Eventually, lawyers, social workers, and child advocates raised concerns that the juvenile justice system was falling short of its goals and that the lack of procedural protections resulted in children being unjustly and arbitrarily punished.[20] "Without right to notice, counsel, or any of the basic protections provided to an adult criminal defendant, a delinquent child often was powerless to contest whatever judgment the court saw fit to pronounce."[21]

The Supreme Court responded to the emerging shortcomings of the juvenile justice system in two significant cases.[22] In *Kent v. United States,*[23] the Supreme Court held that juveniles are entitled to a hearing before transfer to adult criminal court and to the right to confer with counsel throughout the hearing process.[24] The Court emphasized that, in its view, the original purpose of rehabilitation and treatment of juvenile offenders was not being achieved.[25]

Then, in *In re Gault,*[26] the court expanded the definition of juvenile rights by granting juveniles the right to notice of charges, to counsel, to confrontation, to cross-examination of witnesses, and to the privilege against self-incrimination.[27] In *Gault,* the Court reviewed the inadequa-

---

18. Smallheer, *supra* note 1, at 265.

19. *Id.* at 266. As a result of the increase in juvenile offenders, the system began either giving juveniles a "slap on the wrist, or . . . sent to large congregate institutions, which could not possible treat each juvenile on an individualized basis" and as a result many dispositions of juvenile cases resembled dispositions of adult criminal cases. *Id.*

20. *Id.* at 267. *See also* Bazelon, *supra* note 4, at 173.

21. Bazelon, *supra* note 4, at 173. "Juvenile court-mandated 'placements' sometimes resulted in terms of imprisonment that far outlasted the harshest sentence the child could have received upon conviction in criminal court." *Id.*

22. Kent. v. United States, 383 U.S. 541, and In re Gault, 387 U.S. 1, discussed *infra* notes 23-30.

23. 383 U.S. 541 (1966). Kent, age 14, was convicted of housebreaking and robbery, and placed on probation. Kent, 383 U.S. at 543. Two years later, Kent was taken into custody by the police for robbing and raping a women. *Id.* The police interrogated him without the benefit of counsel or his parents. *Id.* at 534-544. Kent was then sent to a Receiving Home for a week with no hearing or arraignment. *Id.* at 544-45. The juvenile court waived jurisdiction without hearing and without ruling on any of the motions filed by Kent's attorney. *Id.* at 546.

24. *Id.* at 561.

25. *Id.* at 556. According to the Court, juveniles adjudicated in the juvenile courts "receive the worst of both worlds . . . he gets neither the protections afforded to adults nor the solicitous care and regenerative treatment postulated for children." *Id. See also* Smallheer, *supra* note 1, at 268. (discussing the shift of the juvenile justice system towards retributions and the constitutional protections afforded to juveniles as a result of this shift).

26. 387 U.S. 1 (1967). Gault was fifteen years old when he was convicted of making obscene phone calls. *In re Gault,* 387 U.S. at 4-10. Gault was sent to the State Industrial School for a maximum of six years by the juvenile court for being a "delinquent." *Id.* at 7-8.

27. *Id.* at 31-57.

cies of the traditional juvenile court proceedings and in its critique the majority said:

> Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, and is frequently a poor substitute for principle and procedure...the absence of substantive standard has not necessarily meant that children receive careful, compassionate, individualized treatment.[28]

Both decisions emphasized the fact that the "juvenile courts had failed to deliver on their promise of treatment, and instead were merely providing punishment in the form of training schools or other types of incarceration." [29] But, as constitutional rights were extended to juveniles, the juvenile court system became more adversarial and more like the adult criminal justice system.[30] In fact, after the *Gault* era, fundamental changes in sentencing of juveniles emerged as the focus shifted to considerations of crime committed and retribution.[31]

Three years after *Gault*, in *In re Winship,*[32] the court imposed a requirement of proof beyond a reasonable doubt for the juvenile court convictions of delinquent acts.[33] The court reasoned that when a juvenile's liberty is at stake, due process requires that the standard of evidence necessary for conviction be as exacting as that applied in adult proceedings.[34] The dissenters in *Winshop* expressed concern that by mandating to juveniles similar procedural due process protections afforded to adult criminals, the Court would destroy the philosophy that warranted maintaining a separate justice system for juveniles.[35] Then, in *Breed v. Jones,*[36] the Court decided that juvenile courts must adhere to the double jeopardy clause.[37] Yet, the Court refused to apply the rationale of *Gault* and *Winship* in *McKeiver v. Pennsylvania,*[38] and held that juvenile delinquents do not have a constitutional right to a trial by jury.[39]

---

28. *Id.* at 18-19.

29. Florence B. Burnstein, *Tenth Circuit Survey Juvenile Law*, 76 DENV. U. L. REV. 877, 880 (1999). Thus, Kent and Gault transformed the juvenile justice system from a social welfare agency, to a "wholly-owned subsidiary of the criminal justice system." Smallheer, *supra* note 1, at 269.

30. Smallheer, *supra* note 1, at 269.

31. *Id.*

32. 397 U.S. 358, 368 (1970). In this case, a juvenile was found guilty of stealing money from a women's purse based on a preponderance of evidence standard. *Id.* at 360.

33. 397 U.S. 358, 368 (1970) ("[T]he constitutional safeguards of proof beyond a reasonable doubt is as much required during the adjudicator stage of a delinquency proceeding as are those constitutional safeguards applied in Gault").

34. *Id.*

35. *Id.* at 376. (Burger, J., dissenting).

36. 421 U.S. 519 (1975).

37. *Breed*, 421 U.S. at 541.

38. 403 U.S. 528 (1971).

39. *McKeiver*, 403 U.S. at 547.

2. The Juvenile Justice Today: A Response to Juvenile Crime Rates

The social trend today is to treat juveniles as criminals because of the atrocious crimes they commit.[40] With the increase in violent crimes committed by juveniles,[41] legislators have shown a willingness to treat juvenile offenders as adults.[42] For example, new legislation allows for the removal of juvenile offenders from the juvenile system and into the adult criminal system through the process of transfer or direct filing. [43] Furthermore, many states have expanded the purpose clauses of their juvenile codes to include the promotion of public safety, punishment, and accountability.[44] "Few jurisdictions provide for an intermediary court where juvenile sentencing may be more appropriate".[45] Juveniles in "adult criminal court will be subject to the full range of adult punishment, including life imprisonment and the death penalty."[46]

"High profile cases and regular news reports of gang violence and school shootings have solidified the public view that juvenile crime is out of control."[47] "The period between 1985 to 1994 saw a 100% increase in adolescent homicides, paralleled by a 100% increase in the number of homicides by adolescents using guns."[48] Furthermore, juvenile violence has declined since the peak in 1994, although total arrests

---

40. Matthew Thomas Wagman,. *Innocence Lost: In the Wake of Green: The Trend is Clear--- If You Are Old Enough To Do The Crime*, Then You Are Old Enough To Do The Time. 49 CATH. U. L. REV. 643, 644 (2000).

41. According to the Uniform Crime Reports for 1995, over a five year period starting in 1991 juvenile arrests increased twenty percent, more than ten times that of adults. Federal Bureau of Investigation, United States Department of Justice, 1995 Crime in the United States: Uniform Crime Reports 207 (1996). These statistics also illustrated that the police arrested children between the ages of thirteen and fourteen for forcible rape with greater frequency than most other age groups considered juveniles. *Id.* at 218.

42. Loken and Rosettenstein *supra* note 7, at 355.

43. *Id.* "Transfer" of jurisdiction is the process of removal of juvenile offenders to the adult judicial system. *See* Burnstein *supra* note 29, at 880. Transfer can occur if the juvenile court waives jurisdiction or if a statute mandates immediate transfer depending on the type of crime. *Id.* The final way a juvenile can be transferred is through direct filing by the prosecution. *Id.* Legislation may give the prosecutor the discretion to file charges directly either in juvenile court or adult criminal court. *Id.* "Today, most judicial transfer statutes include a list of criteria that a juvenile court judge is allowed to consider or should consider in making a transfer determination." Lisa A. Cintron, "Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court", 90 NW. U. L. R.ev. 1254, 1265 (1996).

44. Mabel Artega, *Juvenile Justice with a Future .for Juveniles*, 2 CARDOZA WOMEN'S L.J. 215, 219 (1995). As the states changes the purpose of their juvenile codes the rehabilitative goals of the juvenile justice system is becoming overshadowed. *Id.*

45. Burnstein, *supra* note 29, at 880.

46. *Id.* at 881.

47. *See* Elizabeth Cauffman, Jennifer Woolard, and N. Dickon Reppucci, *Justice for Juveniles: New Perspectives on Adolescents Competence and Culpability*, 18 QLR 403, 404 (1999) (noting that regardless of the accuracy of this perception, the sentiment that the juvenile court was too soft led to an introduction in many states of tougher policies for juvenile delinquents).

48. Cauffman *supra* note 18, at 403, citing Al Blumstein, *Violence by Young People: Why the Deadly Nexus?*, NAT'L INST. JUST. J., Aug. 1995, at 3.

remain significantly higher than the rates in the 1980's and these trends and media coverage of these trends have scared the public.[49]

Ironically, the public demand for adult treatment of adolescents did not go beyond the area of retributive justice.[50] For instance, the Virginia legislature "that lowered the age of transfer to fourteen years of age" also prohibits children "under the age of eighteen from getting a tattoo without permission from their parents because they are too immature to make this type of decision on their own."[51] These recent changes in the treatment of juvenile delinquents raises concerns about the psychological and developmental differences between adolescents and adults, specifically in regards to adjudicative competence and culpability.[52]

3. The Eighth Amendment Gross Proportionality Test

The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[53] In *Weems v. U.S.*,[54] the Court held that the Constitution requires proportionality in sentencing.[55] Thus, the Eighth Amendment became a constitutional basis for "challenges to excessively harsh prison sentences."[56]

---

49. *Id.* at 403.

50. *Id.* at 404.

51. *Id. See generally* Va. Code Ann. § 18.2-371.3 (1999).

52. Cauffman *supra* note 48, at 405. Adjudicative competence refers to "the ability of a person to consult with his or her lawyer and to have a rational and factual understanding of the court proceeding." *Id.* "Culpability refers to the extent to which an individual can be held accountable for his or her actions, and by extension, the degree to which retributive punishment is appropriate." *Id.* For the purposes of this discussion on the Eighth Amendment proportionality, only culpability of adolescents will be further explored.

53. U.S. CONST. AMEND. VIII.

54. 217 U.S. 349 (1910). The issue in this case was a disbursing officer's 15 year sentence to "cadena temporal" for falsifying a cashbook for the port of Manilla in the Philippines. *See id.* at 357-358. "Cadena" is defined as "an afflictive penalty consisting of imprisonment at 'hard and laborious work,' originally with a chain hanging from the waist to the ankle and carrying with it the accessory penalties of civil interdiction, perpetual absolute disqualification from office, and in the case of 'cadena temporal,' surveillance by the authorities during life." Black Law's Dictionary.

55. *Weems*, 217 U.S. at 368. Proportionality is the proposition that a punishment should not exceed the guilt incurred by the commission of a particular crime, gauged by the heinousness of the crime and the culpability of the offender. Chris Baniszewski, *Supreme Court Review of Excessive Prison Sentences: The Eighth Amendment's Proportionality Requirement*, 25 ARIZ. S.T. L.J. 929, 942 (1993).

56. Benjamin L. Felcher, *Kids Get the Darndest Sentences: State v. Mitchell and Why Age Should Be A Factor in Sentencing for First Degree Murder*, 18 LAW & INEQ. 323, 332 (2000). Eighth Amendment issues arise in three main circumstances: challenges to the death penalty, challenges to the treatment of prisoners, and challenges to the length of prison sentences. *Id.* at FN 69. *See* Mirah Horowitz, *Kids Who Kill: A Critigue of How the American Legal System Deals with Juveniles Who Commit Homicide*, 63 SUM. LAW CONTEMP. PROB. 133 (2000) (discussing the history of the death penalty and the juvenile death penalty). The application of the Eighth amendment differs depending upon the issue involved, thus this paper will focus solely upon the Court's decisions

Three cases in which the Supreme Court attempted to clarify the meaning of the Eighth amendment are *Gregg v. Georgia*,[57] *Solem v. Helm*,[58] and *Harmelin v. Michigan*.[59] In *Gregg*, the court created a two-prong test to determine whether a punishment is excessive within the bounds of the Eighth Amendment.[60] The first prong stated that, whatever the punishment, it cannot involve unnecessary and unwarranted infliction of pain.[61] The second prong of the test outlined that the punishment inflicted must be in proportion to the crime committed.[62]

The *Solem* court expanded and clarified the second prong established by the *Gregg* court.[63] Relying on *Gregg*, the *Solem* court held that, regardless of the crime, the sentence imposed must be in proportion to the crime committed.[64] The court stated that, if courts find it necessary to conduct an Eighth Amendment analysis, they should be guided by an objective analysis of the following factors: (1) the seriousness of the crime as well as subsequent punishment, (2) how the state treats other criminals, in order to determine whether or not criminals who commit more serious crimes are subject to a less severe penalty, and (3) how other jurisdictions adjudicate the crime.[65] These factors should be viewed "in light of the harm caused or threatened to the victim or society, and the culpability of the offender."[66]

---

involving the duration of prison sentences and its application to juveniles specifically in the Tenth Circuit's decision in Hawkins v. Hargett, 200 F.3d 1279 (10th Cir. 1999).

57. 428 U.S. 153, 187 (1976) (holding that a death sentence for the crime of murder does not constitute cruel and unusual punishment).

58. 463 U.S. 277 (1983). In *Solem*, the court overturned a life sentence imposed upon a defendant who was found guilty of his seventh felony, the last of which was forging a check. *Id.* at 281-82. In so holding, the court stated that although the judiciary must show substantial deference to legislatures enacting sentencing schemes, the sentence must be proportionate to the crime committed. *Id.* at 290.

59. 501 U.S. 957 (1991). The *Harmelin* court modified the Eighth Amendment proportionality principle and agreed that courts should use the *Solem* objective criteria analysis only in cases where the defendant's sentence was "grossly disproportionate" to the offense. *Id.* at 1001 (Kennedy, J., concurring in part and concurring in the judgment).

60. *Gregg*, 428 U.S. at 173.

61. *Id.*

62. *Id.*

63. *See generally Solem*, 463 U.S. 277. In *Solem*, the court reversed the imposition of a life sentence without the possibility of parole for the cashing of a $100 check for which the defendant did not have an account. *Id.* at 284. *See also* Felcher, *supra* note 56, at 331-338 (discussing the history of the Supreme Court Eighth Amendment Jurisprudence).

64. *Solem*, 463 at 290.

65. *Id.* at 291-92. Based on those factors, the Court found the defendant's sentence "significantly disproportionate his crime, and . . . therefore prohibited by the Eighth Amendment." *Id.* at 303.

66. *Id.* at 292. The majority supported the position that "as a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant has been convicted" with an inquiry into the history of the adoption of the Eighth Amendment. *Id.* at 284-286. The Court stated that the list of established principles was not exhaustive, but simply illustrative of *generally* accepted criteria for comparing the severity of different crimes on a broad scale. *Id.* at 294.

In *Harmelin*, the court rejected the *Solem* three-prong test for proportionality. [67] The court modified the proportionality test and found that it does exist in narrow circumstances.[68] In sum, the law today states that no defined proportionality between the crime and sentence mandated by the Eighth Amendment exists, but rather the Eighth Amendment prohibits outrageous sentences, that are "grossly disproportionate."[69]

4. The Eighth Amendment Proportionality Test and Its Application in the Sentencing of Juveniles in the Tenth Circuit: *Hawkins v. Hargett*[70]

a. Facts

Trent Hawkins, thirteen years and 11 months old, broke into a neighbor's home, tied the neighbor up with ropes, blindfolded her, and then, raped and sodomized her repeatedly.[71] "Throughout the two and half-hour episode, Mr. Hawkins threatened the victim with a knife and threatened to kill her children if she told the police."[72] "After the sexual assault, Mr. Hawkins took seven dollars from the victim's purse and fled."[73] The court certified Mr. Hawkins to stand trial as an adult and the Court of Appeals upheld that decision.[74] "A jury found Mr. Hawkins guilty of first degree burglary, robbery with a dangerous weapon, forcible sodomy, and second degree rape."[75]

b. Sentencing

"The jury sentenced Mr. Hawkins to maximum sentences of twenty years for the burglary, twenty years for forcible sodomy, fifteen years for rape, and up to forty-five years out of a possible life sentence for robbery with a dangerous weapon."[76] "The trial judge ordered that Mr. Hawkins serve the sentences consecutively, resulting in a total term of one hun-

---

67. Harmelin v. Michigan, 501 U.S. 957, 986-91 (1991). Harmelin was convicted of possession of cocaine. *Id.* at 961. Harmelin argued that the mandatory life sentence could only be the harshest of a series of penalties available to a sentencing court, imposed only after a determination that such a sentence would not be grossly disproportionate to the particular crime and defendant. *Id.* at 994-95.

68. *Id.* at 996-1009 (Kennedy, J., concurring in part and concurring in the judgment).

69. *Id.* at 1001. (Kennedy, J., concurring in part and concurring in the judgment). (emphasis added).

70. 200 F.3d 1279 (10th Cir. 1999).

71. *Hawkins*, 200 F.3d at 1280.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Hawkins*, 200 F.3d at 1280.

dred years."[77] "The Oklahoma Court of Criminal Appeals affirmed Mr. Hawkins' convictions and sentences."[78]

Mr. Hawkins filed an application for post-conviction relief in state court and argued that his sentence violated the Eighth Amendment.[79] The court denied relief, and the state court of criminal appeals affirmed.[80] Mr. Hawkins then filed a habeas corpus petition in federal district court.[81] The federal court referred the petition to a magistrate judge for a proportionality review.[82] "The Magistrate's report and recommendations included a detailed proportionality review and recommended denying Mr. Hawkins' petition."[83] The district court adopted the recommendation and affirmed the lower court decision, and then Mr. Hawkins appealed.[84] Mr. Hawkins asked that the Tenth Circuit "examine whether the consecutive sentences were constitutionally disproportionate in light of the fact that, at the time he committed the crimes, he was only thirteen years old."[85]

c. The Eighth Amendment Proportionality Test

First, the court held that the Eighth Amendment proportionality test set forth in *Harmelin* was applicable.[86] After discussing *Solem* and *Harmelin,* the court concluded that the *Harmelin* test was applicable because "Justice Kennedy's opinion was the controlling position of the court since his opinion both retains proportionality and narrows *Solem.*"[87] Thus, the court proceeded to review Mr. Hawkins' sentence in relation to his crimes for "gross disproportionality."[88]

Mr. Hawkins urged the court "to consider his youth at the time of the crimes as a mitigating factor."[89] The court held that "[t]he chronological age of a defendant is a factor that can be considered in determining whether a punishment is grossly disproportionate in as much as it relates to culpability."[90] Culpability is "weighed by examining factors such as the defendant's motive and level of scienter, among other

77. *Id.*; Hawkins v. State, 742 P.2d 33 (Okla. Crim. App. 1987)
78. *Hawkins*, 200 F.3d at 1280.
79. *Id.* at 1281.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Hawkins*, 200 F.3d at 1280.
85. *Id.*
86. *Id.*
87. *Id.* at 1282.; McCullough v. Singletary, 967 F.2d 530, 535 (11th Cir. 1992); United States v. Bland, 961 F.2d 123, 129 (9th Cir. 1992); McGruder v. Puckett, 954 F.2d 313, 316 (5th Cir. 1992).
88. *Hawkins*, 200 F.3d at 1283.
89. *Id.*
90. *Id.*

things."[91] The court recognized the Supreme Court's indication "that the age of a young defendant is relevant, in the Eighth Amendment sense, to his culpability."[92] In *Thompson v. Oklahoma*,[93] the Supreme Court concluded that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult."[94]

In *State v. Green*,[95] the Supreme Court of North Carolina found that, "while the chronological age of a defendant is a factor that can be considered in determining whether a punishment is grossly disproportionate to the crime, the court's review is not limited to that factor."[96] In that case, the court upheld a mandatory life sentence for a thirteen-year-old convicted rapist.[97] Similarly, the court held that "age is a relevant factor to consider in a proportionality analysis."[98] However, the conclusion by the court to consider Mr. Hawkins' age did not lead the court to find Mr. Hawkins' sentence "grossly disproportionate" to his crimes.[99] The court emphasized the seriousness of Mr. Hawkins' crimes.[100] The crimes involved "a deadly weapon, a home invasion, threats of violence, and repeated sexual attacks."[101] "Although his culpability may be diminished somewhat, due to his age at the time of his crimes," the court stated that the sentence is more than "counterbalanced by the harm Mr. Hawkins caused to his victim."[102]

Furthermore, the court underscored the fact that the length of sentence can change considerably by the availability of parole and "good time" credits.[103] The court had previously held that "the availability of

---

91. *Id.*; Solem v. Helm, 463 U.S. 277, 293-294, 103 S.Ct. 3001 (1983).

92. *Hawkins*, 200 F.3d at 1283.

93. 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed.2d 702 (1988).

94. Thompson v. Oklahoma, 487 U.S. 815, 835, 108 S. Ct. 2687, 101 L. Ed.2d 702 (1988). A 15-year-old participated in the brutal murder of his brother in law who had been beating his sister. *Id.* at 816. The court convicted the boy of first degree murder and sentenced him to death. *Id.* On certiorari, the United States Supreme Court vacated the sentence stating that the imposition of the death penalty against the defendant would violate the cruel and unusual punishment clause in the Eighth amendment because of the boys age at the time of the offense. *Id.*

95. 348 N.C. 588, 502 S.E.2d 819 (1998).

96. *Green*, 348 N.C. at 609-610. "North Carolina is among the minority states that allow for juvenile offenders to be transferred to adult criminal court for adjudication." *See* Wagman, *supra* note 40, at 654. In State v. Green, Andre Green was arrested and convicted for raping a twenty-three-year-old woman. *See Green*, 348 N.C. at 593-96. The North Carolina Supreme Court held that the sentence was not contrary to societal standards of decency, the sentence was not disproportionate to the crime committed, and that a mandatory life sentence was not cruel and/or unusual punishment. *Id.* at 602-03. The court held that crime transcended the realm of crimes usually committed by children and that because the court considered Green unamendable to treatment that an adult sentence was the only appropriate remedy for the victim and the state. *Id.* at 610.

97. *Green*, 348 N.C. at 609-612.

98. *Hawkins*, 200 F.3d at 1284.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

parole is relevant to determining whether the length of a sentence violates the Eighth Amendment"[104] Mr. Hawkins had already finished his sentences for the rape and sodomy convictions.[105] The court pointed out that Mr. Hawkins would "serve a total of thirty-five years for all four convictions combined, and would be eligible for parole in approximately fifteen years."[106] Furthermore, the court noted that the sentences met the "permissible statutory range for the offenses he committed."[107]

The court concluded that, "in the light of Mr. Hawkins' crimes, the Supreme Court's benchmarks, and the legislature's proper role in setting sentencing ranges," that Mr. Hawkins' one hundred year sentence with the possibility of parole was not grossly disproportionate to the four violent acts that he committed, nor did it violate "evolving standards of decency" simply because the defendant was thirteen years old at the time of the offense.[108]

B. *Other Circuits*

Other circuits also deal with the proportionality issue in the context of youthful defendants given statutorily mandated sentences.[109] In *Harris v. Wright,*[110] the defendant was fifteen years old when he committed aggravated first-degree murder and received that state's mandatory sentence of life without parole.[111] The defendant argued that his sentence was "grossly disproportionate" to a fifteen-year-old's limited culpability for any crime.[112] The Ninth Circuit disagreed, holding that it had no power to reverse the state legislature's decision on the matter. [113]

In *Rice v. Cooper,*[114] the Seventh Circuit decided that life without parole was not a disproportionate punishment for a sixteen-year-old mentally retarded boy who killed four people.[115] Although the court stated

104. *Id.*
105. *Hawkins*, 200 F.3d at 1284.
106. *Id.*
107. *Id.*
108. *Id.* at 1285.
109. *See infra*, notes 110-119.
110. 93 F.3d 581 (9th Cir. 1996).
111. *Harris*, 93 F.3d at 581. The court stated that the sentence was consistent with the evolving standards of decency and that at least twenty-one other states allowed life without parole sentences to be mandatory imposed on fifteen year olds. *Id.* at 583-586.
112. *Harris*, 93 F.3d at 584.
113. *Id.*
114. 148 F.3d 747 (7th Cir. 1998).
115. *Rice*, 148 F.3d at 747. The boy, who was encouraged by two friends, tossed a bottle of gasoline into an apartment building. *Id.* at 749. "The bottle exploded setting a fire that killed four residents of the building." *Id.* The boy was convicted of first degree murder and sentenced to a natural life in prison. *Id.* In upholding the sentence, the court examined the fact that the United States Supreme Court had rejected the argument that mandatory life sentences, including mandatory life without the possibility of parole, are unconstitutionally just because they prevent the consideration of mitigating factors such as age. *Id.* at 752.

that the defendant's youth argued for a lighter sentence, it found that the statutorily mandated sentence of life without parole was not disproportionate to the crime. [116]

Some circuits determined that the availability of parole should foreclose proportionality review altogether, reasoning that any sentence less than life without parole can never be "grossly disproportionate.[117] However, the Tenth Circuit refused to go that far.[118] It recognized the availability of parole as a relevant consideration but refused to make it a dispositive factor.[119]

C. *Analysis*

The Tenth Circuit's decision in Hawkins is consistent with the recent trend to treat juvenile criminals as adults.[120] Juvenile justice, as it is currently practiced, "imposes two significant costs on American youth."[121] First, the juvenile court itself no longer fulfills its promise of rehabilitation.[122] Second, courts, corrections, and other youth serving agencies are allowed to ignore the inherent youthfulness of many defenders now defined as adults.[123] Thousands of fourteen and fifteen-year-olds are "removed to criminal courts every year to be treated just like any other adult."[124] Furthermore, "[t]he use of structured sentencing fundamentally contradicts the basic premise of juvenile justice by making sentence length proportional to the severity of the offense rather than basing court outcomes on the characteristics and life problems of the offenders."[125]

"The public's widespread and angry sentiment toward young offenders has fueled the most recent demands for reforming the juvenile

---

116. *Id.*

117. *See, e.g.*, United States v. Organek, 65 F.3d 60, 63 (6th Cir. 1995) (holding that the court will not "engage in a proportionality analysis except in cases where the penalty imposed is death or life imprisonment without the possibility of parole"); United States v. Lockhart, 58 F.3d 86, 89 (4th Cir. 1995) (holding that "It is well settled that proportionality review is not appropriate for any sentence less than life imprisonment without the possibility of parole) ; United States v. Meirovitz, 918 F. 2d 1376, 1381-82 (8th Cir. 1990) (The defendant was convicted of conspiracy to distribute cocaine and possession of cocaine with the intent to distribute and sentenced to life without parole. After conducting the three factor Solem analysis, the court concluded that the defendant's life sentence without parole, although harsh, did not violate the proportionality requirement of the Eighth amendment.).

118. *Hawkins*, 200 F.3d at 1284.

119. *Id.*

120. *See infra* notes 109-119.

121. Jeffrey A. Butts, Can We Do without a Juvenile Justice? 15-SPG CRIM. JUST. 50, 52 (2000).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 55. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815 (1988). The dissent in this case noted that merely because a state permits juveniles to be prosecuted as adults it does not necessarily follow that the legislature deliberately concluded that it would be appropriate to impose capital punishment on juveniles.

justice system."[126] However, contrary to popular belief, juvenile crime is not rising out of control.[127] The Bureau of Justice Statistics' National Crime Victimization Survey indicates that, between 1993 and 1997, serious violence by juveniles dropped by thirty-three percent.[128] Although incidences of violent juvenile crime continue to capture headlines, the majority of juvenile court cases involve nonviolent property offenses.[129] The Coordinating Council on Juvenile Justice and Delinquency Prevention reported in 1996 that only a fraction of youth are arrested for violent crimes each year.[130]

Juvenile justice policies are cyclical in nature with polices "shaped directly by changing social responses to juvenile crimes and rhetoric about juvenile delinquency, rather than by actual increases in criminality."[131] This vicious cycle of constantly changing juvenile justice policy begins when officials and the general public believe that juvenile crime is high, and the result is a shift towards harsher punishment.[132] A more balanced approach to fighting juvenile crime than just treating juvenile offenders like adults is needed. A more sensible approach is to incorporate both offender and offense-focused factors in accountability, public safety, and competency development, while delivering appropriate consequences for delinquent conduct and maintaining a focus on long-term objectives for offenders.[133] This balanced approach improves the current system by including restorative principles and, at the same time, preserving the original intent of those who created a separate system for children.[134] A restorative system allows for recognition "that violations

126. Coupet, *supra* note 16, at 1330.

127. *Id.*

128. Statistical Briefing Book. Online. Available. http://www.ojjdp.ncjrs.org/ojstatbb/qal35.html.30 September 1999. Furthermore, "[t]he rate at which juveniles committed aggravated assaults declined 33% between 1994 and 1995 and remained relatively stable thereafter." *Id.* "The number of robberies by juveniles rose in 1981 and 1993, but by 1997, had dropped below the rates seen in the 1970's." *Id.*

129. Carol S. Stevenson et al., *The Juvenile Court: Analysis and Recommendations, Future of Children*, Winter 1996, at 7 ("Although violent juvenile crime grab headlines, the bulk of the court's delinquency work is in the handling of a large volume of crimes against property such as larceny, vandalism, and motor vehicle theft.").

130. Coordinating Council on Juvenile Justice and Delinquency Prevention, Combating Violence and Delinquency: The National Juvenile Justice Action Plan 1 (1996). "Juveniles are responsible for a far greater share of all property crime arrests (33 percent) than either violent crime arrests (18 percent) or drug arrests (8 percent)." *Id.* "In 1993, the highest percentage of juvenile arrest, compared to adults, was for arson (49 percent), vandalism (45 percent), and motor vehicle theft (44 percent). *Id.*

131. Coupet, *supra* note 16, at 1328.

132. *Id.*

133. *Id.* at 1341.

134. *Id.*at 1342.

create obligations and these obligations are bilateral—the offender must acknowledge and take responsibility to both victims and offenders."[135]

In fact, statistics have shown the failure of harsher punishments to deter juvenile crime.[136] For instance, a 1986 New York study found that, for juveniles transferred to adult court at the onset, the likelihood of continued involvement in criminal activity once they were back on the streets increased.[137] Furthermore, a study in Idaho concerning the deterrent effect of their transfer statute reached the conclusion that waivers to adult court neither deter juvenile crime nor lower the rate of violent juvenile crime.[138] Other research indicates that juveniles incarcerated with adults may actually become more violent as a reaction to the violence they regularly experience in prison.[139] The transfer of juveniles to the adult system is incapacitating a system already overwhelmed with too many adult offenders.[140] Also, juveniles in adult prisons are more likely to be victims of sexual assault, beatings by staff, and attacks with weapons than those in juvenile centers.[141]

Transferring juveniles to adult court appears to lack consistent deterrent effects, and incarcerating them seems equally ineffective.[142] Even though the United States permits the execution of individuals for murders committed as juveniles,[143] "the United States continues to have one of the

---

135. *Id.* at 1341. Restorative justice focuses on relationships as well as individuals with the aim of justice on promoting the healing of and the relationships of the victims, community, and offenders. *Id.*

136. *See infra* notes 135-139.

137. Candace Zierdt, *The Little Engine That Arrived At The Wrong Station: How To Get Juvenile Justice Back On The Right Track,* 33 U.S.F. L. REV. 401, 422 (1999).

138. *Id.* at 423.

139. *Id.* at 426.

140. *Id.*at 423. This results in the need to build more prisons which is a cost absorbed by society. *See id.* at 425. "In 1994, taxpayers spent an average of $23,000 per year to keep a person in prison and approximately $70,000 per year to keep a prisoner in maximum security." *Id.* Because of this "get tough" policy, "the United States has the highest rate of incarceration in the world with a prison population growth rate that is ten times more likely that that of the general population." *Id.* at 424.

141. Zierdt *supra* note 137, at 423.

142. *Id.* at 421. *See also* Smallheer, *supra* note 1, at Fn106 (noting that according to Juvenile Justice Reform Initiatives in the States, from 1994-1996, studies confirm that juveniles transferred to adult criminal court have higher recidivism rates than juvenile offenders retained in juvenile court and that juveniles prosecuted as adults are more likely to re-enter society as criminals rather than as rehabilitated than their courter-parts retained in juvenile court). *See also,* Cathi J. Hunt, *Juvenile Sentencing: Effects of Recent Punitive Sentencing Legislation on Juvenile Offenders and a Proposal for Sentencing in the Juvenile Court,* 19 B.C. THIRD WORLD L.J. 621, 656 (1999) (discussing additional studies that support the assertion that punitive legislative responses to juvenile offender does not meet its deterrence goals). *See also* Forst and Bloomquist, *supra* note 14, at 362 (stating that "[e]ven long periods of confinement in juvenile facilities are of questionable utility. Although on a lesser scale than prisons, violence and intimidation also occur in training schools. Moreover, all too often juvenile institutions simply warehouse youths.).

143. Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (holding that the imposition of capital punishment on any person who murders at 16 or 17 years of age does not violate the Eighth Amendment's prohibition against cruel and unusual punishment.).

highest rates of adolescent homicides," which serves as "further proof that even the most severe deterrence based reforms have failed to significantly reduce juvenile criminal activity."[144] Although "transferring juveniles to the adult court system is the mostly widely used method of increasing severity of sanctions for youth offenders," a more balanced approach is the use of blended sentencing.[145] "Instead of choosing between sentencing a juvenile in adult or juvenile court, a judge may draw upon both systems."[146]

Typical sentence blending allows "a juvenile court judge to impose both a juvenile disposition and a stayed adult criminal sentence upon a conviction of a juvenile offender."[147] "If the juvenile offender fails to conform to the requirements of the juvenile disposition, the stay of the adult criminal sentence may be revoked and the juvenile may be transferred to an adult correctional facility."[148] Sentence blending extends juvenile court jurisdiction into criminal court and is designed to give the juvenile a wake-up call and one last chance to change his criminal behavior.[149] Currently, in the juvenile justice system, the judge can either retain the juvenile and in his discretion impose a mandatory minimum sentence or even a more severe sentence, or he can transfer the juvenile to adult court where the juvenile will be susceptible to adult sentencing procedures.[150] While the present choice offers judges an all-or-nothing approach (juvenile court or adult court), sentence blending is an effort at integrating rehabilitation with accountability.[151]

Eighth Amendment proportionality challenges brought by juveniles against sentences, such as life without parole, have met "limited success in state courts and no success in the federal system."[152] Juveniles, who

144. *Id.*

145. Butts, *supra* note 121, at 54.

146. *Id.*

147. Smallheer, *supra* note 1 at 275.

148. *Id.*

149. David Holmstrom, *Punishment Alone Fails to Contain Juvenile Crime*, CHRISTIAN SCI. MONITOR, Apr. 9, 1998, at 13.

150. *See generally*, Hunt, *supra* note 143.

151. Smallheer *supra* note 1, at 276.

152. Wayne A. Logan, *Article: Proportionality and Punishment: Proposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 684 (1998). *See* Harris v. Wright, 93 F.3d 581 (9th Cir. 1996) (holding a life without parole sentence of a 15-year-old convicted of aggravated first degree murder); *See also* State v. Foley, 456 So. 2d 979 (La. 1984) (upholding a sentence of life without parole at hard labor for a 15-year-old convicted of aggravated rape); State v. Moore, 906 P.2d 150, 153-54 (Idaho Ct. App. 1996) (noting that consideration must be given to the youth and immaturity of the offender, but concluding that a term of 25 years to life imposed on a 14-year-old for first degree murder of a police officer was not disproportionate); State v. Pilcher, 655 So. 2d 636, 642-43 (denying the challenge brought by a 15-year-old against a mandatory life without parole sentence for two counts of murder, noting the age of the victim); Rodriguez v. Peters, 63 F.3d 546, 568 (7th Cir. 1995) (refusing to consider the age of the 15-year-old defendant in challenge to life without parole sentence); State v. Spence, 367 A.2d 983, 989 (Del. 1976) (affirming sentence of life without parole and stating that the defendant's youth is irrelevant); State v. Douglas, 216 Wis. 2d

are at least sixteen years of age at the time of their crimes, can be sentenced to the death penalty, and just short of that, juvenile offenders may receive society's "penultimate punishment of life without parole."[153]

Traditionally, the justice system accorded special treatment to juveniles.[154] Thus, the judiciary should be sensitive to their youth, background and culpability when sentencing them as adults.[155] A sentence that is not "grossly disproportionate" for an adult may be so for a juvenile.[156] It is a basic reality that juveniles differ from adults in fundamental ways.[157] Many young offenders have intellectual deficits, learning problems or psychopathology.[158] Juveniles are simply not as able to make sound judgments concerning many decisions.[159] The National Mental Health Association states that up to seventy percent of children in the juvenile justice system suffer from mental or emotional disorders.[160] Arguably, youth may commit crimes due to deficiencies in psychosocial factors that adversely affect judgment which weakens the presumption of autonomy, free will, and rational choice—all attributes which criminal adult responsibility is based.[161] Psychological and scientific data support the idea that young children process information markedly differently from adults.[162] Furthermore, research indicates that children from underprivileged backgrounds "have underdeveloped cognitive skills and are more likely to adopt the inappropriate norms that they experience everyday."[163] Often mental health experts testify "that preadolescent children

---

114, 1997 WL 757701, at 4* (Wis. Ct. App. 1997)(denying proportionality claim of a 15-year-old against a sentence that extended beyond his natural life, the court was not persuaded that based on the petitioner's age alone, the parole eligibility date is excessive or constitutes cruel of unusual punishment).

153. Logan, *supra* note 153, at 689.

154. *See e.g.* Smallheer, *supra* note 1; Oddo, *supra* note 2.

155. Logan, *supra* note 153, at 709.

156. *Id.*

157. *Id.*

158. *See* Stanford v. Kentucky, 492 U.S. 361, 398 (1998) (Brennan, J., dissenting) (citing and discussing studies done on juvenile death row inmates indicating high rates of psychological, intellectual, and emotional disabilities). *See generally* Thomas Grisso, The Competence of Adolescents as Trial Defendants, 3 PSYCHOL. PUB. POL"Y & LAW 3 (1997)(providing extensive overview of relevant studies regarding a child's capacity). *See, e.g.*, Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (A 14 year old boy, no matter how sophisticated is unlikely to have any conception of what will confront him).

159. Logan, *supra* note 152, at 709.

160. Holmstrom, *supra* note 149, at 12.

161. Cauffman, *supra* note 47, at 416.

162. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 157 (1997). A recent study on the ability of juveniles to understand their privilege against self-incrimination found that children aged 10 to 12 understood their rights no better than mentally retarded adults and significantly less well than their 13 to 15 year old counterparts. *See* Grisso, *supra* note 158, at 12.

163. Bazelon, *supra* note 4, at 189. "[W]hile most preadolescents struggle to learn the reasoning and analytical skills necessary to make moral choices meaningful...children from disadvantaged backgrounds tend to struggle harder, and with less success." *Id.* For instance, "in a

have a limited capacity to appreciate the irreversibility of their actions or pinpoint why their behavior is criminal."[164]

Even the Supreme Court noted that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult."[165] The Supreme Court also indicated that, because of the special qualitative characteristics of juveniles, this justifies legislatures to treat them differently from adults, which is relevant to Eighth Amendment proportionality analysis.[166]

The decision to commit a crime involves the consideration of potential consequences, and most states enforce laws, such as the legal drinking age, legal driving age, voting rights, and curfews "based on the recognition that children do not possess the same decision-making capacity as adults."[167] "This legal recognition of a child's limited ability to make informed decisions should apply with equal force to the way society responds to children who have exercised that limited choice-making faculty to commit a crime."[168] Age, per se, should not be determinative of proportionality because some juveniles are capable of moral culpability.[169] But age should be a trigger for heightened proportionality analysis, "requiring a special vigilance" among courts with "respect to the background and traits of the young offender to ensure the presence of the culpability prerequisite to the sentence of life without parole."[170]

---

study of fourteen juveniles on death row, twelve had been brutally abused physically and five had been sodomized by older family members." Horowitz, *supra* note 56, at 157.

164. Bazelon, *supra* note 4, at 189.

165. Thompson v. Oklahoma, 487 U.S. 815, 835 (O'Connor, J., concurring).

166. *Id.* at 854 (O'Connor, J., concurring).

167. Felcher, *supra* note 56, at 347-348. No state allows minors under age Eighteen to vote or to sit on a jury. *See* Stanford v. Kentucky, 492 U.S. 361, 394 (1989) (Brennan, J., dissenting). Only four states allow minors under Eighteen to marry without parental consent; only fourteen states allow minors to consent to medical treatment; and forty-two states prevent minors from purchasing pornographic material. *See id.* According to Justice Brennan, these restrictions placed on minors reflect "the simple truth derived from communal experience that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern." *Id.* at 395. *See also*, Horowitz, *supra* note 56 (discussing the failure of the criminal justice system to recognize the fundamental differences distinguishing juveniles from adults and how that difference reduces culpability of juvenile offenders).

168. Felcher, *supra* note 56, at 347-348.

169. Logan, *supra* note 152, at 723.

170. *Id. See also* Thompson v. Oklahoma, 487 U.S. 815, 853 (O'Connor, J., concurring) ("Proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness."); *see also* Naovarath v. State, 779 P.2d 944, 946 (Nev. 1989)("In deciding whether the sentence [LWOP imposed on a 13-year-old] exceeds constitutional bounds it is necessary to look at both age of the convict and at his probable mental state at the time of the offense."). *See also*, Forst and Bloomquist, *supra* note 14, at 367 (stating that "age per se should be a legally relevant variable in any consideration of capacity to violate the criminal law as well as responsibility for criminal activity.").

II. SENTENCING AND REDUCED CONFIDENTIALITY OF JUVENILE COURT PROCEEDINGS AND RECORDS

A. *Background*

1. Right to Confidentiality

Based on the theory that juvenile court proceedings are not criminal in nature, the courts established only basic procedural rights for juveniles.[171] Some decisions have broadened juveniles' due process rights, but the Supreme Court has failed to grant juveniles constitutional protections equivalent to those granted to adults.[172] For instance, in *In re Gault*,[173] the court stated that the Constitution requires that fourteenth amendment due process guarantees apply to juvenile proceedings.[174] Yet, the court still maintained discretion in some other areas such as sentencing.[175] Judges could consider the juvenile's race, sex, home environment, and other factors not considered in adult cases.[176]

Although the Sixth Amendment guarantees the right to an impartial jury in all criminal prosecutions,[177] the Supreme Court also failed to grant juveniles the constitutional right to jury trials.[178] In *McKeiver v. Pennsylvania*,[179] the Court, in a plurality opinion, refused to extend the juvenile due process rights established in *Gault* to include the right to a

---

171. Coupet, *supra* note 16, at 1314. The atmosphere and organization of the juvenile justice system was intended to give an impression of concern. *See* Smallheer, *supra* note 1, at 265. The focus was on acting in the best interest of the child—not obtaining convictions or adjudicating the child guilty or innocent. *See id.* Because the court operated more like a social agency than a criminal court and sought to rehabilitate the juvenile, constitutional protections were not deemed necessary. *See id.*

172. Hunt, *supra* note 143, at 678. In Lanes v. State, 767 S.W.2d 789, 794 (Tex. Ct. App. 1989), the court summarized the Eighth main cases that explained juvenile rights: (1) protection against coerced confessions, Haley v. Ohio, 332 U.S. 596 (1948); (2) procedural requirements for certification hearings, Kent v. U.S., 383 U.S. 541 (1966); (3) the rights of notice, counsel, confrontation, cross-examination, and protection against self-incrimination, *In Re* Gault, 387 U.S. 1 (1967); (4) proof beyond a reasonable doubt, In re Winshop, 397 U.S. 358 (1970); (5) that a jury trial is not required, McKeiver v. Pennsylvania, 403 U.S. 528 (1971); (6) double jeopardy protections, Breed v. Jones, 421 U.S. 519 (1975); (7) the validity of pre-trial detention, Schall v. Martin, 467 U.S. 253 (1984); and (8) a diminished Fourth Amendment standard applicable to school searches, New Jersey v. T.L.O. 469 U.S. 325 (1985).

173. 387 U.S. 1 (1967).

174. *Gault*, 387 U.S. at 27-30.

175. David Dormont, *For the Good of the Adult: An examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 MINN. L. REV. 1769, 1779-81 (1991).

176. *Id.* at 1780.

177. Duncan v. Louisiana, 391 U.S. 145, 149 (1968). In Duncan, the Court held that the right to a jury trial in criminal cases is fundamental to the American scheme of justice. *Id.*

178. Dormant, *supra* note 175, at 1780-1786 (discussing the right to jury trial as it applies to adults and juveniles).

179. 403 U.S. 528 (1971). Sixteen-year-old McKiever was charged with robbery, larceny, and receiving stolen goods. *Id.* at 534. The court denied his request for a jury trial at his adjudication hearing. *Id.* at 535.

jury trial.[180] Although the court recognized serious shortcomings in the juvenile justice system, the Court emphasized that a jury is not necessary for accurate fact-finding in the context of a juvenile proceeding and that other procedural rights adequately protected the accused juvenile.[181]

"Almost all juvenile court proceedings and records remained confidential as recently as the 1960's."[182] Confidentiality comprised a critical part of the juvenile justice system based on the idea that labeling a "juvenile as a law violator would stigmatize a young person."[183] But during the 1980's and 1990's, "support for confidentiality protections began to erode."[184] Nearly all states now allow juvenile fingerprints to be included in criminal history records and authorization of juveniles to be photographed for later identification.[185] "In addition, many states enacted laws that required juvenile records to remain open longer or prevent the sealing or destruction of juvenile records altogether, typically those involving violent or serious offenses."[186]

2. Use of Juvenile Records in Sentencing

"Some states have even passed laws enabling juvenile court records to affect criminal court sentences."[187] At least twenty states allow for the use of juvenile adjudications to enhance adult criminal sentences.[188] Thus, "adjudication in juvenile court begins to entail potentially serious jeopardy for youth."[189] Laws or statutes that permit such practices allow juvenile offense histories to serve as sufficient grounds for increasing

---

180. *McKiever*, 403 U.S. at 545.

181. *Id.* at 547.

182. *See* Butts, *supra* note 121, at 55.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* Since 1992, "several states have passed legislation that gives the general public and/or media access to the name and address of a minor adjudicated delinquent for specified serious or violent crimes." OJJDP Research Report: State Response to Serious and Violent Juvenile Crime, p.75 (1996) " In all, 39 states permit the release of a juvenile's name and/or picture to the media or general public under certain conditions." *Id.* "From 1992 through 1995, several states enacted or modified their statutes with respect to notice to schools." *Id.* at 79. "As of 1995, 25 states had statutes or court rules that either increase the number of years for which a serious and violent offender's records must remain open or prohibit sealing or expungement of the record." *Id.* at 85. *See* Oddo, *supra* note 2, at 115.

187. Butts, *supra* note 121, at 55.

188. Sara E. Kropf, *Note: Overturning McKeiver v. Pennsylvania: The Unconstitutionality of Using Prior Convictions to Enhance Adult Sentencing Under the Sentencing Guidelines*, 87 GEO. L.J. 2149, 2175 (1999).

189. Butts, *supra* note 121, at 55. For instance, Illinois and Indiana allow past juvenile offenses to serve as sufficient grounds for increasing the lengths of sentences or imposing consecutive sentences. *Id.* Furthermore, California, Louisiana, and Texas allow the use of juvenile adjudications to serve as the first and second strikes against an adult offender. *Id.* Thus, in these states, a juvenile offender with two prior juvenile court adjudications could face life in prison for a first appearance in adult criminal court. *Id.*

sentence length or imposing first and second "strikes" against an adult offender.[190] Thus, an offender with two prior juvenile adjudications could face life in prison for a first appearance in adult criminal court.[191]

Despite the case law prohibiting the use of prior uncounseled convictions, federal courts must include prior juvenile adjudications in adult sentencing calculations.[192] Federal courts generate their sentencing determinations with guidelines promulgated by the United States Sentencing Commission.[193] The core of the United States Sentencing Guidelines (Guidelines)[194] is a sentencing table, consisting of forty-three base offense levels and six criminal history categories, identifying the applicable sentencing range for offenders.[195] According to the Guidelines, assignment to the highest criminal history category, level VI, includes those classified as career offenders.[196] Juvenile defendants, those Eighteen years of age at the time of offense, who commit crimes of violence or controlled substance offenses and have at least two similar prior felony convictions, are then career offenders.[197] The Guidelines treat prior sentences, imposed in related cases, as one sentence for purposes of calculating the criminal history category.[198] Points are based on the length of the sentence imposed for the prior sentence rather than on the severity or nature of the offense.[199] The reason for enhancing sentences through this

---

190. *Id.*

191. *Id.*

192. Robert E. Shepard, *Trying Juveniles in Federal Court*, 9 CRIM. JUST. 45, 47 (1994).

193. Paul M Winters, et al., *Project: Twenty-fourth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1993-1994 Sentencing Guidelines*, 83 GEO. L.J. 1229, 1229 (1995).

194. United States Sentencing Commission, Federal Sentencing Guidelines Manual section Ch.1, Pt.A(4)(h) (1999) [hereinafter U.S.S.G]. The Guidelines are applicable to all offenses committed on or after November 1, 1987. U.S.S.G. Ch.1, Pt.A(1). When a defendant is convicted in federal court, the judge must impose a sentence based on the Guidelines in effect at defendant's sentencing date. *Id.*at Section 1B1.11.

195. The vertical axis of the Sentencing Table is the base offense level. *Id.* at Ch.5, Pt. A. The criminal history category constitutes the horizontal axis of the table. U.S.S.G. Ch.5, Pt.A. The judge determines the appropriate category by totaling the number of criminal history points calculated in the pre-sentencing report. *Id.* section 4A1.1. The points start at zero and have no upper limit. *Id. See* Sentencing Table. A defendant with 13 or more points have a criminal category of VI, regardless if their point total is 14 or 43. *Id.* at Ch.3, Pt.A.

196. U.S.S.G. section 4B1.1.

197. Winters et al., *supra* note 192, at 1244.

198. U.S.S.G. section 4A1.2. In regards to offenses committed prior to age eighteen section 4A1.2(d) of the Guidelines reads: (1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under section 4A1.1(b) for each such sentence. (2) In any other case, (A) add 2 points under section 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days of the defendant was released from such confinement within five years of his commencement of the instant offense; (B) add 1 point under section 4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A). *Id.*

199. *Id.* at Sec. 4A1.1. Three points are added for each prior sentence exceeding one year and a month in length regardless of whether the prior offense was forgery, drug dealing, or murder. *Id.*

method is because the Sentencing Commission "sought to punish recidivism and to protect the public from future criminal behavior."[200]

3. Use of Juvenile Records in Sentencing in the Tenth Circuit: *United States v. McKissick*[201]

a. Facts

On December 7, 1997, a shooting took place in the parking lot of a nightclub in Oklahoma City.[202] The police arrested Mr. McKissick and Mr. Ziegler, the suspects, for discharging a firearm from a motor vehicle shortly after the shooting.[203] The police also found cocaine in Mr. McKissick's car and cocaine on Mr. Ziegler.[204] The trial court convicted Mr. McKissick of being a felon in possession of firearm, possession of crack cocaine with intent to distribute, and use of a firearm during, and in relation to, a drug offense.[205] The court convicted Mr. Ziegler of crack cocaine possession.[206] Both defendants appealed.[207] In relation to the sentencing of Mr. Ziegler, the court of appeals held that "prior state court convictions of the defendant, tried as an adult for offenses occurring when he was a juvenile, could be counted in determining applicability of federal mandatory life sentence."[208]

b. Sentencing

Mr. Ziegler contended that "the district court violated his rights to equal protection under the law when it used Oklahoma drug convictions both as predicates for the 21 U.S.C. Section 841(b)[209] enhancement and as convictions resulting in three criminal history points, each under U.S.S.G. Section 4A1.2(d)."[210] Mr. Ziegler argues that "he was treated

---

200. "A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment." *Id.* sec. 4A introductory commentary.

201. 204 F.3d 1282 (10th Cir. 2000).

202. *McKissick*, 204 F.3d at 1287.

203. *Id.* at 1288.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 1282.

209. *Id.* at 1300. *See also* 21 U.S.C. Section 841(b). 21 U.S.C. Section 841(b)(1)(A) requires a mandatory life sentence if the defendant committed the instant offense "after two or more prior convictions for a felony drug offense have become final." 21 U.S.C. Section 841(b)(1)(A).

210. *McKissick*, 204 F.3d at 1300; *See also* U.S.S.G. Section 4A1.2(d). For offenses committed prior to the age of eighteen, if the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under Section 4A1.1(a) for each such sentence. 4A1.2(d)(1). For any other case, (A) add 2 points under section 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within the five years of his commencement of the instant offense; (B) add 1 point under

differently than similarly situated persons because some states do not allow the unsealing of juvenile records, and the states differ on the ages and crimes for which persons under eighteen can be prosecuted as adults."[211]

The Tenth Circuit reviewed the equal protection claim "under the rational basis standard to determine whether the challenged sentence was based on arbitrary distinction or upon a rational sentencing scheme."[212] In drug trafficking cases involving fifty grams or more of cocaine base, 21 U.S.C. Section 841(b)(1)(A)[213] requires a mandatory life sentence if the defendant committed the instant offense after two or more prior convictions for a felony drug offense have become final.[214] Although U.S.S.G. § 4A1.2(c)(2) provides that juvenile status offenses are never counted as a prior sentence, the statute requires three points to be added if the defendant committed the prior offense to the age of eighteen and if the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month.[215]

The Tenth Circuit concluded that "the use of Mr. Ziegler's felonies as predicate offenses for the section 841 enhancement did not deprive him of equal protection under the law."[216] The court looked at congressional intent and concluded that Congress "left certain aspects of sentence enhancement to the laws of the states and that the language of the statute tied" the definition of the term felony to the state's clarification of the crime as a felony."[217]

The court looked at Mr. Ziegler's conviction as an adult for the two Oklahoma felonies.[218] "Although states have different criteria for determining when a juvenile can be charged as an adult," the court stated that the different criteria did not "render the sentencing scheme irrational any more than relying on the state's various definitions of felonies."[219] The court held that "Mr. Ziegler's assertion that similarly situated juveniles might be treated differently because some states allow the unsealing of

---

section 4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A). 4A1.2(d)(2).

211. *McKissick*, 204 F.3d. at 1301.

212. *Id.* at 1300; Chapman v. U.S., 500 U.S. 453, 465, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991).

213. *See* 21 U.S.C. Section 841 (b)(1)(A).

214. *Id.* at Section 841(b)(1)(A)(viii).

215. U.S.S.G. Section 4A1.2(c) and (d)(1).

216. *McKissick*, 204 F.3d at 1301.

217. *Id.* Congress requested the creation of the Sentencing Guidelines to prohibit the abuses and biases occurring under the system of discretionary sentencing. Dormont, *supra* note 175, at 1771-1772. Congress intended for the Guidelines to ensure that courts treat similarly situated defendants the same. *Id.*

218. *McKissick*, 204 F.3d at 1301.

219. *Id.*

juvenile records, is inapplicable" since Mr. Ziegler had been "convicted as an adult."[220]

4. Other Circuits

Like several other circuits, the Tenth Circuit accepted the constitutionality of the sentence enhancement provisions without question.[221]

Certain types of prior sentences are generally part of the defendant's criminal history calculations, however, the circuit courts do not always agree as to what constitutes an includable prior sentence. [222] In *United States v. Unger,*[223] the First Circuit ruled that uncounseled juvenile proceedings count towards the criminal history scoring.[224] In *United States v. Matthews,*[225] the Second Circuit held that, because the state statute did not eliminate all trace of the prior adjudication and allows consideration of youthful offender adjudication in later proceedings, a youthful offender adjudication in the state is not an "expunged" conviction for purposes of sentencing under the Guidelines.[226] Therefore, the court concluded that the district court properly included the defendant's youthful offender adjudication in calculating his criminal history category.[227]

In *United States v. Asburn,*[228] the Fifth Circuit held that a juvenile conviction, automatically set aside under a state statute, properly received the prior sentence designation.[229] Finally, in *United States v. Bar-*

---

220. *Id.*

221. *See* United States v. McKissick, 204 F.3d 1282.

222. U.S.S.G. section 4A1.2(c). According to the Guidelines, sentences for offenses such as hitchhiking, juvenile status offenses and truancy, loitering, minor traffic violations, public intoxication, and vagrancy do not count towards criminal history scoring. *Id.* To work around these constraints the Guidelines "place no caps on the number of points an adult may acquire from his juvenile record." Dormont, *supra* note 171, at 1774.

223. 915 F.2d 759 (1st Cir. 1990), cert. denied, 498 U.S. 1104 (1991).

224. *Unger*, 915 F.2d at 761-62. Unger allegedly engaged in a variety of criminal conduct as a juvenile, including breaking and entering, receiving stolen goods, and assault and battery. *Id.* at 763. In failing to prove this conduct, the state could not convict Unger of these offenses, but instead found him guilty of being wayward. *Id.* Two years later, an adult court judge used this wayward finding to increase his criminal history score, imposing the maximum sentence. *Id.* at 760.

225. 205 F.3d 544 (2nd Cir. 2000).

226. *Matthews*, 205 F.3d at 548. The defendant was convicted of possession of a firearm by a felon in violation of 18 U.S.C.S. Section 922(g)(1)(1994). *Id.* at 545. In calculating his sentence, the lower court used the defendant's youthful criminal adjudications to magnify his sentence under the U.S. Sentencing Guidelines Manual Section 4A1.1, 4A1.2. *Id.*

227. *Id.* at 548-549.

228. 20 F.3d 1336 (5th Cir.), opinion reinstated in part on reh'g en banc, 38 F.3d 804 (1994), cert. denied, 115 S. Ct. 1965 (1996).

229. *Asburn*, 20 F.3d at 1343. The defendant appealed the sentence given to him after he pleaded guilty to 2 counts of bank robbery. *Id.* at 1337. The court held that the "set aside" provision "should not be interpreted to be an expungement under 4A1.2(j) in calculating the defendant's criminal history category". *Id.* at 1343. The court reasoned that because the youth convictions had been "set aside for reasons unrelated to innocence or errors of law" that they were properly used to calculate the defendant's criminal history category. *Id.*

ber,[230] the Sixth Circuit upheld a sentence enhancement based on the defendant's extensive criminal history dating back to the age of twelve.[231] The court accepted the government's contention that the defendant's current criminal history category did not reflect the seriousness of the defendant's past criminal conduct or the likelihood that he would commit other crimes, and thus the court granted the government's motion for upward departure in sentencing.[232]

In contrast, the Seventh Circuit held, in *United States v. Kozinski,*[233] that a sentence of supervision not based on a finding of guilt received improper consideration as a prior sentence.[234] Yet, in *Nicholas v. United States,*[235] the Supreme Court allowed the use of a prior uncounseled misdemeanor conviction to enhance the sentence for a subsequent conviction that did not, by itself, justify imprisonment.[236]

These failed challenges to the constitutionality of the use of prior juvenile adjudications to enhance adult sentences illustrates that the courts are resistant to limiting the harsh effects of punitive sentencing on young offenders and unwilling to consider how the lack of procedural safeguards available to juveniles in juvenile courts harm convicted adult offenders with juvenile records.[237]

5. Analysis

Although juveniles do not have the same due process rights that adults receive,[238] juvenile offense records are regularly used to lengthen subsequent adult criminal sentences.[239] This trend appears to demand a higher standard of due process rights, such as the right to a trial by jury.[240] The *McKiever* court's decision to deny juveniles the right to a

---

230. 200 F.3d 908 (6th Cir. 2000).

231. *Barber*, 200 F.3d at 914. In addition to his adult record, the defendant had nine juvenile convictions for which he was assessed no criminal history points. *Id.* at 909. The court held that the offenses were properly considered as part of a recidivism inquiry and the sentence increase was affirmed. *Id.* at 912.

232. *Id.* at 910.

233. 16 F.3d 795 (7th Cir. 1994).

234. *Kozinski*, 16 F.3d at 812. The court held that the Sentencing Guidelines made clear that "a prior sentence is any sentence previously imposed upon adjudication of guilt whether by guilty plea, trial, or plea of nolo contendere." *Id.* at 911. (citing U.S.S.G. Section 4A1.2(a)(1).

235. 114 S. Ct. 1921 (1994).

236. *Nicholas*, 114 S. Ct. at 1928. The court emphasized that "sentencing courts have not only taken into consideration prior convictions, but also considered a defendant's past criminal behavior, even if no conviction resulted from that conduct." *Id.*

237. *See* Hunt, *supra* note 142, at 658-669 (discussing implications for the future of the juvenile justice system and the effects of recent punitive sentencing).

238. Butts, *supra* note 121, at 51.

239. Kay Redeker, *Comment: Solidifying the Use of Juvenile Proceedings as Sentence Enhancement and Clarifying Second-Degree Murder*, 37 WASHBURN L.J. 483, 486 (1998).

240. Hunt, *supra* note 142, at 645. "The right to a jury trial allows gives offenders bargaining power to discuss a plea agreement with prosecutors," furthermore "It may also be more difficult to obtain the unanimous guilty verdict necessary for a jury to convict an offender that to convince a

jury trial was based on two assumptions: (1) "juvenile proceedings result in treatment, not punishment," and (2) "juvenile proceedings will not detrimentally affect the juvenile when she reaches the age of majority."[241] These assumptions are not accounted for in the United States Sentencing Guidelines.[242] Thus, courts upholding the use of section 4A1.2(d) base their decision on an erroneous understanding of the "constitutional underpinnings that allow juveniles dispositions absent a jury trial."[243] "If a sentence was imposed under the guise of therapy, it should remain a therapeutic sentence; it should not be allowed to metamorphosize into a criminal conviction at the prosecution's convenience."[244]

Because juveniles do not have the same constitutional protections as adults, arguably, juveniles convicted without a jury or represented by counsel—unless the jury trial is validly waived—are unconstitutionally convicted.[245] Therefore, using such juvenile convictions to enhance later adult sentences under the Guidelines is called into question.[246] The Guidelines allow courts to use prior juvenile adjudications to enhance adult sentences by adding points to a defendant's criminal history score—treating juvenile confinements like adult sentences to the detriment of the adult defendant.[247] When juveniles may face additional confinement as an adult because of juvenile delinquency, then juveniles are entitled to the same protection that juries provide to adults.[248] However, commentary in the Guidelines and Supreme Court case law prohibit courts from using prior unconstitutional adjudications to enhance later sentences.[249] So, if a prior juvenile adjudication is unconstitutional be-

---

single judge of an offender's guilt" which increases the likelihood that a juvenile will be found guilty. *Id.*

241. Dormont, *supra* note 175, at 1790. The *McKiever* court based its decision on the fact that a finding of delinquency being significantly different from than a finding of criminal guilt. *McKiever*, 403 U.S. at 540. The court assumed that the juvenile delinquency proceeding would not stigmatize the child a criminal. *McKiever*, 403 U.S. at 552. (White, J., concurring). *See also* Dormont, *supra* note 175, at footnote 105.

242. *Id.* at 1791. *See also* U.S.S.G. § 4A1.2(d).

243. Dormont, *supra* note 175, at 1791.

244. *Id.* at 1794.

245. Kropf, *supra* note 188, at 2179. To deny juveniles due process rights, that ensures that criminal trials are conducted fairly and that similarly situated defendants are afforded the same constitutional protections, ignores the purpose and intent of the Due Process Clause and the Sixth Amendment. *Id.* at 2180. "Failure to apply constitutional protections such as due process rights to juvenile proceedings was justified under the 'legal fiction' of protective confinement and rehabilitation instead of criminal punishment." Coupet *supra* note 16, at 1314.

246. Kropf, *supra* note 188, at 2179.

247. Dormont, *supra* note 175, at 1792.

248. *Id.* at 1795.

249. Kropf, *supra* note 188, at 2179.

cause the juvenile did not receive fundamental due process rights, then under the Guidelines the court cannot use the prior conviction.[250]

On the other hand, one could argue that "sentencing adults who have a significant criminal history as first offenders is tantamount to offering a double discount."[251] "[T]he offender received a discount at the juvenile level (first juvenile offense) and should not be accorded a second completely fresh start.[252] However, "juvenile priors should not carry the same weight as adult previous convictions."[253] Perhaps a compromise would be to use the juvenile record to disentitle an adult of first-offender status—but not to extend its influence much more than that.[254] In fact, many sentencing guideline systems do just that, namely, counting juvenile adjudications, but with strict limiting standards.[255]

CONCLUSION

"The current juvenile justice system lacks a coherent and consistent policy on how to deal with juveniles."[256] Although the Due Process Clause attempts to ensure that criminal trials are fair and that similarly situated defendants have the same constitutional rights, juveniles do not have the equivalent due process rights as adults.[257] But due process issues in juvenile adjudications extend beyond the individual juvenile's trial.[258] When courts use the Sentencing Guidelines to enhance adult sentences, the courts "unconstitutionally ignores the different protections afforded the juveniles and the different policies that underpin the juvenile justice system."[259]

Historically, the law protected juveniles, but with a perceived increase in juvenile crime rates and violent juvenile crimes, the prospect of

---

250. *Id.*

251. Julian V. Roberts, *Article: The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303, 326 (1997). "The importance of targeting repetitive violent offenders is clear from the juvenile record provisions in many states." *Id.* at 330. According to a Bureau of Justice Statistics study the presence of juvenile offenses was one of the most significant predictors of adult reconviction. *Id.* at 327.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* "The guidelines in Florida count all prior convictions but only if they occurred within a three year period proceeding the commission of the primary offense." *Id.* "In Kansas, the age of the offender is a determining factor" with juvenile adjudications extinguishing "once the adult reaches twenty-five years of age." *Id.*

256. Leta R. Holden, *Tenth Circuit Survey: Juvenile Law*, 73 DENV. U. L. REV. 843, 856 (1996).

257. Kropf, *supra* note 188, at 2180.

258. *Id.*

259. Dormont, *supra* note 175, at 1770. *But see* Mills, *supra* note 14 (arguing that (1) juveniles have almost all of the constitutional protections given to adult criminals, (2) the Guidelines reinforce the important goal of recidivism, and (3) by using juvenile crimes to enhance adult sentences, the Guidelines realistically address the nature and increase of juvenile crime).

a uniform standard by which to treat juveniles seems unpromising.[260] However, the "get tough on crime" rhetoric has prompted reformers to enact legislation that threatens to replace the juvenile justice system as a forum for dealing with juvenile delinquents as adult criminals.[261] Sentencing policies, such as Eighth Amendment proportionality analysis in juvenile cases and the expungement of juvenile records, "threaten to constructively dismantle the system that has protected juveniles" and valued rehabilitation over punishment.[262] Perhaps in the future new efforts will begin to reflect the original intent of the juvenile justice system—rehabilitation and reform, which are more effective than punishment.[263]

Audrey Dupont

260. Burnstein, *supra* note 29, at 902.

261. Coupet, *supra* note 16, at 1346.

262. *Id.* Children are vulnerable to the effects of long sentences in adult prisons and will not just spend time there but will essentially be raised in the prison environment. *See* Felcher, *supra* note56, at 347.

263. *Id.*

QUALIFIED IMMUNITY

THE MISSING VOICE *HERRING V. KEENAN*: THE NARROWING OF THE TENTH CIRCUIT'S QUALIFIED IMMUNITY ANALYSIS

INTRODUCTION

In *Herring v. Keenan*,[1] the Tenth Circuit granted a probation officer qualified immunity after the officer divulged a probationer's HIV positive status to both his employer and to his family.[2] The court held that although a probationer enjoys certain constitutional rights, including a constitutional right to privacy, a probationer's right to privacy regarding his HIV status was not a "clearly established" constitutional right at the time of the disclosure.[3]

Throughout the 1990's, the Tenth Circuit's definition of "clearly established" rights has been controversial. In *Eastwood v. Department of Corrections of the State of Oklahoma*,[4] the Tenth Circuit admitted that its "definitions of what constitutes a clearly established right have been hazy."[5] Specifically, in 1992, the Tenth Circuit drastically changed the nature of its qualified immunity requirements in *Medina v. City & County of Denver*.[6] With suspect justification, the *Medina* court drastically narrowed the definition of what constitutes a "clearly established" right by limiting the range of sources from which a "reasonable official" would be expected to be acquainted with for the purpose of knowing whether a certain right exists. According to *Medina*, for a right to be "clearly established" such that a "reasonable official" would be expected to know of its existence, there must be a United States "Supreme Court decision or Tenth Circuit decision on point, or the clearly established weight of authority from other courts."[7]

From this very narrow conception of what defines a "clearly established" right, the Tenth Circuit slowly broadened its scope to include the holdings in other circuits. In 1997, the Tenth Circuit stated in *Lawmaster v. Ward* [8] that a government official is not free from judgment simply

---

1. 218 F.3d 1171 (10th Cir. 2000).
2. *See id.* at 1171-72.
3. *See id.* at 1173.
4. 846 F.2d 627 (10th Cir. 1988).
5. *Id.* at 630.
6. 960 F.2d 1493 (10th Cir. 1992).
7. *Id.* at 1498.
8. 125 F.3d 1341, 1350-51 (10th Cir. 1997) (holding that the Supreme Court need not have ruled the exact conduct at issue unlawful in order for a law to be "clearly established" and that rights

because the Supreme Court has not ruled on a particular form of conduct.[9]

Further, in *Anaya v. Crossroads Managed Care Systems, Inc.*,[10] the Tenth Circuit qualified its *Medina* holding by stating that the purpose of showing that a law is "clearly established" is to assure that an official understands that his conduct violates a right.[11] Thus, the *Anaya* court affirmed *Lawmaster's* broadening of the definition of "clearly established" by redefining and expanding the scope of what a reasonable government official would and should know.[12] The court in *Anaya* held that "the shield of qualified immunity is pierced if in light of pre-existing law, the unlawfulness of the conduct is apparent to the officer."[13]

In a considerable regression in *Herring*, the Tenth Circuit took a stricter stance on what constitutes a "clearly established" right than even *Medina*.[14] By granting the probation officer qualified immunity, the *Herring* court stepped away from *Lawmaster* and *Anaya's* broadening of the definition of what constitutes a "clearly established" right, and required strict analogies between the government officer's conduct and conduct previously deemed unlawful by the Supreme Court or by the Tenth Circuit.[15]

More importantly, the *Herring* court's narrow view did not account for pertinent Supreme Court precedent that clearly established that both prisoners' and probationers' constitutional rights cannot be violated

---

cannot be defined too narrowly or else qualified immunity will wrongfully become an "insurmountable obstacle to plaintiffs seeking to vindicate their constitutional rights.").

9. *Id.* at 1350.

10. 195 F.3d 584 (10th Cir. 1999).

11. *Id.* at 594.

12. *Id.* at 594-95 (looking to other circuit precedent, Colorado Supreme Court precedent, and the laws of civil forfeiture to determine whether a right was "clearly established" at the time the official undertook the act in question).

13. *Id.* at 594 (quoting *Lawmaster*, 125 F. 3d at 1350).

14. By holding that a right is "clearly established" when the Supreme Court, Tenth Circuit, or the weight of authority from other courts have previously held the law to be as the plaintiff maintain, the *Herring* court ignored the *Anaya* court's specific emphasis on the "*weight of authority from other courts*" portion of the test and effectively focused only on the Supreme Court and the Tenth Circuit. *See Herring*, 218 F.3d at 1176. Furthermore, the *Herring* court decided to define the right of privacy in a probationer's HIV status very narrowly, thus requiring precise factual correspondence between the case at bar and a case previously ruled upon in the Supreme Court or the Tenth Circuit. *See id.* at 1179.

15. *Id.* at 1178 ("none of the cases discuss the question whether the right to privacy protects a probationer who may be HIV positive from a limited disclosure by his or her probation officer to persons whom the probation officer believed might be affected by their contact with the probationer. The cases, therefore, did not clearly establish such a right in 1993.").

without some justification relating to a legitimate penological or probationary objective.[16]

The first section of Part I of this survey discusses the Supreme Court's treatment of qualified immunity. The second section of Part I analyzes the Tenth Circuit's treatment of the "clearly established" prong of the qualified immunity determination. Part II reviews the Tenth Circuit's apparent backtrack in *Herring* and discusses how the Tenth Circuit's narrow treatment of qualified immunity overlooked Supreme Court and circuit precedent that recognizes the existence of a probationer's constitutional rights,[17] an individual's right to privacy in his or her personal information,[18] and more specifically, an individual's right to privacy concerning his or her medical information.[19] Part III examines the Supreme Court cases that clearly establish the balancing test a court must conduct to determine the constitutionality of a restriction on a probationer's constitutional rights. Part IV comments upon the Supreme Court and circuit cases that "clearly establish" that Keenan's disclosure of Herring's HIV status violated his constitutional right to privacy.[20] Finally, Part V explores the social ramifications of the Tenth Circuit's decision to grant qualified immunity in the highly sensitive right to privacy area. Further, Part V questions the implication of the Tenth Circuit's analysis regarding the creation of new rights in the Tenth Circuit.

---

16. Turner v. Safley, 482 U.S. 78 (1987) (holding that a court must determine the "rational connection" between the infringement of a prisoner's constitutional rights and the existence of a legitimate penological goal); Griffin v. Wisconsin, 483 U.S. 868 (1987) (holding that the infringement of a probationer's rights is not "unlimited" and is justified only by a showing of the "special needs" of the probation system).

17. *Griffin*, 483 U.S. at 873-74 (holding that a probationer's retains constitutional rights, but that these rights are limited as compared to an average citizen and that they may be infringed if justified by the "special needs" of the probation system).

18. Whalen v. Roe, 429 U.S. 589, 598-99 (1977) (recognizing that an individual has a right to privacy concerning his or her interest in avoiding disclosure of personal matters and an individuals interest in independently making personal decisions).

19. United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3rd Cir. 1980) (interpreting *Whalen's* dual privacy rights to include an individual's right to privacy in medical records and medical information).

20. *Whalen*, 429 U.S. at 598-99 (recognizing that an individual has a right to privacy concerning his or her interest in avoiding disclosure of personal matters and an individuals interest in independently making personal decisions); *Eastwood*, 846 F.2d at 631 (holding that an individual has a right to privacy that protects him or her from forced disclosure of his or her sexual history); Lankford v. City of Hobart, 27 F.3d 477, 479 (10th Cir. 1994) (quoting *Eastwood*, 846 F.2d at 631 and reiterating that the right to privacy in one's medical information was established in 1990); Harris v. Thigpen, 941 F.2d 1495, 1513-14 (11th Cir. 1991) (recognizing the existence of a constitutional right to privacy and the "significant privacy interest" triggered by an individual's HIV information); *Westinghouse*, 638 F.2d at 577 (interpreting *Whalen's* dual privacy rights to include an individual's right to privacy in medical records and medical information).

I. QUALIFIED IMMUNITY

A. *Causes of Action Against Government Officials—§ 1983 and Bivens*

Qualified immunity arises in situations where a government official violates an individual's constitutional rights. In this situation, the qualified immunity doctrine was developed to strike a balance between an individual's interest in redress and society's interest in efficient government. Individuals injured at the hands of the government have available two avenues of redress. For violations by state or local government officials, the injured party may seek damages pursuant to 42 U.S.C. § 1983.[21] If a federal official violates an individual's rights directly under the Constitution, the injured party may seek redress under the Supreme Court's holding in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[22] In *Bivens*, the Court allowed an individual to state a cause of action directly under the Fourth Amendment.[23] The *Bivens* Court stated that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[24] As a result, *Bivens* stands for the right of an individual to sue a federal officer for a constitutional violation directly under that portion of the constitution that is alleged to be violated.[25]

B. *Qualified Immunity in the Supreme Court—The Harlow Objective Reasonableness Test*

Through §1983 and *Bivens*, an individual is entitled to state a cause of action for virtually any infringement at the hand of a local, state, or federal government actor.[26] Because of qualified immunity, however, the right to state a cause of action by no means guarantees vindication for the vioaltion. In *Harlow v. Fitzgerald*,[27] the Supreme Court defined the justi-

---

21. Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State 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.

42 U.S.C. § 1983 (2000).

22. 403 U.S. 388 (1971).

23. *Id.* at 397 ("Having concluded that the petitioner's complaint states a cause of action under the Fourth Amendment, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.").

24. *Id.* at 396 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

25. *Id.* at 397.

26. *See supra* notes 21-25 and accompanying text.

27. 457 U.S. 800 (1982).

fications for qualified immunity as a defense against government official liability. According to *Harlow*, qualified immunity for government officials is necessary to strike the proper balance between the need to protect the rights of individual citizens and the "need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[28] According to *Harlow*, the unfettered ability to sue the government carries with it enormous social costs.[29] The Court believed that qualified immunity would be a viable mechanism to reduce the burden on society caused by insubstantial lawsuits.[30]

Prior to *Harlow*, the Court refused to grant qualified immunity where it could be shown that the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . . ."[31] In *Harlow*, the Court decided that the subjective portion of the *Wood* qualified immunity standard was "incompatible" with the stated goal of qualified immunity—to terminate insubstantial lawsuits prior to trial.[32] Whether a government official acted with malicious intent is typically a question of fact to be determined at trial after time-consuming discovery and depositions.[33] As a result, the Court chose to eliminate the subjective element from the qualified immunity standard and stated a new standard, "that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[34] The Court stated:

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge may appropriately determine, not only the currently applicable law, but whether the law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent le-

---

28. *Id.* at 807.

29. *Id.* at 814 (discussing such social costs to include the "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.").

30. *Id.*

31. Wood v. Strickland, 420 U.S. 308, 322 (1975). Prior to *Harlow*, there was a subjective element involved in determining whether an official knew that his conduct violated a "clearly established" right. *Id.*

32. *Harlow*, 457 U.S. at 815-16.

33. *Id.* at 816-17.

34. *Id.* at 818.

> gal developments, nor could be fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.[35]

C. *Defining Harlow's Objective Reasonableness*—Anderson v. Creighton

In *Anderson v. Creighton*,[36] the Supreme Court shed light upon the question of what a reasonable official is to be expected to know. A government official's ability to invoke qualified immunity turns on whether that official's conduct was objectively reasonable "in light of the legal rules that were 'clearly established' at the time it was taken."[37] The Court stated that in order for the goals of qualified immunity to be met, the "clearly established" rule must be defined "in a . . . particularized, and hence more relevant, sense . . . ."[38] The Court stated that if the legal rule was defined generally, "[p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."[39] Most importantly, the *Anderson* Court seemed to address an issue that the *Harlow* Court left silent—how the circumstances under which the current state of the law are to be determined.[40] Instead of delineating a static list of courts upon whose decisions a reasonable government official should be knowledgeable, the *Anderson* Court held:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.[41]

By the *Anderson* court holding that the very act in question need not be deemed previously unlawful broadens the potential sources of legal rights that a reasonable official must be aware. The Court simply required that the right be "apparent" from "pre-existing law," without any further definition of the sources from which a law becomes "apparent."[42] The *Anderson* Court left only the negative assumption that even conduct not previously deemed unlawful can be "clearly established" if "pre-

35. *Id.*
36. 483 U.S. 635 (1987).
37. *Anderson*, 483 U.S. at 639.
38. *Id.* at 640.
39. *Id.* at 639.
40. *Id.* at 640.
41. *Id.* at 640.
42. *Id.*

existing law" makes it sufficiently "apparent" that the conduct is unlawful.[43]

D. *Qualified Immunity in the Tenth Circuit*

In order to show that a government official does not deserve qualified immunity, the plaintiff must prove that (1) a constitutional right exists and was in fact violated, and (2) that the defendant's conduct violated a right that was "clearly established such that a reasonable person in the defendant's position would have known the conduct violated the right."[44] Unlike *Anderson*, the Tenth Circuit in *Medina* and again in *Herring* severely limited the available sources of legal rights that a reasonable official is expected to know.[45] According to *Medina* and *Herring*, to prove that a right was clearly established at the time of the alleged violation, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains."[46]

Between *Medina* and *Herring*, the Tenth Circuit modified its approach to be more in line with *Anderson*.[47] In *Lawmaster*, the Tenth Circuit held, "[q]ualified immunity does not protect official conduct simply because the Supreme Court has never held the exact conduct at issue unlawful."[48] Rather, the shield of qualified immunity is pierced if in light of pre-existing law, the unlawfulness of the conduct is apparent to the officer."[49] Citing *Franz v. Lytle*,[50] the *Anaya* court held that, "[i]n light of this rationale underlying the qualified immunity doctrine, this court has held, for example, that police *did not* enjoy qualified immunity where *there was not a Supreme Court or Tenth Circuit case directly on point*,

43. *Id.*

44. Anaya v. Crossroads Managed Care Sys., Inc., 195 F.3d 584, 594 (10th Cir. 1999).

45. In *Medina*, the court held that in order for a right to be clearly established, "there must be a Supreme Court of Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." Medina v. City & County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992). Between 1992-2000, the Tenth Circuit broadened the scope of their inquiry to recognize the existence of rights in the absence of a Supreme Court or Tenth Circuit decision on point. *See* Lawmaster v. Ward, 125 F.3d 1341, 1350 (10th Cir. 1997). In *Herring*, the Tenth Circuit reverted back to *Medina* in their application of qualified immunity by not recognizing the existence of a right because neither the Supreme Court nor the Tenth Circuit had previously ruled on the specific matter that was the subject of the case. *See* Herring v. Keenan, 218 F.3d 1171, 1176 (10th Cir. 2000).

46. *Medina*, 960 F.2d at 1498; *see also Herring*, 195 F.3d at 1176 (holding that in order to show that a right is "clearly established," there must be a Supreme Court or Tenth Circuit case on point).

47. *See e.g., Lawmaster*, 125 F.3d at 1351 (holding that rights need to be defined with a degree of generality to facilitate a plaintiff's attempt to show that the right was "clearly established"); *Anaya*, 195 F.3d at 594-95 (expanding the range of sources of the "clearly established" inquiry beyond just the Supreme Court and Tenth Circuit).

48. *Lawmaster*, 125 F.3d at 1350.

49. *Id.*

50. 997 F.2d 784, 787-91 (10th Cir. 1993).

and where, in fact, there was some contrary authority . . . from other circuits."[51] (emphasis added)

Likewise, in *Franz*, the Tenth Circuit denied a police officer's claim of qualified immunity based on a search alleged to be in violation of the Fourth Amendment.[52] Despite the fact that no Supreme Court or Tenth Circuit cases existed on point, the court denied qualified immunity "based on the longstanding Fourth Amendment probable cause requirements and the officer's presumed familiarity therewith."[53]

When a government official seeks qualified immunity for an alleged violation of an individual's constitutional rights,[54] a court is typically charged with the duty to employ a balancing test to weigh a government official's need for freedom of action and an individual's constitutionally protected rights; this is especially true when dealing with the rights of prisoners and probationers.[55] The Tenth Circuit has previously ruled on the determination of a "clearly established" right when a constitutional balancing test is required.[56] On one hand, *Medina* stated that when a constitutional deprivation must be determined by a balancing test, a court is less likely to find the law clearly established.[57] Since *Medina*, however, the Tenth Circuit has uniformly held that qualified immunity can be pierced if the officer *should have known* that the conduct at issue and the purported governmental interest the official sought to further would not survive a constitutional balancing test.[58]

E. *Tenth Circuit decisions*

From 1992 through 2000, the Tenth Circuit has taken a circuitous route to define the requirements of qualified immunity.[59] From *Medina* to

---

51. *Lawmaster*, 125 F.3d at 594.

52. *Franz*, 997 F.2d at 784.

53. *Id.* at 787-91.

54. As opposed to an individual's civil rights protected by 14 U.S.C. § 1983.

55. *See e.g.* Turner v. Safley, 482 U.S. 78, 87 (1987) (holding that a court must determine the "rational connection" between the infringement of a prisoner's constitutional rights and the existence of a legitimate penological goal); Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987) (holding that the infringement of a probationer's rights is not "unlimited" and is justified only by a showing of the "special needs" of the probation system).

56. *See* Patrick v. Miller, 953 F.2d 1240, 1249 (10th Cir. 1992) (claiming that qualified immunity will be abrogated if it was sufficiently clear that Defendants should have known the [governmental] interest would not survive a balancing inquiry.); *see also* Prager v. LaFaver, 180 F.3d 1185, 1191-92 (10th Cir. 1999) (discussing that the balance in favor of plaintiff should have been anticipated by officials and thus their qualified immunity was abrogated); *see also Medina*, 960 F.2d at 1498 (stating that "[c]onduct may be so egregious that a reasonable person would know it to be unconstitutional even though it is judged by a balancing test.").

57. *See Medina*, 960 F.2d at 1498.

58. *See infra* note 56.

59. The Tenth Circuit has gone full circle in defining the scope of sources applicable to the determination of a "clearly established" right. *See* discussion *infra* pp. 13-29.

Herring, consistency has eluded the Tenth Circuit in its attempt to "clearly establish" what constitutes a "clearly established" right. Before analyzing Medina, however, it is first important to discuss *Stewart v. Donges*,[60] the unsuspecting root of the Tenth Circuit's chaotic qualified immunity jurisprudence.

1. *Stewart v. Donges*

In *Stewart*, the plaintiff brought suit under 42 U.S.C. § 1983 against a police officer for allegedly violating his rights under the Fourth and Fourteenth Amendments during the defendant's arrest of the plaintiff for larceny.[61] The plaintiff, Stewart, accused the officer of making "material misrepresentations and omissions" on the affidavit that supported a warrant for the plaintiff's arrest.[62] In response, the defendant officer claimed that he was entitled to qualified immunity from suit because it was not "clearly established" at the time of the alleged conduct that making such omissions would violate that plaintiff's rights under the Fourth and Fourteenth Amendments.[63]

The *Stewart* court noted that the Supreme Court had previously found that a police officer violates an individual's Fourth Amendment rights when, in submitting an affidavit, knowingly makes a false statement or makes a false statement in "reckless disregard of the truth."[64] The *Stewart* court stated, however, that the Supreme Court failed to mention whether this right extended to showings that a police officer deliberately or recklessly omitted material information.[65] Despite the Supreme Court's silence on the issue, the *Stewart* court looked to the rulings of the other circuits in coming to the determination that the right did extend to omissions, thereby holding that the right was "clearly established" at the time of the conduct at bar.[66] In a side note, the court made the following statement:

> Our conclusion that the law was 'clearly established' does not necessarily imply that it was frivolous for defendant to argue otherwise in his interlocutory appeal. As long as there was no controlling Supreme Court or Tenth Circuit precedent at the time and it required an extension of the holding in *Franks* to establish a duty of the defendant not to withhold material information from the search warrant affidavit, we cannot necessarily say that an appeal arguing that the law was

60. 915 F.2d 572 (10th Cir. 1990).
61. *Id.* at 573.
62. *Id.*
63. *Id.* at 573, 581.
64. *Id.* at 582 (referring to Franks v. Delaware, 438 U.S. 154 (1978)).
65. *Id.*
66. *Id.* at 582-83.

> therefore not clearly established was 'frivolous," a 'sham,' or 'wholly without merit.'[67]

In this statement, the *Stewart* court is simply noting situations where it might be deemed "frivolous" for a defendant to claim that a law is not "clearly established." If there is "*controlling Supreme Court or Tenth Circuit precedent at the time*"[68] (emphasis added), then it might be "frivolous" for a defendant to attempt to claim that the law is not "clearly established." As discussed below, the court in *Medina v. City and County of Denver*,[69] extended this limited statement beyond its intended boundaries by turning it into the determinative test of "clearly established" rights.[70]

2. *Medina v. City and County of Denver*

In *Medina*, the Tenth Circuit announced a rule that drastically altered the way the court handled qualified immunity cases.[71] In *Medina*, the plaintiff was hit while riding his bicycle by a stolen Cadillac engaged in a high-speed chase with the Denver Police Department.[72] The district court found that the plaintiff failed to state a claim under 42 U.S.C. § 1983[73] because he could not produce enough evidence to show that the Denver police "maintained a policy or course of conduct authorizing or condoning reckless, high speed chases that was deliberately indifferent to the rights of innocent bystanders."[74] The Tenth Circuit rejected the district court's dismissal of the claim on these grounds and instead found that the officers were entitled to qualified immunity.[75] In its review, the Tenth Circuit court stated that the police officers were entitled to qualified immunity because it was not "clearly established" at the time of the accident that reckless behavior could trigger § 1983 liability, nor was it apparent that police officers could be liable for injuries caused indirectly.[76]

The *Medina* court held that in order for a right to be clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts

---

67. *Id.* at 583 n.14.

68. *Id.*

69. 960 F.2d 1493 (10th Cir. 1992).

70. *See id.* at 1498 (stating that "[o]rdinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.").

71. *See Medina*, 960 F.2d at 1498 (turning a single criterion from *Stewart v. Donges* for determining whether a right is "clearly established" into the single determinative test).

72. *Id.* at 1494.

73. *See infra* note 21.

74. *Medina*, 960 F.2d at 1494.

75. *Id.*

76. *Id.*

must have found the law to be as the plaintiff maintains."[77] In stating this new proposition, the *Medina* court cited *Stewart v. Donges*,[78] to justify stepping into new qualified immunity territory. The court, however, failed to explain how it made the leap from the holding in *Stewart* to its unprecedented holding in *Medina*.[79] Commentators believe that the *Medina* court overstepped its bounds by turning *Stewart's* statement intended to show when a defendant's claim is "frivolous"[80] into the affirmative "clearly established" requirement.[81] One commentator wrote:

> Citing *Stewart* for the proposition that a United States Supreme Court or Tenth Circuit opinion is necessary, rather than sufficient, for clear establishment is a classic example of fallacious converse logic in *Medina*. *Stewart* states that such authority is a sufficient condition to clearly establish a duty—not that it is a necessary condition. [citation omitted] Moreover, *Stewart* discussed not what constituted clearly established law, but what constituted a frivolous argument regarding clearly established law.[82]

Literally speaking, the *Medina* court placed a very strict limitation on the qualified immunity analysis; a limitation which effectively stood for the proposition that a law is not clearly established unless there is Supreme Court or Tenth Circuit case, or the weight of authority of other circuits on point. The *Medina* court merely paid lip service to the prior standard, that the "alleged unlawfulness must be apparent in light of pre-existing law . . . [the] contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[83] *Medina* redefined the "reasonable official" aspect of the analysis by drastically narrowing the scope of what a "reasonable official" is expected to know.[84] In a sweeping manner, *Medina* held that that if there is no Supreme Court of Tenth Circuit case on point, a "reasonable official" is not expected to possess knowledge of the contours of the right.[85] There are many scenarios where a government official knows that certain con-

---

77. *Id.* at 1498.

78. 915 F.2d at 582-83 (stating that "[o]ur conclusion that the law was 'clearly established' does not necessarily imply that it was frivolous for the defendant to argue otherwise in his interlocutory appeal. As long as there was not controlling Supreme Court or Tenth Circuit precedent at the time and it required an extension of the holding in *Franks* to establish a duty on behalf of the defendant . . . we cannot necessarily say that an appeal arguing that the law was therefore not clearly established was 'frivolous.'").

79. In relying on *Stewart* to support its holding, the *Medina* court takes *Stewart* totally out of context and transforms a single factor in determining whether a law is "clearly established" into the definitive test for the Tenth Circuit. *Medina*, 960 F.2d at 1498.

80. *Stewart*, 915 F.2d at 583; *see also* discussion *infra* Part I.E.1.

81. Heather Meeker, *Article: "Clearly Established" Law in Qualified Immunity Analysis for Civil Rights Actions in the Tenth Circuit*, 35 WASHBURN L.J. 79 (1995).

82. *Id.* at 113; *see also Stewart*, 915 F.2d at 583 (citation omitted).

83. *Medina*, 960 F.2d at 1497.

84. *Id.* at 1498.

85. *Id.*

duct would violate another's constitutional rights where that particular conduct has not been the subject of a Supreme Court or Tenth Circuit case. In the face of the new *Medina* standard, however, these scenarios are kept out of the court's view.

3. *Lawmaster v. Ward*

The Tenth Circuit's decision in *Lawmaster v. Ward*[86] is a prime example of the court's disapproval of the narrow qualified immunity requirements set forth in *Medina*. While many of the post-*Medina* qualified immunity decisions mention *Medina's* main holding, they seem to treat it not as the end-all-be-all requirement, but as one of the many factors of consideration.[87]

In *Lawmaster*, the plaintiff sued several agents from the United States Bureau of Alcohol, Tobacco and Firearms for their conduct during a search of his home.[88] After a confidential informant advised the agents that the plaintiff owned an illegal automatic machine gun, the agents submitted an affidavit and received a warrant to search the plaintiff's home.[89] The plaintiff alleged that the agents ransacked his home, and conducted their search in an unreasonable manner in violation of his Fourth and Fifth Amendment rights.[90] Specifically, the plaintiff claimed that he came home to find one of his pistols "submerged in the dog's water bowl" and cigarette ashes "mixed in with the bedding which had been stripped from the bed and left in a pile on the floor."[91] The District Court granted the agents qualified immunity from suit and consequently granted them summary judgment.[92] The *Lawmaster* court reversed the district court's decision to grant qualified immunity on the Fourth Amendment claim of unreasonable conduct during the search of the plaintiff's home.[93] The court first discussed the rationale behind qualified immunity:

---

86. 125 F.3d 1341

87. The post-*Medina* decisions seem to lend credence to the claim that *Medina* misconstrued the holding in *Stewart v. Donges* by turning a single factor of consideration into the circuit's determinative test. *Lawmaster* emphasizes that a law may be "clearly established" even if neither the Supreme Court nor the Tenth Circuit had previously ruled on the particular action. *See Lawmaster*, 125 F.3d at 1350. Further, in *Anaya*, the Tenth Circuit analyzes several sources besides Supreme Court and Tenth Circuit cases in their determination of whether a right is "clearly established." *See* Anaya v. Crossroads Managed Care Sys., Inc., 195 F.3d 584, 594-95 (10th Cir. 1999).

88. *Lawmaster*, 125 F.3d at 1344.

89. *Id.*

90. *Id.* at 1345-46.

91. *Id.* at 1346.

92. *Id.*

93. *Id.* at 1351.

> Qualified immunity serves the public by striking a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions. Qualified immunity mitigates costs that society as a whole otherwise bear such as the expenses of litigation, the diversion of official energy from important public issues, and the deterrence of talented citizens from accepting public office.[94]

In defining a "clearly established" right, the *Lawmaster* court stated a new and broader way to look at the "clearly established" requirement.[95] The new guideline did not necessarily broaden *Medina's* "Supreme Court and Tenth Circuit" limitation,[96] but it did expand upon the range of Supreme Court, Tenth Circuit and other circuit cases the Tenth Circuit was willing to consider in its determination of whether the right was "clearly established."[97] The court stated:

> However, where the reasonableness inquiry necessarily turns on the cases' particular facts such that the reasonableness determination must be made on an ad hoc basis, we must allow some degree of generality in the contours of the constitutional right at issue. We would be placing an impracticable burden on the plaintiff if we required them to cite to a factually identical case before determining they showed the law was 'clearly established' and cleared the qualified immunity hurdle . . . [w]hile qualified immunity was meant to protect officials performing discretionary duties, it should not present an insurmountable obstacle to plaintiffs seeking to vindicate their constitutional rights.[98]

In line with this rationale, the *Lawmaster* court did not grant the agents qualified immunity even though there were no decisions expressly prohibiting the conduct at issue.[99] The court ruled that the general principles of the Fourth Amendment; the preservation of the sanctity of the home and that while conducting searches, officers may only engage in conduct that reasonably furthers the purpose of the search, were in fact clearly established.[100] Unlike *Medina*, *Lawmaster* stood for the principal that "[q]ualified immunity does not protect official conduct simply because the Supreme Court has never held the exact conduct at issue un-

---

94. *Id.* at 1347.

95. *Id.* at 1351 (discussing that in order for a plaintiff to have any chance to overcome the officer's qualified immunity defense, the right in question must be defined with "some degree of generality," so that the plaintiff does not face an "insurmountable burden" proving the right to be "clearly established").

96. *Medina*, 960 F.2d at 1498.

97. *Lawmaster*, 125 F.3d at 1351.

98. *Id.* at 1351.

99. *Id.*

100. *Id.* Generally, the Fourth Amendment grants individuals the right to be "free from unreasonable searches and seizures." *Id.* at 1347.

lawful."[101] Rather, the court retreated from *Medina's* narrow survey of Supreme Court and Tenth Circuit cases in favor of a broader test of what constitutes "clearly established."[102] The court stated, "the test here is whether the law is sufficiently well-defined such that a 'reasonable official would understand that what he is doing violates that right.'"[103]

4. *Anaya v. Crossroads Managed Care Systems, Inc.*[104]

In 1999, the Tenth Circuit in *Anaya* reiterated the holding of *Medina*, but did so with new emphasis on the second prong of *Medina's* analysis.[105] The court held: "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, *or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.*"[106] The *Anaya* court's analysis of the qualified immunity issue at bar clearly demonstrated its rationale behind adding italics to the *Medina* test.[107] As opposed to *Medina*, the *Anaya* court sought to re-formulate the definition of the "clearly established" right requirement to encompass rights beyond the limits of the Supreme Court and the Tenth Circuit.[108] First, the *Anaya* court mentioned that the Tenth Circuit had, on prior occasion, ruled that a right was "clearly established" where the Supreme Court and the Tenth Circuit had never before ruled on the issue.[109] Second, the court surveyed the decisions of six circuit courts that had ruled on the issue.[110] Third, the court noted that the Colorado Supreme Court had specifically ruled on the issue at hand.[111] Finally, the court thought it was also instructive to look to the law of civil forfeitures in determining whether the right was "clearly established" at the time of the conduct at issue.[112] In coming to

---

101. *Id.* at 1350.

102. *Id.* at 1351.

103. *Id.* at 1351.

104. 195 F.3d 584 (10th Cir. 1999).

105. *Id.* at 594 (quoting *Medina*, 960 F.2d at 1498).

106. *Id.* (citing the exact holding of *Medina*, but adding italics to the entire second half of the "clearly established" law requirement).

107. After specifically adding emphasis to the second half of the *Medina* test, the *Anaya* court found that the right to be free from civil seizures without probable cause "to believe that a person was a danger to himself or others" was "clearly established" by the combination of other circuit precedent, Colorado Supreme Court precedent, and the law of civil forfeitures. *Id.* at 594-95. Looking at the *Anaya* court's analysis, it is clear that they intended to broaden the range of sources from which a court may find a right to be "clearly established."

108. *Id.* at 594-95.

109. *Id.* at 594 (discussing the Tenth Circuit's ruling in *Franz v. Lytle* that Supreme Court or Tenth Circuit precedent are not absolute preconditions to a finding that a right is "clearly established).

110. *Id.*

111. *Id.* at 595.

112. *Id.*

the decision that the right at issue was "clearly established," the *Anaya* court held:

> *In light of the clear authority* that existed prior to 1995, and *in light of the laws of seizure the police officers should be expected to know*, we hold it was clearly established in 1995 that civil seizures without probable cause to believe a person was a danger to himself or others violated the Fourth Amendment. The defendants in their individual capacities are not protected by qualified immunity.[113]

The court's analysis clearly displays their intention to broaden the scope of what a "reasonable official" must know in order to properly claim the protection of qualified immunity.[114] In contrast, under a *Medina* analysis, if a particular right was not specifically delineated by a Supreme Court or Tenth Circuit case, whether or not a reasonable official knew or should have known that his conduct violated a particular right was immaterial.[115] Despite *Medina's* assertion that "the clearly established weight of authority from other courts"[116] can be determinative of a law's "clearly established" status, commentators disagree with the reality of this contention.[117] The clear intent of the *Anaya* court was to redefine and broaden the scope of the Tenth Circuit's "clearly established" inquiry.[118] By italicizing the second portion of the *Medina* requirement,[119] and by reasserting a broader sense of the "reasonable official" test,[120] the *Anaya* court followed *Lawmaster* and continued to broaden what constitutes a "reasonable official" in the Tenth Circuit's qualified immunity jurisprudence.

5. *Prager v. LaFaver*[121]

In 1999, the Tenth Circuit supported a somewhat different "clearly established" standard for rights found under a constitutional balancing test.[122] For example, if a plaintiff makes a claim that a government official violated his First Amendment right of free speech, a court will en-

---

113. *Id.* at 595 (emphasis added).
114. *Id.* at 594-95.
115. *Medina*, 960 F.2d at 1498.
116. *Id.*
117. *See e.g.* Meeker, *supra* note 24, at 116 (stating "[f]inally, there is the law of other circuits. The pivotal question is what type and what amount of extra-circuit authority, under the rubric of *Medina*, comprise clearly established law. The answer to this question is at best complex and at worst nonexistent. The Tenth Circuit has been quite inconsistent in its treatment of extra-judicial authority to clearly establish rights.").
118. *Anaya*, 195 F.3d 594-95.
119. *Id.* at 594.
120. *Id.* at 594-95.
121. 180 F.3d 1185 (10th Cir. 1999).
122. *Id.* at 1191-92.

gage in a *Pickering*[123] balancing test to determine whether his right was abridged.[124] Likewise, if a prisoner alleges that a government official deprived him of his constitutional rights while incarcerated, the court will engage in "rational connection" balancing test to determine whether the deprivation was justified by a legitimate and neutral penological objective.[125] Because rights that find their definition in constitutional balancing inquiries are, by their nature, more difficult to clearly foresee, *Prager* recognized a need to allow more leeway to government officials in this setting.[126] The court stated, "[n]evertheless, 'to the extent that courts in analogous (but not necessarily factually identical) cases have struck the necessary balance, government officials will be deemed 'on notice.'"[127] The Tenth Circuit produced similar holdings in several other cases throughout the 1990's.[128]

II. *HERRING V. KEENAN*: BACK TO MEDINA AND BEYOND

In September 2000, the Tenth Circuit's decision in *Herring v. Keenan*[129] ignored the recent trend of *Lawmaster* and *Anaya* and reinvigorated the narrowness of *Medina*.[130] The decision arguably went a step beyond *Medina* in its narrow approach to the "clearly established" right inquiry and turned its back on the qualified immunity doctrine created by the circuit since *Medina*.[131]

---

123. Pickering v. Bd. of Educ. of Township High School Dist. 205, 391 U.S. 563, 569 (1968) (creating a balancing test for the determination of a public employee's First Amendment rights).

124. In *Pickering*, in determining whether the state had violated the teacher's First Amendment right to free speech, the Court balanced the interests of the state as an employer promoting the efficiency of "the public services that it performs through its employees" and the interests of the teacher as a citizen commenting upon matters of public concern. *See id.* at 568.

125. Turner v. Safley, 482 U.S. 78, 87 (1987) (holding that a court must determine the "reasonable relation" between the infringement of a prisoner's constitutional rights and the existence of a legitimate penological goal).

126. *Prager*, 180 F.3d at 1191 (stating the qualified immunity test, where there is a balancing test involved, requires that a government official know where courts have "struck the necessary balance" in cases that are factually analogous, but not requiring strict factual adherence).

127. *Id.* at 1191-92.

128. *Medina*, 960 F.2d at 1498 (holding that "[c]onduct may be so egregious that a reasonable person would know it to be unconstitutional even though it is judged by a balancing test."); *see also See* Patrick v. Miller, 953 F.2d 1240, 1246, 1249 (10th Cir. 1992) (holding that qualified immunity will be abrogated if it was "sufficiently clear that Defendants should have known the [governmental] interest would not survive a balancing inquiry.").

129. 218 F.3d 1171 (10th Cir. 2000).

130. By defining the right in question with utter particularity, *Herring* ignored *Lawmaster's* notion that rights need to be defined with a degree of generality. *Id.* at 1179. Furthermore, by focusing only upon Supreme Court and Tenth Circuit cases, *Herring* disregarded *Anaya's* analysis that included sources outside the Supreme Court and the Tenth Circuit. *See id.* at 1176.

131. *See infra* note 119.

A. *Facts*

In September of 1993, Mr. Herring began serving probation under the supervision of probation officer Ms. Keenan following his conviction for driving while intoxicated on federal property.[132] In December, in accordance with the terms of his probation, Herring met with Keenan. During the meeting, Herring voluntarily told Keenan that he had been tested for HIV and that he suspected that he would test positive.[133] It is undisputed that Herring had not received the results of the test prior to this meeting nor did he at any time after the meeting inform Keenan of the final results of the test.[134] Additionally, Herring did not authorize Keenan to disclose this information.[135]

Without knowledge of the results of the test and without any authorization to disclose any such information, Keenan immediately informed Herring's employer, the manager of the 50's Café at the Lowry Air Force Base Recreation Center, that Herring was *in fact* HIV positive.[136] (emphasis added) Further, Keenan advised the manager to fire Herring from his position as a waiter.[137] Directly thereafter, Keenan telephoned Herring's sister and informed her that her brother *in fact* tested positive for HIV.[138] On January 10, 1994, Keenan informed the acting director of the 50's Café that Herring was HIV positive.[139] She further told the acting director that Herring should be fired "because she believed that Colorado law prohibited a person who has tested as HIV positive from working in a food preparation position."[140] Herring's complaint, amongst other allegations, charged that Keenan's unauthorized disclosure of his HIV status was in direct violation of her own internal probation department guidelines.[141] The Guide to Judiciary Policies and Procedures provides:

> Officers should not disclose HIV infection or illness information to the offender's family members, parents, or sexual/drug partners without the offender's informed, written consent. If the offender will not consent to disclosure and State law permits non-consensual disclosure to public health officials, the officer should notify such officials ... Officers should seek written, informed consent of the offender before

---

132. *Id.* at 1173.
133. *See Herring*, 218 F.3d at 1173.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Herring*, 218 F.3d at 1173.
140. *Id.*
141. *Id* ("The complaint also alleges that: Defendants' conduct was in blatant violation of Volume X, Sec. 16 D and F of the Guide to Judiciary Policies and Procedures which provides that probation officers 'should not disclose HIV infection or illness information to the offender's family members, parents, or sexual/drug partners without the offender's informed, written consent' and that 'notification of other third parties is the responsibility of the exposed person.'").

> making further disclosure when information concerning a individual's HIV antibody test ... is disclosed to the officer by a third party or by the offender.[142]

B. *Disposition*

Herring brought suit in the district court alleging that Keenan violated his federal constitutional right to privacy and his statutory right to non-disclosure of a record pursuant to the Privacy Act, 5 U.S.C. § 552(b),[143] by divulging to his employer and sister his alleged HIV positive status.[144] Herring died seven months after filing the initial complaint.[145] Herring's sister took the role of her brother's personal representative and subsequently filed a second amended complaint alleging that Keenan's disclosures "violated Herring's constitutional right to privacy, constitutes cruel and unusual punishment in violation of the Eighth Amendment, and deprived Herring of his liberty without due process of law in violation of the Fifth Amendment."[146] Keenan filed a motion to dismiss the second amended complaint alleging that she was entitled to qualified immunity.[147] The District Court submitted Keenan's motion to a magistrate judge for an opinion whether Keenan's conduct had violated "clearly established" law.[148] The magistrate judge recommended that Keenan's motion to dismiss be granted.[149] The magistrate judge based his decision on the opinion that the "contours of the right of privacy" of a probationer's HIV status were not "sufficiently clear" because "[n]o decision of the United States Supreme Court or the United States Court of Appeals for the Tenth Circuit ha[d] specifically considered the parameters of the constitutional right to privacy in the context of the limited governmental disclosure of one's HIV status."[150] Despite the magistrate judge's recommendation, the District Court rejected Keenan's motion to dismiss.[151] The District Court ruled that Keenan's actions were clearly not supported by a compelling governmental interest due to the fact that her actions directly violated the written guidelines for probation

---

142. UNITED STATES JUDICIAL CONFERENCE COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION, GUIDE TO JUDICIARY POLICIES AND PROCEDURES, vol. X, ch. IV, § 16, D, F (requiring that probation officers receive written consent prior to any disclosure of a probationer's HIV status).

143. Section 552(b)(6) disallows the disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," Privacy Act, 5 U.S.C. § 552(b)(6) (2000).

144. *Herring*, 218 F.3d at 1173.

145. *Id.*

146. *Id.* at 1173-74.

147. *Id.* at 1174.

148. *Id.*

149. *Id.*

150. *Herring*, 218 F.3d at 1174.

151. *Id.*

officers.[152] Moreover, relying on two prior Tenth Circuit opinions, the District Court held that "the contours of the constitutional right to privacy as it relates to dissemination of one's actual or potential HIV status were clearly established in late 1993."[153] The Tenth Circuit agreed with the District Court that there is a constitutional right to privacy that protects an individual from the nonconsensual disclosure of information pertaining to a person's health.[154] The court, however, reversed the District Court's denial of Keenan's qualified immunity claim.[155] The court claimed that the right to privacy of a probationer regarding information concerning his or her medical condition was not "clearly established" at the time of Keenan's disclosure in 1993.[156]

The court started its inquiry by recognizing that the Supreme Court has repeatedly held that there exists a constitutional right to privacy regarding the non-disclosure of personal information.[157] The court also cited *Eastwood*, the decision relied upon by the District Court in its determination that the probationer's right to privacy in his HIV status was "clearly established," for the more limited proposition that a constitutional right to privacy in the non-disclosure of personal information exists.[158] After determining that a constitutional right to privacy exists,[159] the court then turned its attention to the "clearly established" requirement of the qualified immunity claim.[160]

The court proceeded to state that the "plaintiff need not demonstrate that the specific conduct in this case had been previously held unlawful, so long as the unlawfulness was 'apparent.'"[161] This statement, however,

---

152. *Id.*

153. *Id.* The District Court held that the Tenth Circuit had, prior to 1993, established that an individual's constitutional right to privacy is "implicated when an individual is forced to disclose information regarding personal sexual matters." Eastwood v. Dep't of Corrections of the State of Oklahoma, 846 F.2d 627, 631 (10th Cir. 1988). The District court further found that that Tenth Circuit had recognized that employee medical records, which may contain intimate facts are entitled to privacy protection. Lankford v. City of Hobart, 27 F.3d 477, 479 (10th Cir. 1994).

154. *Herring*, 218 F.3d at 1175.

155. *Id.* at 1180-81.

156. *Id.*

157. *Id.* at 1175 (citing the Supreme Court's decision in *Whalen v. Roe*, 429 U.S. 589 (1977), as establishing two rights of privacy. First, an individual's interest in avoiding disclosure of personal matters, and second, the interest in being independent when making certain kinds of personal decisions).

158. *Id.* (limiting the holding in Eastwood to a general right to privacy in the non-disclosure of personal information).

159. *Id.* (stating that "[t]his circuit, however, has repeatedly interpreted the Supreme Court's decision in *Whalen v. Roe* as creating a right to privacy in the non-disclosure of personal information.").

160. *Id.* at 1175-76.

161. *Id.* at 1176.

was not in accordance with the standard the court applied.[162] In the very next sentence, the *Herring* court cited the holding in *Anaya*, without any reference to the special emphasis the *Anaya* court placed on the "proposition is supported by the weight of authority from other courts"[163] segment of the test.[164] In effect, the *Herring* court disregarded the intention of the *Anaya* holding and reverted back to *Medina*. Furthermore, the *Herring* court ignored its own statement in which they purported that factual adherence to a Supreme Court or Tenth Circuit decision was not a necessary precondition to qualified immunity.[165] While stating that "some but not precise factual correspondence" is required for a right to be clearly established, the court went on to require strict factual adherence. The court stated:

> Thus, while *Eastwood*, *Lankford*, and *Mangels* indicate that under some circumstances, a release of information regarding a person by a government officer may violate a constitutionally protected right to privacy, *none of the cases discuss the question whether the right to privacy protects a probationer who may be HIV positive from a limited disclosure by his or her probation officer to persons whom the probation officer believed might be affected by their contact with the probationer.* The cases, therefore, did not clearly establish such a right in 1993.[166]

In *Anderson v. Creighton*,[167] the Supreme Court required that the right being questioned be defined with some degree of particularity so that its' contours are clear enough that a "reasonable official would understand that what he is doing violates that right."[168] In *Lawmaster v. Ward*,[169] however, the Tenth Circuit limited necessary the degree of particularity.[170] The court in *Lawmaster* held:

> However, where the reasonableness inquiry necessarily turns on the cases' particular facts such that the reasonableness determination must be made on an ad hoc basis, we must allow some degree of generality in the contours of the constitutional right at issue. We would be placing an impracticable burden on plaintiffs if we required them to cite to a factually identical case before determining they showed the law was 'clearly established' and cleared the qualified immunity

---

162. *See infra*, note 157. The *Anaya* court mentioned that the specific conduct at issue need not be previously deemed unlawful but proceeded to search amongst the Supreme Court and the Tenth Circuit for cases factually identical to the case at bar.

163. *Anaya*, 195 F.3d at 594.

164. *Herring*, 218 F.3d at 1176 (placing the second half of the qualified immunity in italics to emphasize that the inquiry needs to extend beyond just the Supreme Court and the Tenth Circuit).

165. *Id.* at 1176.

166. *Id.* at 1178-9 (emphasis added).

167. 483 U.S. 635 (1987).

168. *Id.* at 639.

169. 125 F.3d 1341 (10th Cir. 1997).

170. *Id.* at 1351.

> hurdle . . . While qualified immunity was meant to protect officials performing discretionary duties, it should not present an insurmountable obstacle to plaintiffs seeking to vindicate their constitutional rights.[171]

If a plaintiff were required to show that the exact factual scenario had previously been held unlawful to defeat the defendant's qualified immunity defense, *Harlow's* balance[172] would be summarily defeated. For example, *Anderson* required a plaintiff to state the right with more particularity than "the defendant violated my 14th Amendment Due Process rights,"[173] while *Harlow* and *Lawmaster* emphasize a plaintiff's need to vindicate constitutional violations and a plaintiff's inability to do so if rights are defined too narrowly.[174] In *Herring*, the Tenth Circuit required precise factual correspondence between the right alleged to be violated and a right that had previously been judicially vindicated.[175] In the process, *Herring* violated its own precedent in *Lawmaster*[176] and severely disregarded *Harlow's* balancing strictures.[177] In essence, the court held that because the Supreme Court and the Tenth Circuit have not specifically ruled on this precise factual scenario, the right was not clearly established.[178] Even though the Supreme Court, the Tenth Circuit, and the weight of authority from other courts clearly indicated that a government official's public release of personal information regarding a person may violate a constitutionally protected right to privacy, the court failed to classify the right as "clearly established" because the cases did not include the specific factual combination of probationer, probation officer, and HIV positive status.[179]

III. *TURNER V. SAFLEY*[180] AND *GRIFFIN V. WISCONSIN*:[181] THE RIGHT CLEARLY ESTABLISHED

The United States Supreme Court, in *Turner v. Safley* established the rule that the charged government official must show that the infringement of a prisoner's constitutional right is "reasonably related" to a

---

171. *Id.*

172. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1981) (holding that the rationale behind the qualified immunity doctrine is striking a balance between a citizen's interest in vindicating violations of his or her constitutional rights and the government's interest in effective and efficient governance).

173. *Anderson*, 483 U.S. at 639.

174. *Harlow*, 457 U.S. at 814; *see also Lawmaster*, 125 F.3d at 1351.

175. *Herring*, 218 F.3d at 1178-79.

176. Lawmaster v. Ward, 125 F.3d 1341, 1350-51 (10th Cir. 1997).

177. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

178. *See infra*, note 157.

179. *Id.*

180. 482 U.S. 78 (1987).

181. 483 U.S. 868 (1987).

legitimate governmental objective.[182] In *Turner*, the Supreme Court identified several factors applied in the balancing test to determine the relatedness of the infringement and the government's objective.[183] The factors in the penal system are:

> (a) whether there is a 'valid, rational connection' between the regulation and a legitimate government interest put forward to justify it; (b) whether there are alternative means to exercising the asserted constitutional rights that remain open to the inmates; (c) whether and the extent to which accommodation of the asserted right will have an impact on prison staff, inmates and the allocation of prison resources generally; and (d) whether the regulation represents an 'exaggerated response' to prison concerns.[184]

Before turning to the Supreme Court's treatment of the probation system in *Griffin v. Wisconsin*,[185] it is important to note the ramifications of its determination of a prisoner's constitutional rights in *Turner*. In *Griffin*, the Supreme Court stated that "probation is simply one point (or, more accurately, one set of points) on a continuum of possible punishments ranging from solitary confinement . . . to mandatory community service."[186] While *Griffin* does not explicitly delineate a balancing test for the deprivation of a probationer's constitutional rights akin to the test set forth in *Turner*,[187] it is only logical to assume that a probationer's constitutional rights are *less restricted* than a prisoner's. If *Turner* holds that a prisoner's constitutional rights cannot be infringed without a showing that the infringement is "reasonably related" to a legitimate penological goal,[188] it is safe to assume that an infringement of a probationer's constitutional rights must *at least* be justified by a showing that the infringement "reasonably related" to a legitimate probationary goal. On *Griffin's* continuum,[189] probation is one step removed from prison, thus it is logically necessary that a probationer's constitutional rights are less restricted than a prisoner's. Supporting this rationale, in her dissenting opinion in *Herring*, Judge Seymour took it as "clearly established" that *Griffin* stands for the proposition that "probationers retain a right to

---

182. *Turner*, 482 U.S. at 78-9 (requiring that an infringement of a prisoner's constitutional rights be "reasonably related to legitimate penological interests.").

183. *Turner*, 482 U.S. at 89-91.

184. *Id.*

185. 483 U.S. 868 (1987).

186. *Id.* at 874.

187. *Id.* ("We have recently held that prison regulations allegedly infringing constitutional rights are themselves constitutional as long as they are 'reasonably related to legitimate penological interests.' We have no occasion in this case to decide whether, as a general matter, that test applies to probation regulations as well.").

188. *Turner*, 482 U.S. at 89-91.

189. *Griffin*, 483 U.S. at 874.

privacy under the Constitution which is violated where the State impinges upon that right without a legitimate, governmental purpose."[190]

Herring, nevertheless, failed to make a single mention of *Turner's* "reasonable relation" requirement.[191] Moreover, *Herring* failed to analyze the logical and necessary connection between *Turner* and *Griffin*—if prisoners are protected by "X" (requiring that an infringement be "reasonably related" to a legitimate penological goal[192]) then probationers are logically protected by "X+1" because probation is a less restrictive step in the criminal justice process. While *Griffin* refrained from delineating a standard of review for infringements in the probation system,[193] it did hold that restrictions must bear a relationship to the "special needs" of the probation system.[194] It is only natural to assume that the Supreme Court would determine the level of review in the probation system to at least require a reasonable relation, if not more. Instead, *Herring* cited *Griffin* as standing solely for the proposition that a probationer's right to privacy is limited,[195] and that Herring's expectation of privacy was justifiably infringed by the probation officer.[196] The court stated:

> In view of the fact that it was clearly established in *Griffin* that a probationer's right to privacy is limited, without further guidance from the Supreme Court or this circuit, a reasonable probation officer in late 1993 could not be presumed to know whether a limited disclosure of a probationer's HIV status to his sister and restaurant employer would violate a probationer's constitutional rights.[197]

As noted by Chief Judge Seymour in her dissenting opinion, the *Herring* majority completely misconstrued the *Griffin* holding.[198] There is no support for the *Herring* majority's claim that *Griffin* stands for the bare holding that probationers have limited constitutional rights to privacy and that the Supreme Court gave no further guidance.[199] Chief Judge Seymour stated:

> The majority here simply relies upon the court's approval of the regulation in *Griffin* to conclude that Mr. Herring's privacy right was not clearly established in this case. In so doing, the majority extrapolates from the Court's naked holding without ever acknowledging the underlying analysis and reasoning, and fails entirely to apply that analysis and reasoning to the facts of this case. The majority thus ig-

190. Herring v. Keenan, 218 F.3d 1171, 1182 (10th Cir. 2000).
191. *Turner*, 482 U.S. at 78-9.
192. *Id.*
193. *Griffin*, 483 U.S. at 874.
194. *Id.* at 873-74.
195. *Herring*, 218 F.3d at 1176.
196. *Id.*
197. *Id.*
198. *Id.* at 1182.
199. *Id.* at 1176.

> nores the clear holding in *Griffin* that a probationer has a constitutional right to privacy, which is limited insofar as the limitation is justified by the 'special needs' of the probation system.[200]

Moreover, the Tenth Circuit previously established a standard for determining whether a right is "clearly established" when a constitutional balancing test is required.[201] In three prior opinions, the Tenth Circuit established that when a balancing test is at issue, if it is "sufficiently clear" that the defendant should be aware that the governmental interest would not survive a balancing inquiry, then the defendant is deemed to be on notice.[202] In *Medina*, the Tenth Circuit held that "[c]onduct may be so egregious that a reasonable person would know it to be unconstitutional even though it is judged by a balancing test."[203] Keenan's conduct was unsupported and inimical to any recognizable governmental interest. In fact, it ran contrary to U.S. probation system policy, Colorado state criminal law, and was undertaken prior to her even securing knowledge that Herring in fact was HIV positive.[204] Peculiarly, the *Herring* court failed to analyze Keenan's conduct in light of an officer's reasonable expectation of whether his or her conduct would survive a balancing test. It seems rather clear that Keenan reasonably should have been aware of her own internal probation system guidelines and would have known that a direct violation of its stated guidelines would tip the balance out of her favor.

The *Herring* decision ignored Tenth Circuit precedent by requiring that there be strict factual analogy between the case at bar and a case previously decided by either the Supreme Court or the Tenth Circuit.[205] Further, the narrowness of the court's inquiry caused it to turn a blind eye to the balancing tests established by both *Turner* and *Griffin*.[206] As

---

200. *Id.*; *see also* Turner v. Safley, 482 U.S. 78, 89 (1987) (holding that prison guidelines infringing prisoner's constitutional rights are lawful only when reasonably related to legitimate penological interests); Doe v. Attorney Gen., 941 F.2d 780, 796 (9th Cir. 1991) (stating that the law was clearly established in 1988 that the government may disclose private information only upon a showing that the disclosure of such information advances a legitimate governmental objective).

201. *See* discussion *infra* Part I.E.4.

202. Patrick v. Miller, 953 F.2d 1240, 1246, 1249 (10th Cir. 1992) (holding that qualified immunity will be abrogated if it was "sufficiently clear that Defendants should have known the [governmental] interest would not survive a balancing inquiry."); *see also* Prager v. LaFaver, 180 F.3d 1185, 1191-92 (10th Cir. 1999) (stating that a balance in favor of plaintiff should have been anticipated by officials and thus their qualified immunity was abrogated); *see also Medina*, 960 F.2d at 1498 ("Conduct may be so egregious that a reasonable person would know it to be unconstitutional even though it is judged by a balancing test.").

203. *Medina*, 960 F.2d at 1498.

204. *Herring*, 281 F.3d at 1182.

205. *Id.* at 1178-79.

206. *Turner* establishes that a prisoner's rights cannot be infringed absent a "reasonable relation" to a legitimate penological goal. *See Turner*, 482 U.S. at 89. *Griffin* does not speak to a level of judicial scrutiny for the probation system, but does state that infringements must bear a relationship to the "special needs" of the probation system. *Griffin*, 483 U.S. at 873-74,

noted by Chief Judge Seymour, *Griffin* clearly held that the "legitimacy of the governmental interest" is the key ingredient to the "legitimate government purpose" balancing test.[207] The majority swept *Turner* and *Griffin* under the rug and refused to recognize that Keenan's conduct was actually contrary to a legitimate governmental interest. To highlight this fact, the probation system maintained an internal policy of non-disclosure of a probationer's HIV status.[208] If the court had applied the proper qualified immunity requirements and recognized that *Turner* and *Griffin* both require a variation of a balancing test, it would be impossible for Keenan to attain qualified immunity. Conduct that not only failed to state a legitimate governmental purpose but also explicitly violated the policy of the governmental entity should fail a balancing inquiry per se. Moreover, had *Keenan* followed its own precedent set in *Anaya*,[209] its "clearly established" analysis would have included such sources as other circuit authority, the probation system's internal guidelines (which Herring was required to abide by), the Colorado state criminal statute which she violated. If Keenan had been properly aware of the law "clearly established" in 1993, she would have known that her conduct would fail even the most deferential balancing test and constitute a violation of Herring's constitutional right to privacy.

IV. THE CLEARLY ESTABLISHED RIGHT TO PRIVACY PROTECTING FROM DISCLOSURE OF PERSONAL INFORMATION FROM SUPREME COURT AND CIRCUIT CASES

In *Whalen v. Roe*,[210] the Supreme Court dealt with a challenge to a New York law seeking to create a database of names and addresses of individuals on prescription drugs.[211] The plaintiffs in the action claimed that the compilation of personal medical information and the possibility of its release to the public undermined their constitutional right to privacy.[212] The *Whalen* court stated that the Constitution supported a privacy interest grounded in the Fourteenth Amendment's concept of personal liberty.[213] From this foundation, the court outlined two distinct privacy interests; an individual's interest in avoiding disclosure of personal matters, and an individual's interest in independently making personal

207. *Herring*, 218 F.3d at 1182.

208. *Id.* The internal policy statement mandates that "[o]fficers should not disclose HIV infection or illness information without the offender's informed written consent." *See id.* at 1182.

209. In *Anaya*, the Tenth Circuit broadened its definition of the scope of the sources from which "clearly established" law may arise. For example, the *Anaya* court looked to other circuit cases, cases decided by the Colorado Supreme Court, and the civil forfeitures laws in determining the applicable "authority" in determining whether a right in actually "clearly established." Anaya v. Crossroads Managed Care Sys. Inc., 195 F.3d 584, 594-95 (10th Cir. 1999).

210. 429 U.S. 589 (1977).

211. *Id.* at 591.

212. *Id.* at 599-600

213. *Id.* at 600.

decisions.[214] The Tenth Circuit has repeatedly interpreted the Supreme Court's decision in *Whalen* as effectively "creating a right to privacy in the non-disclosure of personal information."[215] The following cases show that both the Tenth Circuit and several other circuits have interpreted *Whalen's* two privacy interests to include an individual's right to privacy in the non-disclosure of one's sexual and medical information.[216]

A. Eastwood v. Department of Corrections of the State of Oklahoma[217]—*Whalen Interpreted in the Tenth Circuit*

In *Eastwood*, the plaintiff, a former employee of the Oklahoma Department of Corrections brought a § 1983 suit against a departmental investigator for violating her constitutional right to privacy.[218] After being sexually assaulted by a fellow employee, the Department of Corrections assigned an investigator to question her version of the incident.[219] The plaintiff alleges that this investigator, Mr. Lovelace, harassed her with explicit questions regarding her sexual history which he subsequently shared with others at the Department of Corrections.[220] As a result, the plaintiff alleges that the Department of Corrections became an "offensive work environment" where she was continually harassed with further sexually explicit questions and "offensive and insulting drawings within the DOC facility."[221]

In response to the defendant's claim of qualified immunity, the *Eastwood* court first stated that in determining whether a law is "clearly established," they do not require there to be "strict factual correspondence between the cases establishing the law and the case at hand."[222] Even further, the court held that it is "incumbent upon government officials 'to relate established law to analogous factual settings.'"[223]

Regarding the constitutional right to privacy question, the *Eastwood* court noted that the Supreme Court had established two distinct privacy

---

214. *Id.* at 599-600.

215. *Herring*, 218 F.3d at 1175; *see also* Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986) (recognizing a constitutional privacy interest that is especially significant where the information is "intimate or otherwise personal in nature"); Eastwood v. Dep't of Corrections of Okla., 846 F.2d 627, 630-31 (10th Cir. 1988) (holding that an individual has a right to privacy that protects him or her from forced disclosure of his or her sexual history); Lankford v. City of Hobart, 27 F.3d 477 (10th Cir. 1994) (holding that the right to privacy in one's medical information was established in 1990).

216. *See* discussion *infra* Part IV.A-D.

217. 846 F.2d 627 (10th Cir. 1988).

218. *Id.* at 628-29.

219. *Id.* at 629.

220. *Id.*

221. *Id.*

222. *Id.* at 630.

223. *Id.*

interests in *Whalen v. Roe*.[224] The *Eastwood* court interpreted *Whalen* to encompass the privacy interest implicated in this case.[225] The court held: "[t]his constitutionally protected right is implicated when an individual is forced to disclose information regarding personal sexual matters."[226]

B. Lankford v. City of Hobart[227]—*Right to Privacy of Medical Records in the Tenth Circuit*

In *Lankford*, the plaintiff alleged that after rebuking her employer's sexual advances, he "used his authority as chief of police to obtain [her] private medical records without her consent from a local hospital in an attempt to discredit her and to prove his statements that she was a lesbian."[228] In holding that the defendant was not entitled to qualified immunity because the privacy violations of this sort were "clearly established in 1990,"[229] the court stated, "there is 'no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection.'"[230]

C. Harris v. Thigpen:[231] *Eleventh Circuit Applies the Turner Factors*

In *Harris v. Thigpen*, the Eleventh Circuit discussed a prisoner's specific right regarding the non-disclosure of his or her HIV positive status.[232] In *Harris*, the appellant challenged the Alabama Department of Corrections' policies of mandatory HIV testing and segregation of prisoners testing HIV positive as a violation of those prisoners' constitutional right to privacy.[233] First, the court explained that as a general principle, "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison."[234] The court cited

---

224. 429 U.S. 589, 599 (1977); *see also* discussion *infra* Part IV.

225. *Eastwood*, 846 F.2d at 631.

226. *Id.*

227. 27 F.3d 477 (10th Cir. 1994).

228. *Id.* at 478.

229. *Id.*

230. *Id.*; *see also* Woods v. White, 689 F. Supp. 874, 876 (W.D. Wis. 1988) (holding that "[c]asual, unjustified dissemination of confidential medical information to non-medical staff and other prisoners can scarcely be said to belong to the sphere of defendants' discretionary functions. Therefore, the defense of qualified immunity is not available to defendants); U.S. v. Westinghouse, 638 F.2d 570, 577 (3d Cir. 1980) (interpreting *Whalen's* dual privacy rights to include an individual's right to privacy in medical records and medical information).; Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986) (recognizing a constitutional privacy interest that is especially significant where the information is "intimate or otherwise personal in nature").

231. 941 F.2d 1495 (11th Cir. 1991).

232. *Id.* at 1498.

233. *Id.* at 1512.

234. *Id.*; *see also* Bell v. Wolfish, 441 U.S. 520, 545 (1979) (holding that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison").

Turner v. Safley[235] when it stated, "[p]rison walls do not separate inmates from their constitutional rights."[236] Thus, prior to their determination of whether the prisoner's constitutional rights to privacy regarding the non-disclosure of his HIV positive status was violated, the Eleventh Circuit affirmatively proclaimed that prisoners[237] maintain constitutional protection despite their position within the penological system.[238]

The *Harris* court went on to state the limitations upon the constitutional rights of prisoners.[239] "It is also axiomatic, however, that 'lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the consideration underlying our penal system."[240] The court added that prisoners retain the constitutional rights that do not run contrary to the "legitimate penological objectives of the corrective system."[241]

Upon this foundation, the *Harris* court used the "rational connection" factors set forth in *Turner*[242] and found that the Alabama Department of Corrections' policies did not violate the prisoners' constitutional right to privacy in light of the countervailing interests of the penological system.[243] The court recognized the legitimacy of the penological system's interest in reducing HIV transmission and violence.[244]

More importantly, however, the *Harris* court recognized and followed two "clearly established" trends that the Tenth Circuit ignored in *Herring*. First, *Harris* acknowledged a prisoner's residual constitutional rights, and followed *Turner* by balancing those residual rights with the

---

235. 482 U.S. 78 (1987).

236. *Harris*, 941 F.2d at 1512; *see also* Turner v. Safley, 482 U.S. 78, 84 (1987).

237. The Supreme Court in *Griffin v. Wisconsin* also held that probationers maintain constitutional protections despite their involvement with the probation system. *See infra* pp. 16-17; *see also* Herring v. Keenan, 218 F.3d 1171, 1182 (10th Cir. 2000) (discussing in dissent, Judge Seymore claimed, "*Griffin*, therefore, clearly established six years prior to the incidents here that probationers retain a right to privacy under the Constitution which is violated where the State impinges upon that right without a legitimate, governmental purpose.").

238. *Harris*, 941 F.2d at 1515-16; *see also* Procunier v. Martinez, 416 U.S. 396 (1974) (holding that "[t]he constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights."); Thornbaugh v. Abbott, 490 U.S. 401 (1989) (reiterating *Turner's* holding that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."); Sheley v. Dugger, 833 F.2d 1420, 1423 (11th Cir. 1987) (holding that "[a] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country.").

239. *Id.* at 1512-13

240. *Id.*

241. *Id.*

242. *See infra* p. 15.

243. *Harris*, 941 F.2d at 1521.

244. *Id.* at 1517.

legitimate objectives of the penological system.[245] To the contrary, *Herring* misconstrued the holding in *Griffin* and failed to recognize the need to justify an infringement of a probationer's constitutional rights by the "special needs" of the probation system.[246] Second, the *Harris* court was careful to point out the existence of a constitutional right to privacy and the "significant privacy interest" triggered by the disclosure of a prisoner's HIV status.[247] As previously discussed, because the probation system is situated on a less restrictive point on the criminal justice continuum than the penological system, it naturally follows that probationer's maintain a greater constitutional rights than prisoners.[248]

D. United States v. Westinghouse:[249] *The Right to Privacy in Medical Information*

In *United States v. Westinghouse*, the Third Circuit interpreted the dual privacy rights created by the Supreme Court in *Whalen*; an individual's interest in avoiding disclosure of personal matters, and an individual's interest in independently making personal decisions,[250] to encompass an individual's right to privacy in medical records and medical information.[251] The *Westinghouse* court stated:

> There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection. Information about one's body and state of health is a matter which the individual is ordinarily entitled to retain within the 'private enclave where he may lead a private life.'[252]

In *Westinghouse*, the Third Circuit stated that governmental intrusion into medical records is allowed only after the government can show that the public interest in disclosure outweighs the individual's privacy

---

245. *Id.* at 1515 ("The [*Turner*] Court determined that the standard of review for evaluating prisoners' constitutional claims should be one of reasonableness: when a prison regulation or policy 'impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.'").

246. *Griffin* holds that a probationer maintains residual constitutional rights that are less than what is afforded to an average citizen but nevertheless cannot be stripped without being justified by the "special needs" of the probation system.

247. *Id.* at 1514 ("The threat to family life and the 'emotional enrichment [gained] from close ties with others' ... is quite real when an AIDS victim's diagnosis is revealed. Ignorance and prejudice concerning the disease are widespread; the decision of whether, or how, or when to risk familial and communal opprobrium and even ostracism is one of fundamental importance.").

248. *See infra* Part III.

249. 638 F.2d 570 (3d Cir. 1980).

250. Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

251. *Westinghouse*, 638 F.2d at 571.

252. *Id.*

interest.[253] In determining whether the specific governmental intrusion was constitutional, the court listed the factors relevant to the inquiry:

> the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosures, the degree and need of access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.[254]

The first four *Westinghouse* factors question the nature of the information requested and the potential injury caused by the nonconsensual disclosure of that information.[255] The purpose for these factors is to determine which medical information disclosures are more harmful than others. These factors serve the purpose of drawing a line between nonconsensual disclosure of a trivial matter, such as an employee's allergic tendencies, and disclosure of information that has the ability to harm the employee.

In terms of potential injury and discrimination against the employee, an individual's HIV status is arguably the most sensitive form of medical information.[256] Several federal courts, prior to 1993, commented on the heightened risk of disclosure of HIV information.[257] The Ninth Circuit held that a forced and mandatory AIDS test might violate an inmate's constitutional rights.[258] In *Doe v. Borrough of Barrington*,[259] the federal district court of New Jersey stated:

> The sensitive nature of medical information about AIDS makes a compelling argument for keeping this information confidential. Society's moral judgments about the high-risk activities associated with the disease, including sexual relations and drug use, make the information of the most personal kind. Also, the privacy interest in one's exposure to the AIDS virus is even greater than one's privacy interest in ordinary medical records because the stigma that attaches with the

253. *Id.* at 577.

254. *Id.* at 578.

255. *Id.*

256. *See infra* note 229.

257. *See e.g.*, Doe v. Borough of Barrington, 729 F. Supp 376, 384 (D.N.J. 1990) (stating that an individual's privacy interest in HIV information outweighs that of regular medical information because of the stigma that attaches to the HIV virus); Doe v. Coughlin, 697 F. Supp. 1234 (N.D.N.Y. 1988) (noting that disclosure of HIV information threatens family life and triggers prejudice and ignorance).

258. Walker v. Sumner, 917 F.2d 382 (9th Cir. 1990) (holding that "[prison] authorities cannot rely on general or conclusory assertions to support their policies. Rather, they must first identify the specific penological interests involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests.").

259. 729 F. Supp. 376, 384 (D.N.J. 1990)

> disease. The potential for harm in the event of a nonconsensual disclosure is substantial.[260]

Further, in *Doe v. Coughlin*,[261] the federal district court for the Northern District of New York stated:

> Each [seropositive prisoner] is fully aware that he is infected with a disease which at the present time has inevitably proven fatal. In the court's view there are few matters of a more personal nature, and there are few decisions over which a person could have a greater desire to exercise control, than the manner in which he reveals that diagnosis to others . . . [t]he threat to family life and the 'emotional enrichment [gained] from close ties to others' . . . is quite real when an AIDS victim's diagnosis is revealed. Ignorance and prejudice concerning the disease are widespread; the decision of whether, or how, or when to risk familial and communal opprobrium and even ostracism is one of fundamental importance.[262]

E. *Herring's Two Flaws*

It was clearly established in 1993 that a government official could not impinge upon the constitutional rights of a probationer without the justification of a legitimate governmental purpose.[263] Moreover, it was also clearly established in 1993 that courts only allow government infringement of an individual's medical information where there is a finding "that the societal interest in disclosure outweighs the privacy interest on the specific facts of the case."[264] Thus, the Tenth Circuit's decision in *Herring* is flawed in two key respects. First, to grant the defendant qualified immunity, the Tenth Circuit applied a narrow construction of "clearly established" rights—a construction that was antithetical to Tenth Circuit precedent since *Medina*.[265]

Second, because of the consequent narrow qualified immunity analysis, the Tenth Circuit effectively removed from consideration Supreme Court and circuit authorities that sufficiently establish that (a) a probationer's constitutional rights cannot be impinged unless "justified by the 'special needs' of the probation system,[266] and (b) there exists a privacy

---

260. *Id.*

261. 697 F. Supp. 1234 (N.D.N.Y. 1988).

262. *Id.* at 1237-38.

263. Griffin v. Wisconsin, 483 U.S. 868 (1987); Turner v. Safley, 482 U.S. 78 (1987).

264. U.S. v. Westinghouse, 638 F.2d 570, 578 (3d Cir. 1980).

265. In *Lawmaster*, the circuit held that the right in question needs to be defined with some degree of generality in order to give plaintiffs the ability to rebut a defendant's qualified immunity defense. Lawmaster v. Ward, 125 F.3d 1341, 1351 (10th Cir. 1997) Further, in *Anaya*, the circuit expanded the range of sources it was willing to consider in determining whether a law was "clearly established" at the time of the conduct in question. Anaya v. Crossroads Managed Care Sys., Inc., 195 F.3d 584, 594-95 (10th Cir. 1999).

266. Griffin v. Wisconsin, 483 U.S. 868, 875 (1987); *see also* Herring v. Keenan, 218 F.3d 1171, 1182 (10th Cir. 2000) (Seymour, J. dissenting).

interest in one's medical records and medical information, especially so when the information pertains to one's HIV status.[267]

More specifically, the Tenth Circuit ignored the Supreme Court's decisions in *Turner* and *Griffin*, which both stand for the proposition that prisoners and probationers retain their constitutional rights despite their status within either the penological or probationary system.[268] *Turner* established a "rational connection" balancing test that forces the government to justify any impingement upon the constitutional rights of prisoners by proving that the restriction is "rationally connected" to a penological or objective.[269] Likewise, *Griffin* affirmatively holds that a probationer has a constitutional right to privacy that can be impinged only upon a showing of a "special need of the probation system."[270] The *Herring* court failed to even mention the existence of either constitutional balancing test.

Second, the *Herring* court made no mention of the Third Circuit's decision in *Westinghouse*,[271] which recognized a constitutional right to privacy regarding one's medical records and medical information, or the Eleventh Circuit's determination in *Harris v. Thigpen*, which emphasized the "significant privacy interest" triggered by an individual's HIV status.[272] *Westinghouse* outlined a seven-factor balancing test to help determine the types of medical records and information that require protection from divulgence without consent.[273] As stated above, the *Herring* court's narrow qualified immunity standard caused it to sweep these other circuit decisions under the rug.

IV. ANALYSIS: THE IMPLICATIONS OF MEDINA WITH TEETH

Like the flaws, the implications of the Tenth Circuit's decision in *Herring v. Keenan*[274] are two-fold. First, the decision may cause negative social ramifications due to its treatment of the constitutional right to privacy regarding a person's HIV positive status. The decision, to the con-

267. The Third Circuit, in *U.S. v. Westinghouse* interpreted the Supreme Court's decision in *Whalen* to encompass an individual's right to privacy in medical record and medical information, *see Westinghouse*, 638 F.2d at 571. Moreover, in *Harris v. Thigpen*, the Eleventh Circuit stated that one HIV status triggers a "significant privacy interest" that is "of fundamental importance," *see* Harris v. Thigpen, 941 F.2d 1495, 1514 (11th Cir. 1991).

268. Griffin v. Wisconsin, 483 U.S. 868 (1987); Turner v. Safley, 482 U.S. 78, 84 (1987).

269. *Turner*, 482 U.S. at 84.

270. *Griffin*, 483 U.S. at 875.

271. *Id.* at 570.

272. *Harris*, 941 F.2d at 1514.

273. Hence, if these medical records/information are such that require protection, a person's divulgence of the records/information without the patient's consent would be deemed a constitutional violation. *See generally id.* at 578-579 (applying the seven-factor test to the conduct at bar with the underlying inference that if the balance tips in favor of protection, the non-consensual divulgence of the records/information would be a constitutional violation).

274. 218 F.3d 1171 (10th Cir. 2000).

trary, does not stand for the proposition that a constitutional right to privacy in an individual's HIV status has not been judicially recognized. Rather, it purports that the right was not "clearly established" circa 1993.[275]

In coming to the decision that the right to privacy in a probationer's HIV status was not "clearly established" in 1993, the *Herring* court went directly against Tenth Circuit qualified immunity analysis precedent. In *Lawmaster* and again in *Anaya*, the Tenth Circuit consistently broadened the scope of sources they were willing to consider in the determination whether a right was "clearly established" for qualified immunity purposes.[276] Moreover, in *Lawmaster*, the Tenth Circuit also recognized the need to define the right in question with a lesser degree of particularity to facilitate a plaintiff's attempt to defeat a government official's qualified immunity defense.[277] The *Herring* court had a choice. It could follow precedent and define the right with a lesser degree of particularity so that the precise factual scenario would not have to have been previously ruled upon. Or it could do what it did and turn the precedent on its head and define the right narrowly, requiring that the precise factual scenario be specifically ruled upon in either the Supreme Court or the Tenth Circuit. Even though the *Herring* court refrains from elucidating any policy based views or rationale regarding an individual's right to privacy in his or her HIV status, its decision to defy precedent speaks volumes. In the final analysis, the public policy message sent by the Tenth Circuit is clear—action certainly speaks louder than words. The *Herring* court changed its qualified immunity analysis in order to protect a government official who, in direct violation of internal policy, informed an HIV positive probationer's employer and family of his HIV status. In changing the analysis, the *Herring* court looked at the case through a microscope and eliminated from view numerous sources that would have served as the "clearly established" authority that a "reasonable official" would be expected to know about. Despite the fact that in 1994 the Tenth Circuit recognized that there is a constitutional right to privacy regarding disclosure by a peace officer of an arrestee's HIV test results,[278] *Herring*

---

275. *Id.* at 1176. *Herring* states that an individual's right to privacy in his or her HIV information was established in 1994.

276. In *Lawmaster*, the Tenth Circuit held that "the shield of qualified immunity is pierced if in light of pre-existing law, the unlawfulness of the conduct is apparent to the officer." Lawmaster v. Ward, 125 F.3d 1341, 1350 (10th Cir. 1997). In *Anaya*, the Tenth Circuit broadened its definition of the scope of the sources from which "clearly established" law may arise. For example, the *Anaya* court looked to other circuit cases, cases decided by the Colorado Supreme Court, and the civil forfeitures laws in determining the applicable "authority" in determining whether a right in actually "clearly established." *See* Anaya v. Crossroads Managed Care Sys. Inc., 195 F.3d 584, 594-95 (10th Cir. 1999).

277. *Lawmaster*, 125 F.3d at 1351.

278. A.L.A. v. West Valley City, 26 F.3d 989 (10th Cir. 1994) (establishing in the Tenth Circuit in 1994, that an arrestee has a constitutional right to privacy in the nondisclosure of his HIV information).

strikes a blow to the public's confidence that the court stands behind the policy that underlies its 1994 decision.

Besides *Herring's* public policy implications, this analysis seeks to discuss the long-term effects of the court's narrow qualified immunity analysis and its potential to halt the creation of new civil or constitutional rights in the Tenth Circuit. In *Herring*, the Tenth Circuit unleashed a new breed of qualified immunity analysis: *Medina* with sharper teeth. Not only did the court require that a Supreme Court or Tenth Circuit decision exist that was on point,[279] but, contrary to Tenth Circuit precedent,[280] it also required a strict factual similarity between the case at bar and a previously decided case.[281] Looking for precedent under a microscope, the court granted the defendant qualified immunity because it was unable to find a Supreme Court or Tenth Circuit case that specifically held that a probationer has a constitutional right to privacy regarding the limited disclosure of his or her HIV positive status by his or her probationer to family members and employers.[282]

The decision in *Herring*, however, took the qualified immunity analysis in the Tenth Circuit to a level unimaginable even by *Medina* standards. Under a strict *Medina* analysis, the Tenth Circuit would likely take notice of the Supreme Court precedent in *Turner* and *Griffin* and at least acknowledge the need to conduct a "rational connection" balancing test to determine whether the impingement was justified by a legitimate goal of the probation system. Even under *Medina*, the Tenth Circuit would recognize that in 1993, it was entirely inimical to a prisoner's or a probationer's constitutional right to privacy to sanction an alleged right to privacy violation without conducting the proper balancing test.

Additionally, *Herring's* strict factual setting requirement turned *Medina* on its head. The gravity of the court's new standard is evident by the fact that the nonconsensual disclosure of a probationer's HIV status stood in direct violation of a probation system rule requiring consent prior to any such disclosure.[283] "In making the disclosures to Mr. Herring's family and employer, Ms. Keenan acted contrary to *every* written guideline addressing the disclosure of confidential medical information contained in the U.S. Probation Manual, which serves as the 'authorita-

279. While the majority initially states that a right is clearly established when there is a Supreme Court or Tenth Circuit opinion on point, or that the plaintiff's proposition is supported by the weight of authority from other courts, the decision later only mentions the need for the first two and drops the latter from consideration. *See* Herring v. Keenan, 218 F.3d 1171, 1176 (10th Cir. 2000).

280. *See* discussion *infra* Part I, I.A.2, I.A.3, I.A.4.

281. *Herring*, 218 F.3d at 1179 (stating that "[n]one of the cases identified by the plaintiff involved a limited disclosure by a probation officer to a probationer's sister and restaurant employer of voluntarily exposed information . . . ").

282. *Id.*

283. Herring v. Keenan, 218 F.3d 1171, 1173 (10th Cir. 2000).

tive standard for community supervision of federal offenders."[284] (emphasis added) In her dissenting opinion in *Herring*, Judge Seymour discussed the Supreme Court's decision in *Griffin* that upheld as proper a search conducted within the residence of a probationer.[285] Judge Seymour concluded that *Griffin* held that the search was "reasonable within the meaning of the Fourth Amendment because *it was conducted pursuant to a valid regulation governing probationers*, which was itself justified by the special needs of the probation system..."[286] Judge Seymour made the point that under a properly construed *Griffin* analysis, there is no way Keenan would have been granted qualified immunity. Judge Seymour stated:

> [H]ere, however, we are asked to review the independent action of a probation officer which was *directly contrary to* the published guidelines of the U.S. Probation Office. Ms. Keenan cannot plausibly argue that her random, unauthorized and illegal conduct provides a basis for a legitimate or reasonable governmental interest sufficient to warrant the intrusion on Mr. Herring's privacy which occurred here."[287]

Griffin required that the restriction be justified by a special need of the probation system. Likewise, *Turner* required that a "'valid, rational connection' between the regulation and a legitimate government interest put forward to justify it"[288] must exist.

The *Herring* court's narrow analysis caused it to miss the seven-part balancing test set forth in *Westinghouse*[289] as well. *Westinghouse's* first four factors are dedicated to determining the nature of the medical information and the potential injury to an individual if that information is disclosed.[290] Undoubtedly, one's HIV positive information is the most sensitive type of medical information and its disclosure without consent poses a potential harm that can devastate the life and emotional well being of the individual.

The *Herring* court's decision to grant the probation officer qualified immunity leads one to question the modern court's stance on the rights of those afflicted with the HIV virus. While the social ramifications of this decision on the rights of HIV victims is muted by the court's decision one year after the conduct at issue in *Herring*,[291] it is peculiar that the court would turn its recent qualified immunity doctrine on its head to

---

284. *Herring*, 218 F.3d at 1182 (J. Seymour, dissenting).
285. *Id.* at 1183-84.
286. *Id.*
287. *Herring*, 218 F.3d at 1184 (J. Seymour, dissenting).
288. Turner v. Safley, 482 U.S. 78, 89-91 (1987).
289. U.S. v. Westinghouse, 638 F.2d 570, 577 (3d Cir. 1980).
290. *Id.*
291. A.L.A. v. West Valley City, 26 F.3d 989 (10th Cir. 1994) (holding that an individual holds a constitutional right to privacy regarding his or her HIV status).

protect a probation officer who clearly and blatantly violated the constitutional privacy rights of her probationer.

CONCLUSION: THE MISSING VOICE

After *Herring*, the possibility of the Tenth Circuit independently recognizing the existence of a new constitutional right may be nonexistent. Under its *Herring* qualified immunity standard, the Tenth Circuit has effectively decided to relinquish all circuit authority to establish new laws in response to novel social problems. One commentator feared that *Medina* had developed a narrow qualified immunity analysis that effectively removed the Tenth Circuit's ability to create new civil and constitutional rights. The commentator wrote:

> In conclusion, *Medina* changed the Tenth Circuit's handling of the qualified immunity issue. Those cases that actually cite the *Medina* rule uniformly hold there is no clearly established duty. Most of the clearly established rights from cases prior to *Medina* would probably not survive a post-*Medina* analysis . . . [w]hen there is clearly established weight of authority in other circuits, the Tenth Circuit will follow suit. This not only cedes Tenth Circuit decision-making to other circuits, but, in a sense, undermines the independence of the circuit courts. This is particularly problematic because one of the strongest predicates for United States Supreme Court review is the resolution of circuit splits. Therefore, the *Medina* rule tends to belay Supreme Court review . . . [t]herefore, it is likely the *Medina* rule . . . will slow the development of civil rights law...[292]

Similarly, requiring that the conduct and facts be strictly analogous to conduct and facts previously deemed unlawful by the Supreme Court or another Tenth Circuit decision really means that no right or law will ever be clearly established in the Tenth Circuit unless such a right or law was previously established by the Supreme Court. One of the functions of the circuit courts is to decide novel issues with the potential for circuit disagreement. Likewise, one of the functions of the Supreme Court is to survey the areas of circuit disagreement and grant certiorari to settle the disputed questions of law. As a result of *Herring*, however, the Tenth Circuit has effectively taken itself out of the mix. If the Tenth Circuit chooses to follow *Herring* in future qualified immunity cases, not only will the potential for legal development in this area of law be dormant, but the overall legal discourse between the circuits and the Supreme Court over pressing legal and social matters will be impaired by the Tenth Circuit's missing voice. On the flip side, if the Tenth Circuit chooses to revert back to its broader pre-*Herring* qualified immunity analysis, its decision to look at *Herring* the way that it did begs the ques-

---

292 Meeker, *supra* note 24, at 133.

tion of their tenuous stance regarding the right to privacy in an individual's HIV status.

Colin Barnacle

THE ROOKER-FELDMAN DOCTRINE

A MERE SUPERFLUOUS NUANCE OR A VITAL CIVIL PROCEDURE DOCTRINE? AN ANALYSIS OF THE TENTH CIRCUIT'S DECISION IN *JOHNSON V. RODRIGUES*

INTRODUCTION

The Rooker-Feldman Doctrine ("Rooker-Feldman") has been, and continues to be, a tremendous source of confusion for courts and attorneys alike. Rooker-Feldman is often misapplied as an abstention or preclusion doctrine and courts exacerbate the problem by continually using the three doctrines interchangeably. One source of this confusion is that the United States Supreme Court ("Supreme Court") has not provided the Circuit Courts direction about how to apply the doctrine. In fact, the "Supreme Court has not held a case barred by Rooker-Feldman since 1983."[1] Therefore, there is little guidance on how to properly apply the doctrine and many federal courts have written confusing and contradictory opinions as a result. Although the application of Rooker-Feldman use has been problematic, courts us it frequently. In fact, the Tenth Circuit has already addressed four Rooker-Feldman cases in the year 2001.[2] This alone makes Rooker-Feldman an important civil procedure tool and one that must be clearly understood. In order to clarify the use of Rooker-Feldman, this article focuses on the Tenth Circuit's decision in *Johnson v. Rodrigues*.[3] In this case, the Tenth Circuit not only properly applied Rooker-Feldman, but signaled the likely manner in which many courts will utilize the doctrine in the future.

Part I will explain the origin and foundation of Rooker-Feldman, how Rooker-Feldman relates to abstention and preclusion theories, the controversy surrounding the doctrine including why some commentators think Rooker-Feldman should be overturned and abandoned, and how the Tenth Circuit has applied Rooker-Feldman in past decisions. Part II will discuss the scope of Rooker-Feldman in today's courts, focusing on the Tenth Circuit's decision in *Johnston v. Rodrigues* and the positions taken by other Circuit Courts. Finally, Part III will provide an analysis of what

---

1. Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action*, 74 Notre Dame L. Rev. 1085 (1999).

2. *See* Mehdipour v. Chapel, 2001 U.S. App. LEXIS 2680 (10th Cir. Feb. 22, 2001); Continental Cas. Co. v. Hempel, 2001 U.S. App. LEXIS 2757 (10th Cir. Feb. 22, 2001); Bisbee v. McCarty, 2001 U.S. App. LEXIS 1512 (10th Cir. Feb. 2, 2001); Read v. Klein, 2001 U.S. App. LEXIS 334 (10th Cir. Jan. 9, 2001).

3. 226 F.3d 1103 (10th Cir. 2000).

place the doctrine has in civil procedure and how the Tenth Circuit used the doctrine for its intended purpose in *Johnston v. Rodrigues*.[4]

I. BACKGROUND

There are three major legal doctrines or theories to keep a claim that has previously been litigated from being re-litigated. Those doctrines are abstention theories, preclusion theories, and Rooker-Feldman. While abstention and preclusion theories are familiar to courts and to litigation attorneys, Rooker-Feldman has been and continues to be confusing and troublesome. Rooker-Feldman appears to be, on the one hand "superfluous"[5] and on the other, "extremely significant."[6] In order to understand the application of Rooker-Feldman and where the doctrine may have a purpose in the legal system, one must understand the doctrine itself, and more importantly, how it fits with abstention and preclusion theories.

A. *Rooker-Feldman: A Doctrine Grounded in Jurisdiction Theories*

Rooker-Feldman, in its most simple terms, limits lower federal court's jurisdiction as an "appellate" court to cases that originated in the state courts.[7] Rooker-Feldman is a doctrine grounded in jurisdiction theories.[8] It is based on statutes passed by Congress that give appellate jurisdiction to the United States Supreme Court.[9] The Supreme Court has jurisdiction to hear "final judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ."[10] This statute not only gives the Supreme Court jurisdictional rights, but it also denies the lower federal courts the ability to hear cases that arise in state courts.[11] Furthermore, Congress has enacted statutes that grant lower federal courts jurisdiction in other kinds of cases.[12] Since Congress has specified when the lower federal courts have jurisdiction, one may conclude that lower federal courts do not have jurisdiction over cases originating in

---

4. *Johnston*, 226 F.3d 1103 (10th Cir. 2000).

5. *See* Barry Friedman & James E. Gaylord, *Rooker-Feldman, From the Ground Up*, 74 NOTRE DAME L. REV. 1129 (1999).

6. *Id.*

7. Edmonds v. Clarkson, 996 F. Supp. 541, 546 (E.D. Va. 1998).

8. *See* 18 C. WRIGHT, et al., FEDERAL PRACTICE AND PROCEDURE § 4469 (1981 & Supp. 2000) [hereinafter WRIGHT, MILLER & COOPER], David P. Currie, Res Judicata; *The Neglected Defense*, 45 U. CHI. L. REV. 317, 322 (1978); Gary Thompson, *The Rooker-Feldman Doctrine and the Subject Matter Jurisdiction of Federal District Courts*, 42 RUTGERS L. REV. 859, 912 (1990).

9. Thompson, *supra* note 8, at 860.

10. 28 U.S.C. §1257 (2000).

11. *Id.*

12. 28 U.S.C. § 1331 (2000) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); 28 U.S.C. § 1332(a) (2000) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between (1) citizens of different States.").

state court.[13] The Supreme Court noted in its 1988 term, "The Rooker-Feldman doctrine interprets 28 U.S.C. § 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is vested solely in this Court."[14] If allowed, ". . . [t]he effect of such a jurisdiction would be to displace almost the whole of state litigation into federal courts by making the final judgment in the state court the cause of action that kicks off a suit to undo that judgment in federal courts."[15]

This statutory construction leads to the most favored policy reason for Rooker-Feldman—"facilitat[ing] a state appellate process free from federal interference."[16] Rooker-Feldman restricts a litigant from accessing the lower federal courts, therefore, allowing the state courts to rule free from federal intervention. Therefore, "once the highest state court has taken some form of action, only the Supreme Court may hear an appeal."[17]

1. The Rooker Decision

Rooker-Feldman originated from two Supreme Court cases, decided sixty years apart. In *Rooker v. Fidelity Trust Co*,[18] decided in 1923, Rooker asked the Court to declare void a judgment by an Indiana Supreme Court because it was "rendered and affirmed in contravention of the contract clause of the Constitution of the United States and the due process of law and equal protection clauses of the Fourteenth Amendment."[19] Rooker argued before the Federal District Court that the Indiana Supreme Court applied their own state statute in conflict with the United States Constitution.[20] The District Court ruled that "the suit was not within its jurisdiction as defined by Congress" and they, therefore, dismissed the case.[21] Rooker appealed to the United States Supreme Court where the issue was whether a federal plaintiff could bring an action claiming constitutional error, in a state proceeding to which he was a party.[22] The Court affirmed the District Court's decree, holding that if the constitutional questions actually arose in the state case, it was the duty of the state court to decide them; and the state court's decision, whether

---

13. Williamson B.C. Chang, *Rediscovering the Rooker-Feldman Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HASTINGS L.J. 1337, 1349 (1980).

14. ASARCO, Inc. v. Kadish, 490 U.S. 605, 622 (1989).

15. Lynk v. LaPorte Superior Court No. 2, 789 F.2d 554, 563 (7th Cir. 1986).

16. Benjamin Smith, *Texaco Inc., v. Pennzoil Co.: Beyond a Crude Analysis of the Rooker-Feldman Doctrine's Preclusion of Federal Jurisdiction*, 41 U. MIAMI L. REV. 627, 629 (1987).

17. *Id.*

18. 263 U.S. 413 (1923).

19. *Rooker*, 263 U.S. at 415.

20. *Id.*

21. *Id.*

22. *Id.* at 414-15.

constitutional or not, was an exercise of appellate jurisdiction.[23] If the decision was unconstitutional, this fact does not make the state court's judgment void, but merely left the decision open for reversal or modification in a hearing by the United States Supreme Court.[24] The United States Supreme Court is the only court that can hear an appeal from a state's highest court, therefore, issues that arise in a state cause of action cannot be the subject of subsequent litigation in an original federal action, but may be heard only on direct appeal to the United States Supreme Court.[25] This holding became the Rooker Doctrine stating that, "lower federal courts lack appellate jurisdiction to review the judgments of state courts that have been affirmed by the highest court of the state."[26] The lower federal courts, following this decision, applied the Rooker Doctrine infrequently, often using the Rooker Doctrine in the same way they used doctrines of preclusion.[27]

2. The Feldman Decision

In 1983, the United States Supreme Court decided *District of Columbia Court of Appeals v. Feldman*,[28] which upheld the idea that Rooker was a doctrine grounded in jurisdiction theories.[29] Feldman was a member of both the Virginia and Maryland bars.[30] He tried to be admitted into the District of Columbia Bar under a lighter admission requirement allowing for members of bars in other states to be accepted without taking the bar exam.[31] The Bar Committee in District of Columbia denied Feldman's admission, because Feldman had not graduated from an accredited law school.[32] Feldman brought his claim in the District Court of the District of Columbia,[33] asking the Court to grant him admission or alternatively, allow him to take the bar exam.[34] After the District of Columbia District Court, and later, the District of Columbia Court of Appeals, the highest "state" court, denied his request, Feldman filed in federal court in the United States District Court. Feldman requested an in-

23. *Id.* at 415.
24. Rooker, 263 U.S. at 415.
25. *Id* at 416.
26. Thompson, *supra* note 8, 863.
27. For example, in Lavasek v. White, 339 F.2d 861 (1965), the Tenth Circuit found that plaintiffs claims were barred from federal court because they had been fully litigated in the state courts. *Id.* at 863. The Court upheld the District Court that found the claims barred by *res judicata*. *Id.* at 862. However, the Tenth Circuit found the claims were barred by the Rooker-Feldman doctrine, without explaining why they used the different doctrine. *Id.* at 863.
28. 460 U.S. 462 (1983).
29. Thompson, *supra* note 8, at 871.
30. *Feldman*, 460 U.S. at 465.
31. *Id.*
32. *Id.* at 466.
33. The District Court of the District of Columbia is the equivalent of a state court.
34. *Feldman*, 460 U.S. at 467.

junction that required the Bar Committee to either to grant him immediate admission to the District of Columbia Bar or to allow him to take the bar exam.[35] Therefore, the issue in Feldman was whether bar admission decisions made by the highest state court could be challenged on constitutional grounds in federal district court.[36] Feldman went beyond the scope of Rooker because the issue was whether Feldman may bring his constitutional questions in federal court, when these issues were intertwined with other issues raised in state court.

The Supreme Court held that lower federal courts have no jurisdiction to hear "challenges to state court decisions in particular cases arising out of judicial proceedings . . ."[37] or to decide questions "inextricably intertwined" with state court judgments.[38] In other words, Rooker-Feldman will bar parties from re-litigating in federal court, not only federal issues actually raised in state court proceedings, but also those inextricably intertwined issues that could have been raised there.[39]

This decision helped solve one of the unresolved questions left open in *Rooker*-- "whether the issues actually must have been raised or litigated in the state proceeding."[40] The Feldman court made it clear that a plaintiff cannot fail to bring a federal claim in state court in hopes to later bring that claim in federal court.[41] This ruling lead to a new layer of analysis to the Rooker test—one must decide if the claim is "inextricably intertwined" with the state court judgment.[42] By adding this additional inquiry, the Feldman court extended the Rooker doctrine from issues that were actually decided by the state court proceedings, to also include claims that were *not* litigated in the state court, and are inextricably intertwined with the merits of the state court. A claim that is inextricably intertwined has been defined as a claim that is so closely tied to another litigated claim, so that if a court were to rule on the second claim it would "effectively reverse the state court decision or void its ruling."[43] Likewise, a claim is not inextricably intertwined with a state court ruling "if the purpose of a federal action is 'separable from and collateral to' a state court judgment . . .. [T]he claim is not 'inextricably intertwined'

35. *Id.* at 468-69.

36. *Id.* at 463.

37. *Id.* at 486.

38. *Id.* at 483 n. 16.

39. Friedman, *supra* note 5, at 1135.

40. Friedman, *supra* note 5, at 1134.

41. *Feldman*, 460 U.S. at 484 n. 16 ("By failing to bring [his/her] claims in state court a plaintiff may forfeit [his/her] right to obtain review of the state court decision in any federal court.").

42. *Feldman*, 460 U.S. at 483 n. 16.

43. Fielder v. Credit Accept. Corp., 188 F.3d 1031, 1035 (8th Cir. 1999). The Tenth Circuit defines inextricably intertwined as, "[i]f adjudication of a claim in federal court would require the court to determine that a state court judgment was erroneously entered or was void, the claim is inextricably intertwined with the merits of the state court judgment." Lecates v. Barker, 2000 U.S. App. LEXIS 29306 at 6 (November 16, 2000).

merely because the action necessitates some consideration of the merits of the state court judgment."[44]

The resulting doctrine, arising from these two cases, asks the questions (1) has the claim or issue been litigated in a state court proceeding, and (2) is the claim or issue, although not raised in state court, "inextricably intertwined" with a state court judgment. If either of these two questions can be answered affirmatively, Rooker-Feldman will bar the suit at the District or Circuit Court level.

B. *A Comparison of Rooker-Feldman and Doctrines of Abstention and Preclusion*

The reason why many courts confuse Rooker-Feldman and abstention and preclusion theories is because all three doctrines are very similar in substance and procedural uses.[45] All three doctrines overlap one another and may often be used interchangeably. For example, the same policy reason for Rooker-Feldman, a state appellate process free from federal interference, may also be a reason for the use of abstention and preclusion theories. Abstention and preclusion doctrines keep claims and issues arising out of state court proceedings from being litigated in federal court.[46] Thus, they too help facilitate a state court process free from federal interference. However, there are a few fundamental differences between Rooker-Feldman and abstention and preclusion doctrines.

1. Abstention Theories Defined

One of the doctrines that Rooker-Feldman may overlap is abstention theories.[47] Abstention theories can be defined simply as a federal court's relinquishment of jurisdiction when necessary to avoid needless conflict with a state court's administration of its own affairs.[48] The abstention doctrine most closely related to Rooker-Feldman is Younger abstention.[49]

---

44. Kiowa Indian Tribe of Okla. v. Hoover, 150 f3d.1163, 1170 (1998).

45. Wright, *supra* note 8, at 4469.1, "The "Rooker-Feldman" doctrine . . . establishes a nearly redundant limit on federal subject-matter jurisdiction. This doctrine is nearly redundant because most of the actions dismissed for want of jurisdiction also could be resolved by invoking the claim- or issue-preclusion consequences of state judgments. All of the desirable results achieved by the jurisdiction theory could be achieved by supplementing preclusion theory with familiar theories of abstention, comity and equitable restraint."

46. Abstention theories stop federal courts from hearing a case that is still pending in state court. *See* Younger v. Harris, 401 U.S. 37, 43 (1971). Preclusion theories prevent claims or issues that have already been litigated from being relitigated in another judicial proceeding. *See* Allen v. McCurry, 449 U.S. 90, 94 (1980).

47. *See* Thompson, *supra*, note 8, at 898.

48. Younger v. Harris, 401 U.S. 37 (1971).

49. This article will strictly address Younger abstention because it involves a federal court's decision not to interfere with an ongoing state court proceeding. However there are several other

The Younger abstention doctrine, arose out of the Supreme Court case, *Younger v. Harris*.[50] *Younger* involved a defendant who was indicted in a California state court for allegedly violating provisions of the California Criminal Syndicalism Act.[51] After he was indicted, Harris filed suit in federal court to enjoin the state court district attorney from proceeding with the prosecution because the California act violated his First and Fourteenth Amendment rights.[52] The lower federal court found that the California act violated his constitutional rights and enjoined the state court proceeding.[53] However, the Supreme Court reversed stating that the injunction violated "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances."[54] The Younger abstention doctrine, therefore, is a "federal court's decision not to interfere with an ongoing state criminal proceeding by issuing an injunction or granting declaratory relief."[55]

Although Younger abstention originally applied only in criminal cases, it has been expanded to preclude all cases where a party in an action may desire the federal court to interfere with an ongoing state proceeding.[56] Justice Powell described the scope of Younger abstention in *Pennzoil v. Texaco*[57] stating:

---

types of abstention theories such as: (1) Burford abstention is a federal court's refusal to review a state court's decision in cases involving a complex regulatory scheme and sensitive areas of state concern. *See* Burford v. Sun Oil Co., 319 U.S. 315, 317-18 (1943); (2) Colorado River Abstention is a federal court's decision to abstain while there are relevant and parallel state-court proceedings under way. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817-18 (1976); (3) Pullman abstention is a federal court's decision to abstain in order to give the state courts an opportunity to settle an underlying state-law question whose resolution may avert the need to decide a federal constitutional question. *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 499-500 (1941); and (4) Thibodaux abstention is a federal court's decision to abstain in order to allow state courts to decide difficult issues of public importance that, if decided by the federal court, could result in unnecessary friction between state and federal authorities. See Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30 (1959).

50. *Younger*, 401 U.S. 37 (1971).

51. *Id.* at 38.

52. *Id.* at 39.

53. *Id.* at 40.

54. *Id.* at 41.

55. *See Younger*, 401 U.S. 37 (1971).

56. *See* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), where the court expanded *Younger* to apply to civil cases. *Id.* at 594. In this case, the court voided a federal injunction against enforcement of a state judgment that closed a theater as a nuisance for showing obscene films, which had not been adjudged obscene in prior hearings. *Id.* at 599. The court held that Younger principles applied although the state proceeding was civil in nature and a party must use the state appellate remedies before seeking a federal injunction unless one of the Younger exceptions applies. *Id.* at 609. The exceptions to Younger are (1) if the state proceeding is motivated by a desire to harass or is conducted in bad faith; (2)if the challenged statute is flagrantly violative of express constitutional prohibitions in every clause and paragraph thereof, or (3) if extraordinary circumstances exist. Phelps v. Hamilton, 59 F.3d 1058, 1063-64 (10th Cir. 1995).

57. *See* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987).

> This concern mandates application of Younger abstention not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending, if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government.[58]

The broadening of Younger abstention to civil cases makes Rooker-Feldman's scope very similar to Younger abstention. This is because, in many cases, Rooker-Feldman plaintiffs are seeking to enjoin the state proceedings.[59]

2. Preclusion Theories Defined

Courts have used Rooker-Feldman interchangeably with two preclusion theories.[60] The most common preclusion doctrine, claim preclusion or *res judicata*, is defined as prohibiting the same parties from relitigating claims[61] that "were or could have been raised in a previous suit."[62]

The second preclusion theory, issue preclusion or collateral estoppel, requires a court to uphold an earlier decision by another court on issues[63] that were actually litigated.[64] There are two different types of issue preclusion, (1) between the same parties, and (2) between different parties. Issue preclusion between the same parties requires that the issue is the same as in the prior action, actually litigated, essential to the final judgment, and the party against whom the estoppel is enforced was fully represented in the action.[65] Issue preclusion between different parties may be either defensive collateral estoppel or offensive collateral estoppel. In defensive collateral estoppel, the plaintiff is estopped from litigating an issue that has already been litigated and a final judgment has been reached.[66] In offensive collateral estoppel, the defendant is estopped from

---

58. *Pennzoil*, 481 U.S. at 10.

59. For example, in Morrow v. Winslow, 94 F.3d 1386, the defendants argued that Rooker-Feldman should bar the plaintiff's claims because he was seeking to enjoin a state court adoption proceeding. *Id.* at 1390. However, the court found that Younger abstentions should apply. *Id.*

60. Robinson v. Ariyoshi, 753 F.2d 1468, 1472 (9th Cir. 1985) ("We have read Rooker not as a jurisdictional barrier but as an application of res judicata"); Ellentuck v. Klein, 570 F.2d 414, 425 (2d Cir. 1978) (due process claims that were fully litigated barred by res judicata; Rooker cited as support).

61. Claims are defined as "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of transactions, out of which the action arose." Restatement (Second) of Judgments § 24 (2000).

62. Allen v. McCurry, 449 U.S. 90, 94 (1980).

63. Issue is defined as material points in dispute and essential to the judgment. Restatement (Second) of Judgments § 27 (2000).

64. Tuteur Ass. v. Taubensee Steel & Wire Co., 861 F. Supp. 693, 696 (N. D. Ill. 1994).

65. *Tutuer*, 861 F. Supp. at 696.

66. Bernhard v. Bank of America, 122 P.2d 892, 895 (Cal. 1942).

litigating an issue that it lost to another plaintiff, and the new plaintiff wins the issue automatically. Offensive collateral estoppel requires all the same elements as defensive and that the plaintiffs could have been easily joined, the defendant had adequate incentive to defend the issue, it was not a prior inconsistent judgment, and the defendant was not deprived of a procedure advantage in the original action.[67]

Rooker-Feldman's scope is, again, very similar to preclusion theories. This is because, in many cases, Rooker-Feldman plaintiffs are raising claims in federal court that are very similar to those raised in the original state court proceeding. Therefore, courts could very easily apply preclusion theories, rather than Rooker-Feldman to bar a case.

3. Substantive Comparison of Rooker-Feldman and Abstention and Preclusion Theories

Many have confused Rooker-Feldman with abstention and preclusion theories in civil procedure because Rooker-Feldman appears to overlap the two theories. One commentator observes, "[t]his doctrine is nearly redundant because most of the actions dismissed for want of jurisdiction also could be resolved by invoking the claim- or issue- preclusion consequences of the state judgment."[68] In order to understand how Rooker-Feldman has been confused and may be redundant, a comparison of these theories will be discussed.

a. Rooker-Feldman and Abstention Theories

Courts have confused and mingled together Rooker-Feldman and abstention theories, because of their striking similarities.[69] Both doctrines can bar claims arising in state court from being heard in federal courts. Younger abstention bars claims in federal court that are pending in state court.[70] Rooker-Feldman bars claims that arose in state courts, or those that are inextricably intertwined with such claims.[71] An overlap occurs because all claims that are still pending in state court are inextricably intertwined with claims brought in federal court if the federal claims ask the federal court to make a decision regarding the pending state court claims. If a federal court were to rule on a claim that is still pending in

67. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329 (1979).

68. Wright, *supra* note 8, at § 4469.1.

69. For example in Johnson v. De Grandy even the Supreme Court seemed to label Rooker-Feldman as another type of abstention theory by stating, "the Federal Government's § 2 challenge deserved dismissal under this Court's Rooker-Feldman abstention doctrine . . . ." Johnson v. De Grandy, 512 U.S. 997, 1005 (1994). The Seventh Circuit recently stated their confusion of the distinction by stating that rather than attempting "a problematic application of the Rooker-Feldman doctrine," the court applied abstention principles and refused to issue an injunction to enjoin a pending state litigation on the grounds that principles of federalism and comity would be upset. Owens-Corning Fiberglas Corp. v. Moran, 959 F.2d 634, 635 (7th Cir. 1992).

70. *See* Younger v. Harris, 401 U.S. 37 (1971).

71. *Feldman*, 460 U.S. at 483 n. 16.

state court, the court would make the lower state court's ruling void. This is essentially the definition of inextricably intertwined.[72]

This similarity brings up the question, "If an injunction is permissible under Younger, should the Rooker doctrine cut in to prevent it? [Alternatively,] if an interference is prohibited by Younger . . . what need is there for Rooker?"[73] Rooker-Feldman, by barring a federal court's appellate review of a state court's proceeding, may be superfluous of Younger abstention when the case is still pending in the state court.

However, there is one fundamental substantive difference between Rooker-Feldman and abstention theories—Rooker-Feldman may continue to bar a suit when litigants are seeking relief from a final state court judgment.[74] In this respect, Rooker-Feldman has a purpose that goes beyond the scope of abstention. Abstention doctrines only stop a case when it is pending in state court, while Rooker-Feldman can bar a case that has reached its final judgment.[75] However, this clear distinction is substantially blurred by similarities between Rooker-Feldman and preclusion theories.

b. Rooker-Feldman and Preclusion Theories

The similarity between Rooker-Feldman and preclusion theories is, simply stated, that both doctrines provide a way for the federal court to refuse to hear a state claim that has reached a final judgment by a state court. Furthermore, both doctrines require an analysis of whether the state claims or issues were substantively similar to those bring brought in federal court. Conversely, the differences between preclusion theories and Rooker-Feldman are often very difficult to distinguish.

Essentially, the difference between Rooker-Feldman and issue preclusion is simply, that issue preclusion bars only those claims that have actually been litigated in another court proceeding, while Rooker-Feldman may bar claims that have not been litigated, but are inextricably

---

72. The Tenth Circuit defines "inextricably intertwined" claims as "separate to and collateral to" the merits of the state court judgment. Kiowa Indian Tribe of Oklahoma v. Hoover, 150 F.3d 1163,1170 (1998).

73. H. HART & H. WESCHLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1637 (3d ed. 1988).

74. Sherry, *supra* note 1, at 1092-93.

75. For example, the Tenth Circuit in Marrow v. Winslow, 94 F.3d 1386 (1996) asked parties to submit supplemental memoranda advising the court on two questions: "(1) if an adoption order has been entered in that proceeding, what are the positions of the parties as to whether dismissal of this federal suit should be ordered under the doctrine of [Rooker-Feldman]; and (2) if the state adoption proceeding is still pending, whether we should vacate and remand, directing abstention by the federal district court under the rationale of the [Younger doctrine]. *Id.* at 1389. This example clearly shows the court's recognition of the distinction between Rooker-Feldman and abstention theories.

intertwined with claims litigated in a previous decision.[76] Therefore, Rooker-Feldman, by barring issues that have not actually been litigated in a lower court proceeding but were intertwined with the issues litigated, has a purpose that extends beyond the scope of issue preclusion.

However, many commentators feel that the substantive difference between Rooker-Feldman and claim preclusion is more complex and Rooker-Feldman does not bar anything that claim preclusion would not also bar.[77] Consequently, many argue that Rooker-Feldman has the exact scope of claim preclusion.[78]

The Rooker-Feldman bar extends to claims that were not litigated but are inextricably intertwined with claims that have been litigated.[79] The claim is inextricably intertwined if, by ruling, the federal court would make the lower state court's ruling void.[80] However, claims barred by claim preclusion arise in the same way. Claim preclusion bars claims that have been litigated or are virtually identical to those claims that have been litigated.[81] This raises the question of whether there is ever a time when an inextricably intertwined claim arises that can void a state court judgment, and, at the same time, is not a claim that has risen out of the same series of connected transactions which claim preclusion would bar. Many feel that this would never occur.[82] However, there are two limited occasions that arise where Rooker-Feldman has a purpose that extends beyond the scope of claim preclusion.

One occasions arises when a claim is inextricably intertwined with another claim and therefore voids the lower state court's ruling, but the inextricably intertwined claim is not virtually identical to a claim that was raised in the lower state court proceeding. An example of this arises in the Tenth Circuit case, *Lecates v. Barker*.[83] Here the Court found that the Plaintiff's fraud claim was inextricably intertwined with the lower state court's default judgment.[84] Plaintiff's fraud claim was not virtually identical to any of the claims raised in the state court, dealing with attor-

---

76. Wright, *supra* note 8, at § 4402.

77. Smith, *supra* note 16, at 655, stating "Inextricably intertwined claims will only result out of the same series of connected transactions . . . [which is barred by claim preclusion].

78. *Id.*

79. *Feldman*, 460 U.S. at 484 n. 16.

80. *Fielder*, 188 F.3d at 1035.

81. Wright, *supra* note 8, at § 4402.

82. For example, one commentator states, "[I]nextricably intertwined claims will only result out of the same series of connected transactions . . . [which is barred by claim preclusion.]" Smith, *supra* note 16, at 655. The only way a claim is inextricably intertwined with another is if it is so similar to the original claim that it would change the lower state court's ruling. However, since this claim is virtually identical to the original claim, claim preclusion would also bar it and there is no need for Rooker-Feldman. *Id.* Therefore, many argue Rooker-Feldman may never bar a claim that claim preclusion would not also bar.

83. 2000 U.S. App. LEXIS 29306 (2000).

84. *Lacates*, 2000 U.S. App. LEXIS at *6.

ney misconduct.[85] Therefore, claim preclusion would not bar the claim. However, the Court still found that if they ruled that the lower state court's ruling was based on fraud, this would be voiding the state court's decision. Therefore, the Tenth Circuit found that the suit was barred by Rooker-Feldman.[86] Because the two claims, fraud and attorney misconduct, were not virtually identical, claim preclusion could not be used, and only Rooker-Feldman could bar the fraud claim that was raised in the federal court.

Another occasion that Rooker-Feldman may fill a gap in preclusion doctrines involves the question of whether the Feldman court wanted to preclude jurisdiction "over separate claims that a litigant did not raise in state court and which are not inextricably intertwined with actually litigated state court claims, where that party procedurally could have presented the separate claim to the state trial court, but simply chose not to do so."[87] Therefore, if Rooker-Feldman forbids review of non-inextricably intertwined claims and all claims or issues that could have been raised in state court but were not, then Rooker-Feldman will extend beyond the scope of claim preclusion, which only precludes unlitigated issues if there is substantial connection between the original claim and the unlitigated issue.[88]

4. Procedural Differences Between Rooker-Feldman and Abstention and Preclusion Theories

In addition to substantive differences, there are procedural differences in uses and incidents between the use of Rooker-Feldman and abstention and preclusion theories. These procedural differences between Rooker-Feldman and abstention theories are the same as the differences between Rooker-Feldman and preclusion theories.

One difference arises because Rooker-Feldman is a doctrine grounded in jurisdiction theories, and therefore it can be raised by the federal court as a bar to jurisdiction, anytime during the litigation.[89] Parties cannot waive their right to bring Rooker-Feldman jurisdiction issues into court by not raising it as an affirmative defense.[90] Alternatively, doctrines of preclusion and abstention can be waived if the defendant does not plead it as an affirmative defense in the answer.[91] Courts have

85. *Id.* at *4.
86. *Id.* at *6.
87. Smith, *supra* note 16, at 655.
88. *Id.*
89. Wright, *supra* note 8, at § 4469.1.
90. *Id.*
91. The Supreme Court has stated that abstention can be waived in Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 626 (1986). However, the Tenth Circuit in Morrow v. Winslow, 94 F.3d 1386 (1996), stated, "we are convinced that we have properly raised

used Rooker-Feldman to raise the issue of jurisdiction *sua sponte* in many cases.[92]

Another difference is that "the preclusive effect a federal court will give to a state court judgment will vary because under U.S.C. § 1738 preclusion is governed by state rules."[93] Therefore, some worry that without Rooker-Feldman there will be no uniform application of preclusion rules. While Rooker-Feldman "provides for a limited and uniform federal law of preclusion in cases that varying state laws may not foreclose."[94]

However, some scholars feel that these differences between preclusion and abstention theories and Rooker-Feldman still do not provide Rooker-Feldman with a place in our legal system. For example, Wright, Miller, and Cooper, in *Federal Practice and Procedure* take the position that using the jurisdictional doctrine for cases that involve a form of direct attack on a state court judgment gives little reason for having a second doctrine.[95] The authors explain why:

> [T]he application of federal jurisdiction law rather than state preclusion law may weigh as much against Rooker-Feldman theory as for it—if state preclusion law permits a second action, and there is federal subject-matter jurisdiction apart from the Rooker-Feldman theory, it is not immediately clear that the Supreme Court's sole jurisdiction to review a state judgment impliedly defeats the explicit grant of district court jurisdiction. In the same vein, reliance on a jurisdictional theory may impede a desirable opportunity to decide an easy merits question rather than a complex preclusion-jurisdiction question.[96]

Likewise, the second reason for upholding Rooker-Feldman, uniform application, has also been thought to be contrary to our legal system. Some feel that applying Rooker-Feldman as a uniform rule without

---

the abstention issue sua sponte." *Id.* at 1392. Although there is a debate on the issue of whether a court may raise abstention sua sponte, there is no debate that a court may raise Rooker-Feldman on its own. Therefore, for the purposes of this article, this remains a procedural difference between Rooker-Feldman and abstention theories.

92. Jurisdiction raised by the court:
"A challenge under the Rooker-Feldman doctrine is for lack of subject matter jurisdiction and may be raised at any time by either party or sue sponte by the court" Moccio v. N.Y. State Office of Court Admin., 95 F. 3d 195, 198 (1996); "[T]his court on its own motion may raise issue of subject matter jurisdiction." Ritter v. Ross, 992 f.2d 750, 752 (1993); "At the motions hearing, the district court appropriately sua sponte raised the Rooker-Feldman issue. . ." Jordahl v. Democratic Party of Va., 122 F.3d 192, 197 n.5 (1997); "A challenge to a federal court's subject matter jurisdiction under the Rooker-Feldman doctrine 'may be raised at any time by either party or sua sponte by the court.'" Doctor's Assocs. V. Distajo, 107 F.3d 126, 137 (1997).

93. Thompson, *supra*, note 8, at 912.

94. Currie, *supra* note 8, at 324.

95. WRIGHT, *supra* note 8, at § 4469.1.

96. *Id.* (citations omitted).

taking into consideration the preclusion rules of individual states contradicts the purpose of 28 U.S.C. § 1738 that "requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged."[97] A commentator asks, "If the federal court cannot give less deference to a state court judgment then the state rendering would give it, why should Rooker-Feldman be used in a way that would require the federal court to give it greater deference to a state court judgment than the state rendering would give it?"[98] Applying Rooker-Feldman uniformly would deny states the opportunity to decide "the preclusive effects of their own judgments."[99]

Finally, some scholars believe that Rooker-Feldman and claim preclusion overlap completely and that instead of there being two doctrines, claim preclusion and Rooker-Feldman, each having different "work," there is instead only one—a jurisdictional claim preclusion.[100] Professor Chang states, "if the law of the state rendering the judgment would require the application of claim preclusion, the federal court must apply bar and merger and dismiss the action even if the issue was not raised by the parties."[101]

Whether one believes that Rooker-Feldman is a complete overlap of abstention and preclusion theories or that Rooker-Feldman is adding an important part to the idea of federalism, the bottom line is that Rooker-Feldman is alive and well today and used extensively by the lower federal courts.

C. *Application of Rooker-Feldman in Early Tenth Circuit Decisions*

The Tenth Circuit has used Rooker-Feldman in many of its decisions. An analysis of their past decisions shows how the Court initially used the Rooker doctrine interchangeably with claim preclusion or *res judicata*. The Court then introduced the concept of "inextricably intertwined" claims in *Doe v. Pringle*,[102] cited by the United States Supreme Court in their *Feldman* decision. However, the Tenth Circuit has not always followed its approach advocated in *Doe*, but has both broadened and narrowed their definition of what claims that are "inextricably intertwined" with the state court claims.

---

97. Thompson, *supra*, note 8, at 913, *citing* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466 (1982).

98. Thompson, *supra*, note 8, at 913.

99. *Id.*

100. Chang, *supra* note 13, at 1354-55.

101. Thompson, *supra*, note 8, at 912, *citing* Chang, *supra* note 12, at 1355.

102. 550 F.2d 596 (1976).

1. *Lavasek v. White*:[103] the Court's Application of the Rooker Doctrine

In *Lavasek*, the defendants were landowners that were sued in New Mexico state courts for a condemnation proceeding.[104] The State of New Mexico was converting Highway 66 into a controlled access highway.[105] The rights of the landowners were fully litigated in the New Mexico state courts, ending with a final decision by the New Mexico Supreme Court.[106] The state supreme court found that the landowners had "suffered no compensable injury for the loss of access or impaired visibility occasioned by the construction changes under the facts of the case."[107] The appellants filed in the United States District Court, claiming that they had been deprived of their constitutional rights under the Fifth and Fourteenth Amendments.[108] The District Court denied their claims finding them barred by *res judicata*.[109] The Tenth Circuit affirmed, however, it based its decision on the Rooker doctrine and not on *res judicata*.[110] The Court never explained why they did not use preclusion theories. Rather, it appears that because the parties were trying to raise federal constitutional issues in federal court that were based on a state court's decision, the Tenth Circuit used the Rooker doctrine instead of preclusion theories. However, the Court never stated that the District Court was wrong for using *res judicata*, but instead seemed to imply that Rooker and *res judicata* can be used interchangeably.

2. *Doe v. Pringle*:[111] the Introduction of Inextricably Intertwined Claims

Doe brought his claim into federal court after the Colorado Supreme Court dismissed his application to the Colorado Bar based on a prior felony conviction.[112] The Colorado Supreme Court found that based on Doe's prior record he could not be admitted even though he had passed the bar exam and the state Bar Committee found he was suited to practice law.[113] Doe filed suit in federal court claiming that his rights accorded by the Due Process Clause and Equal Protection of the Fourteenth Amendment had been violated.[114] The United States District Court dismissed his claim finding that there was a "subtle but fundamental dis-

103. 339 F.2d 861 (1965).
104. *Lavasek*, 339 F.2d at 862.
105. *Id.*
106. *Id.*
107. *Id.*
108. Lavasek v. White, 339 F.2d 861, 862 (1965).
109. *Id.*
110. *Id.* at 863.
111. 550 P.2d 596 (1976).
112. *Doe*, 550 P.2d at 579.
113. *Id.* at 597.
114. *Id.* at 597.

tinction between two types of claims which a . . . bar applicant . . . might bring to federal court: The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission."[115] The District Court found that federal courts do not have jurisdiction to hear claims "where review of a state court's adjudication of a particular application is sought."[116] The Tenth Circuit adopted this reasoning and found that the constitutional challenges were "an attempt by Doe to seek review in inferior federal courts of the entire state proceedings . . . ."[117] The United States Supreme Court later adopted this language seven years later which gave birth to the Feldman part of the Rooker analysis: whether a claim is inextricably intertwined with a state court decision.[118]

3. *Facio v. Jones*:[119] the Broadening of the Definition of Inextricably Intertwined

Facio brought his action in federal court after the Utah State Court had entered a default judgment against him.[120] The Federal District Court found for Facio finding that "the Utah procedural requirement that a meritorious defense be presented before a default judgment could be set aside was unconstitutional . . .."[121] The Tenth Circuit overturned by finding that Facio was seeking two types of relief: (1) he wants the default judgment set aside; and (2) he wants the federal court to declare the Utah Rules of Civil Procedure unconstitutional.[122] The Court found that the first relief would require the federal court to reverse the Utah state court judgment, and therefore it was inextricably intertwined and barred by Rooker-Feldman.[123] The Court further found that the second relief was also barred because it was inextricably intertwined with the first relief.[124] The Court did not look to see whether the second claim was intertwined with a state claim, but rather found it was intertwined with the first claim for relief.[125] Therefore, this holding broadened the definition of inextricably intertwined claims to include not only those relating to state claims, but also claims inextricably intertwined with claims that are barred in state courts.

---

115. *Id.*
116. *Id.*
117. *Doe*, 550 F.2d at 599.
118. *Feldman*, 460 U.S. at 483 n.16.
119. 929 F.2d 541 (1991).
120. *Facio*, 929 F.2d at 542.
121. *Id.* at 543.
122. *Id.*
123. *Id.*
124. *Id.* at 541, 543.
125. *Facio*, 929 F.2d at 543-44.

4. *Kiowa Indian Tribe of Okla. v. Hoover*:[126] Narrowing the Definition of Inextricably Intertwined

In *Kiowa*, Hoover sued the Kiowa Tribe ("Tribe") and six other defendants in state court for a breach of contract claim.[127] The Oklahoma Supreme Court held that the state courts do have jurisdiction over a Native American tribe when the contract was entered into outside of the "Indian Country."[128] Meanwhile, Aircraft Equipment Company (Aircraft Equipment) sued the Tribe for a breach of an assumption agreement. The Oklahoma Supreme Court also ruled that state court has jurisdiction over the claim. The Tribe then filed a § 1983 action in federal court. The Tribe claimed that Mr. Hoover and Aircraft Equipment, "by bringing breach of contract actions against the [Tribe] in Oklahoma state court, and the Judges, by exercising the action, deprived the Tribe of rights, privileges and immunities secured to the Tribe by the Constitution of the United States."[129] The federal district court dismissed the Tribe's suit, holding that Rooker-Feldman barred the claims.[130] The Tenth Circuit overturned and held that it should apply a narrow meaning of the definition of "inextricably intertwined" by finding that a claim is not inextricably intertwined if it is "separable from and collateral to" a state court judgment.[131] The Court found that because a court could rule on the § 1983 claim without disturbing the original state action, the District Court did have jurisdiction over the Tribe's claims.[132]

The Tenth Circuit's decision in *Kiowa*, reflects the Court's current analysis of Rooker-Feldman. The court, although once adopting a broad definition of "inextricably intertwined," has come to adopt a more narrow definition of the test—a claim is inextricably intertwined if it is not separable from and collateral to a state court judgment.[133] This analysis also reflects the United States Supreme Courts' interpretation of inextricably intertwined.[134]

II. THE PRESENT SCOPE OF ROOKER-FELDMAN

As mentioned previously, direct attacks to state court judgments have given lower courts many occasions to use Rooker-Feldman to block

126. 150 F.3d 1163 (1998).
127. *Kiowa*, 150 F.3d at 1166.
128. *Id.*
129. *Id.* at 1168.
130. *Id.*
131. *Id.* at 1170.
132. *Kiowa*, 150 F.3d at 1171.
133. *Id.* at 1170.
134. The United States Supreme Court's decision in Texaco, Inc. v. Pennzoil, 481 U.S. 1 (1987), found that Texaco's federal action was "separate from and collateral to" the merits of the state-court judgment, and therefore it was not barred by Rooker-Feldman. *Id.* at 21.

cases.[135] "Since 1990 alone, lower federal courts have used Rooker-Feldman to find jurisdiction lacking in more than five hundred cases."[136] However, many of these rulings have been inconsistent. For example, the Court wrote that the doctrine is merely a "jurisdictional recasting of preclusion questions."[137] The Fifth Circuit has merged the two doctrines, by stating that Rooker-Feldman does not bar an action "when that same action would be allowed in the state court of the rendering state."[138] Many courts also go back and forth between the jurisdictional principles of Rooker-Feldman, preclusion theories, and abstention theories, without explaining how they are all related.[139]

One issue that routinely troubles lower federal courts is whether Rooker-Feldman bars a suit when it is brought by nonparties. State judgments are sometimes collaterally attacked in federal court by someone who was not a party to the state suit. Under preclusion rules, the nonparty would rarely be barred, because these preclusion rules only bar those suits that involve the same parties or and the same issues.[140] However, the fact that the same issues that were brought in the state court may now be brought into a federal court by a nonparty troubles some lower federal courts, which further causes inconsistent decisions. The lower courts struggle with the issue of how to apply Rooker-Feldman to suits by nonparties.

A. *An Analysis of the Tenth Circuit Case* Johnson v. Rodrigues[141]

The Tenth Circuit has recently struggled with whether to use Rooker-Feldman to bar an action by a nonparty in federal court. In *Johnson v. Rodrigues*,[142] plaintiff Johnson, the biological father of a baby placed for adoption, sued the two defendants, Rodrigues, the mother, and Adoption Center of Choice, in federal court after a Utah state court granted the adoption of Johnson's daughter without allowing Johnson to join the proceedings and contest the adoption.[143]

---

135. WRIGHT, *supra* note 8, at § 4469.1 lists the many occasions that it has been used: "to enjoin, to set aside and void, or to declare unlawful a state judgment. Jurisdiction also has been denied in actions to compel specific acts by a state court, such as continuance, entry of judgment, rehearing, or a new trial. A bankruptcy court order to release a prisoner also has run afoul by Rooker-Feldman. An action to compel restitution of the amount paid on a state judgment, for injury caused by the judgment, or for damages measured by the amount of the judgment, falls by the same reasoning (citations omitted).

136. Sherry, *supra* note 1, at 1088.

137. Cross-Sound Ferry Servs. v. ICC, 934 F.2d 327, 343 (D.C. Cir. 1991) (Thomas, J., dissenting).

138. Davis v. Bayless, 70 F.3d 367, 376 (5th Cir. 1995).

139. McKinnis v. Morgan, 972 F.2d 351 (7th Cir. 1992).

140. *See* Richards v. Jefferson County, 517 U.S. 793, 798 (1996).

141. 226 F.3d 1103 (10th Cir. 2000).

142. *Johnson*, 226 F.3d at 1103.

143. *Id.* at 1105.

Johnson and Rodrigues conceived a child in Arizona and Rodrigues later informed the father (Johnson) that she had an abortion.[144] Johnson later learned that Rodrigues did not have an abortion and that he may be the father of the daughter that Rodrigues had placed for adoption.[145] Using a Utah subpoena, Johnson obtained records that made him believe that there was a pending adoption in Utah for a child that may be his daughter.[146] Johnson called the other defendant, Adoption Center of Choice, and spoke with an employee about the adoption. The employee indicated that the father could do nothing about the pending adoption.[147]

Johnson argued in Federal District Court that the Utah statutes applied in this case violated his due process rights by refusing to allow his participation in the adoption proceeding and thus deprived him of his fundamental right to have a parent-child relationship. Johnson argued that the statute was unconstitutional because it did not require the mother to give the name of the father.[148] Johnson wanted the defendants, to produce the baby for DNA testing and return the baby to Johnson, if he was proven the biological father.[149]

The defendants moved for summary judgment.[150] The Federal District Court stated that it was going to dismiss the case because Johnson did not have subject matter jurisdiction.[151] The Court believed that Johnson may seek remedy only in the state court for his challenge to the Utah statute and not in the federal courts where "the relief sought is in the nature of appellate review [of the state court's decision]."[152] The federal district court stated that Johnson's claims were essentially seeking to undo the adoption decision of the Utah state court, and therefore his case "fits squarely within the parameters of the Rooker-Feldman doctrine which prohibits me, a federal district court, from reviewing the state court judgment."[153] The lower federal court did not recognize that Johnson was a nonparty to the original proceeding and was not allowed to bring his claim in the original suit.

The Tenth Circuit Court of Appeals reversed the federal district court's decision, finding that Rooker-Feldman did not bar the case in federal court.[154] The Court accepted Johnson's argument that he was not seeking appellate review of the state court's decision because he was not

144. *Id.* at 1106.
145. *Id.*
146. *Id.* at 1106.
147. *Johnson*, 226 F.3d at 1106.
148. *Id.* at 1107.
149. *Id.*
150. *Id.*
151. *Id.* at 1107.
152. *Johnson*, 226 F.3d at 1107.
153. *Id.*
154. *Id.* at 1108.

a party to the adoption proceeding in Utah.[155] The Court stated two main reasons why the district court erred: (1) because Johnson did not have the opportunity to litigate in federal court; and (2) Johnson was not asking the Federal District Court to overturn the state court decision.[156]

The Tenth Circuit held that if a plaintiff was not a party to the action in the state court proceeding, then Rooker-Feldman does not apply.[157] The Court continued by stating that Rooker-Feldman does not bar a federal action when the plaintiff lacked a reasonable opportunity to litigate claims in state court.[158] The Court did not apply a broad, general rule providing that any nonparty to the suit would not be barred from federal court by Rooker-Feldman; but rather the Court looked to the procedural nature of the case and limited its holding to just those parties who "lacked a reasonable opportunity to litigate" their claims in the state courts.[159]

The Tenth Circuit's second reason for overruling the Federal District Court is that Johnson's "discrete general challenge to the validity of the Utah adoption laws must be considered, thus distinguishing this case from one challenging the merits of a particular state court ruling."[160] The Court found that federal district courts have jurisdiction "over general challenges . . . which do not require review of a final state court judgment in a particular case."[161] This principle gives the Federal District Court jurisdiction because the court can decide Johnson's challenge to the Utah's adoption laws without reviewing a final state court judgment.[162] In other words, the two claims are not "inextricably intertwined." The Court finally relied on, *Doe v. Pringle*[163] which held, "a federal district court may exercise jurisdiction in relation to review of alleged federal constitutional due process or equal protection deprivations in the state's adoption and/or administration of general rules and regulations governing admission."[164] Thus, the Tenth Circuit found that it was error to dismiss Johnson's complaint, because his claim did not appeal a particular state court judgment.

---

155. *Id.*
156. *Id.*
157. *Johnson*, 226 F.3d at 1108.
158. *Id.* at 1109.
159. *Id.* at 1110.
160. *Id.* at 1108.
161. *Feldman*, 460 U.S. at 486.
162. *Johnson*, 226 F.3d at 1108-09.
163. Doe v. Pringle, 550 F.2d at 596 (10th Cir. 1976).
164. *Id.* at 599.

B. *Other Circuit Court Decisions Regarding Rooker-Feldman and Non-Parties*

Other Circuit Courts have also addressed the issue decided by the Tenth Circuit: whether suits by nonparties are barred by Rooker-Feldman. The other Circuit Courts have rarely used Rooker-Feldman to bar a suit brought by a nonparty. However, the reasoning why a Circuit Court decided not to dismiss a case based on Rooker-Feldman has varied greatly. Reasoning has ranged from applying a broad, general rule, to a more fact specific analysis that looks at the nature of the case and its parties.

The Circuit Courts have so rarely applied Rooker-Feldman to bar suits brought by nonparties, that some Circuit Courts have adopted a broad, general rule that Rooker-Feldman does not apply to nonparties. However, this broad rule does not reflect the purpose of Rooker-Feldman and excludes the limited occasions when Rooker-Feldman has a use that extends beyond abstention and preclusion theories. Rooker-Feldman, as discussed above, may have a use beyond the other theories when a party does not seek to enjoin an ongoing state proceeding, but instead wants to "jump ship" and litigate in federal court. This purpose of Rooker-Feldman does not depend on the identity of the parties.[165] The purpose of Rooker-Feldman, rather, depends on the nature of the federal suit, and whether it is an "appellate" review of the state court judgment. Therefore, it would be incongruous to create a broad, general rule that excludes nonparty plaintiffs from the effects of Rooker-Feldman.[166] Furthermore, it is not against due process to require a nonparty plaintiff to intervene in a state court proceeding, as long as "that plaintiff had notice that the state suit might affect [his or her] interest."[167]

The Tenth Circuit, as discussed above, did not apply Rooker-Feldman to *Johnson v. Rodrigues*, involving nonparties.[168] However, the court did not base its decision on a broad rule against applying Rooker-Feldman to nonparties.[169] The Court, rather, looked to the issues underlying the federal claim to make the decision.[170]

1. The Eleventh and Ninth Circuit Decisions

The Eleventh and Ninth Circuit Courts, like the Tenth Circuit, have analyzed cases, where Rooker-Feldman's use was at issue, without making a broad, general rule. For example, the Eleventh Circuit in *Dale*

165. Sherry, *supra* note 1, at 1114.
166. *Id.*
167. *Id.*
168. *Johnson*, 226 F.3d at 1108.
169. *Id.* at 1110.
170. *Id.*

v. Moore,[171] held that, "the Rooker-Feldman doctrine applies as long as the party had a reasonable opportunity to raise his federal claims in the state court proceedings. If the party did not have a reasonable opportunity to raise the claim, then the federal claim was not inextricably intertwined with the state court's judgment."[172] In *Dale v. Moore*, the Eleventh Circuit precluded the federal district court's exercise of subject matter jurisdiction finding that the Plaintiff's "ADA claim is inextricably intertwined with the state's judicial proceedings relating to his bar admission."[173] The Court found that since the ADA claim would require the federal district court to review the facts of the Plaintiff's case, the claim is inextricably intertwined with the state court case.[174] Therefore, the Eleventh Circuit looked at the nature of the suit and resisted making a broad, over-encompassing rule.

Likewise, the Ninth Circuit's decision in *Marriott International, Inc. v. Mitsui Trust & Banking Co*[175] also barred a nonparty from relitigating a claim in federal court using Rooker-Feldman, without using an overbroad rule.[176] A district court, within the Ninth Circuit, applied Rooker-Feldman to bar a party who had been denied the right to intervene in a state court suit, on the ground that the state court's denial, itself, was a final judgment of the very claim the party was attempting to raise in federal court.[177] The district court, within the Ninth Circuit did not allow the case to proceed in federal court simply because the federal plaintiff was a nonparty to the state proceedings. Rather, the Court looked at the nature of the federal case and applied Rooker-Feldman to bar the case.

2. The Seventh, Third, and Fourth Circuit Decisions

The Seventh, Third, and Fourth Circuit Courts have a general rule barring the use of Rooker-Feldman to cases involving nonparties to the original state proceeding. Unlike the Tenth, Eleventh, and Ninth Circuit decisions, these three Circuit Courts do not look to see whether the plaintiff was given a reasonable opportunity to intervene in the state court's proceeding or at the nature of the federal suit, to determine if the federal court is acting in an "appellate" capacity.

For example, the Seventh Circuit in *Allen v. Allen*[178] relied squarely on a rule that prohibited applying Rooker-Feldman to nonparties. *Allen* involves a woman who gave birth to a child by a man who was not her

171. Dale v. Moore, 121 F.3d 624 (11th Cir. 1997).
172. *Id.* at 626.
173. *Id.* at 627.
174. *Id.* at 628.
175. 13 F. Supp. 2d 1059 (D. Haw. 1998).
176. *Marriott International, Inc.*, 13 F. Supp. 2d at 1059.
177. *Id.* at 1062-63.
178. 48 F.3d 259, 261 (7th Cir. 1995).

husband.[179] She later divorced her husband and the Court gave her now ex-husband, not the child's biological father, visitation rights.[180] The woman then married the biological father of her child.[181] The biological father sought an injunction in federal court against the enforcement of the state visitation order that allowed the woman's ex-husband to visit the child.[182] The Court may have applied Rooker-Feldman to bar the case, because the defendant, the biological father, had a reasonable opportunity to enjoin the state proceeding and the lower federal court would have been acting as an appellate court of the state court's ruling.[183] However, the Court did not use Rooker-Feldman, because the Court had a broad rule banning the use of Rooker-Feldman to cases involving nonparties. Rather the Court had to rely on the domestic relation exception to federal jurisdiction to bar the suit from federal court.[184]

The Third Circuit has also applied a broad, general rule banning the use of Rooker-Feldman to suits with nonparties. In *FOCUS v. Allegheny County Court of Common Pleas*,[185] the plaintiffs, a citizen's advocacy group, For Our Children's Ultimate Safety ("FOCUS") and two of FOCUS' members, challenged a gag order the state judge entered in a child custody case. The Plaintiffs wanted to talk to one of the parties in the case and could not. Subsequently, the Plaintiffs tried to intervene and challenge the gag order, claiming it violated their First Amendment rights.[186] The state court refused to hear FOCUS's motion to intervene.[187] The Plaintiffs then filed a U.S.C. § 1983 suit in a federal district court.[188] The Third Circuit ruled that the federal court had jurisdiction because Rooker-Feldman did not apply to cases with nonparties.[189] The Court did not need to apply a broad rule, which might not always be appropriate for suits by nonparties. Rather, the Court should have looked to whether the parties had the opportunity to litigate in state court or whether they were asking the federal district court to hold an "appellate" hearing of the state court's decision.

Finally, the Fourth Circuit also has not applied Rooker-Feldman in cases where the federal plaintiff was not a party to the original state action. In *Republic of Paraguay v. Allen*,[190] Paraguay and its ambassador to the United States filed suit in federal court, alleging that the State of Vir-

179. *Allen*, 48 F.3d at 260.
180. *Id.* at 260.
181. *Id.*
182. *Id.* at 260.
183. *Id.* at 261-62.
184. *Allen*, 48 F.3d at 261.
185. FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834 (3rd Cir. 1996).
186. *Id.* at 836.
187. *Id.*
188. *Id.* at 837.
189. *Id.* at 840.
190. 134 F.3d 622 (1998).

ginia had violated various treaties when it tried and convicted a Paraguayan national resident in the United States.[191] Instead of looking at the procedural posture of the case and deciding whether the Plaintiffs were asking the Court to be an "appellate" court, the Fourth Circuit court bared their action without regard to whether or not they had a reasonable opportunity to litigate in state court.[192]

III. ANALYSIS

Rooker-Feldman has caused substantial confusion and, as discussed above, many commentators feel that it is mostly redundant of other legal theories.[193] However, the Supreme Court has not abandoned the doctrine and the lower courts continue to use it to bar cases from federal jurisdiction. Consequently, it is vital for the lower courts to apply Rooker-Feldman correctly. The Tenth Circuit's decision in *Johnson v. Rodrigues*[194] reflects a movement by Circuit Courts towards establishing case law that will help guide legal scholars in understanding the correct purpose of the doctrine—one that looks at the nature of the federal suit and not the parties.

Courts should not adopt and apply a broad, over-encompassing rule that Rooker-Feldman should not be applied to nonparties, because this rule does not reflect the original intent of the doctrine. Courts using an all-encompassing rule confuse the already muddled purpose of Rooker-Feldman. The analysis for Rooker-Feldman only requires courts to look at whether the parties are asking the federal court to change or alter a final state court judgment. "A court that strays from this common sense conclusion will end up hopelessly confused—and will often find some other reason to avoid jurisdiction."[195]

For example, the Seventh Circuit's decision in *Allen v. Allen* appeared to confuse the application of its general rule that Rooker-Feldman is inapplicable to nonparties by not looking at the federal suit itself. In *Allen*, the suit is the type of case where most courts have applied Rooker-Feldman, because the federal plaintiff appears to be trying to undo the state court's decision.[196] The Court found that the father could have been a party to the state proceeding if he had followed the correct procedures for establishing paternity.[197] The Court further found that it would not be fair to let the father's failing to follow the correct procedures allow him to litigate in federal court, while someone who followed correct proce-

191. *Republic of Paraguay*, 134 F.3d at 624.
192. *Id.* at 627 n.4.
193. WRIGHT, *supra* note 8, at § 4469.1.
194. Johnson v. Rodrigues, 226 F.3d 1103 (10th Cir. 2000).
195. Sherry, *supra* note 1, at 1120.
196. *Allen*, 48 F.3d at 261.
197. *Id.*

dures could not.[198] Rather than find that the father was barred from federal court by Rooker-Feldman, the Court found instead that it was barred by the domestic relations exception.[199] Instead of looking at the nature of the federal case and using Rooker-Feldman to bar the case, the Court further muddled Rooker-Feldman by writing a attenuated decision that attempts only to justify its own reasoning.

Although some courts still apply an over-encompassing rule, most courts look at the nature of the suit and apply Rooker-Feldman accordingly. As discussed above, many courts first decide whether a plaintiff had the opportunity to litigate in state court or if the plaintiff is trying to change a state court's decision. The Tenth Circuit followed the original intent of Rooker-Feldman in *Johnson v. Rodrigues*. The Court looked at the nature of the federal case, and in doing so, the Court used Rooker-Feldman as to reach the result originally sought by the Supreme Court—to extend beyond the scope of abstention and preclusion theories. If all the Circuit Courts would follow the lead by the Tenth Circuit, Rooker-Feldman will likely become less confusing. Instead, Rooker-Feldman would become a worthwhile tool for litigators and courts to use to help preserve comity and the appropriate amount of federalism of our courts.

198. *Id.*
199. *Id.*

CONCLUSION

Whether Rooker-Feldman is an overlap of claim preclusion or a vital civil procedure doctrine, the Supreme Court has to date neither nullified it or abandoned it and the fact remains that Rooker-Feldman is alive and well today and used extensively by the lower federal courts. Although, Rooker-Feldman has a very limited purpose in our judicial system, it does have a purpose that extends beyond the scope of abstention and preclusion theories. Therefore, it is important that it Rooker-Feldman is clearly understood and properly used.

The Tenth Circuit's decision is a reflection of an analysis that shows the place that Rooker-Feldman may have in our federal jurisdiction. By focusing on the nature of the federal suit and not on the parties, the Tenth Circuit's analysis may help many to understand the real purpose of Rooker-Feldman. Many of the Circuit Courts are moving in the direction of the Tenth Circuit. If courts continue to do the proper analysis, and no longer blend principles of preclusion theories with Rooker-Feldman principles, Rooker-Feldman may no longer be a confusing doctrine, but one that is a useful tool in civil procedure.

Rachel Thomas Rowley[*]

---

* J.D. candidate 2002, University of Denver School of Law. The author would like to thank Daniel Young, for his guidance and indispensable editing; Gregory Mayers, for his support, encouragement, and willingness to read countless drafts of this article; and Ryan Rowley, for his endless faith.