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Constitutional Law Survey

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CONSTITUTIONAL LAW SURVEY

INTRODUCTION

During the survey period, the Court of Appeals for the Tenth Circuit handed down three important constitutional decisions. *Adolph Coors Co. v. Bentsen*[1] and *Cannon v. City and County of Denver*[2] gave the Tenth Circuit an opportunity to better define its approach to freedom of speech under the First Amendment. The *Coors* case addressed whether a federal ban on beer labels that announced alcohol content violated commercial speech rights.[3] In *Cannon*, abortion protestors arrested for carrying signs that read "The Killing Place" claimed the arrests violated their speech rights.[4] The case presented the Tenth Circuit with its first opportunity to apply and define the 'fighting words' doctrine. The third case involved the nascent constitutional right of familial association. In *Griffin v. Strong*,[5] the Tenth Circuit grounded the right in the Fourteenth Amendment and consequently altered the analytical approach on which it had relied in earlier cases.[6]

I. COMMERCIAL SPEECH: *ADOLPH COORS CO. V. BENTSEN*[7]

A. *Background*

In 1942, the Supreme Court in *Valentine v. Chrestensen*[8] refused to recognize constitutional limitations on government's ability to prohibit speech of a "purely commercial" nature.[9] In spite of its categorical disposal of the issue, the Court spent the next thirty-five years retreating from this holding. During this period, the Court published a series of decisions suggesting that speech made for commercial purposes should receive some protection.[10]

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1. 2 F.3d 355 (10th Cir. 1993). This case reached the Tenth Circuit first as Adolph Coors Co. v. Brady, 944 F.2d 1543 (10th Cir. 1991), in which the court remanded for further factual findings. References to this earlier case are *Coors I*. References to Adolph Coors v. Bentsen, 2 F.3d 355 (10th Cir. 1993) are *Coors II*.

2. 998 F.2d 867 (10th Cir. 1993).

3. *Coors II*, 2 F.3d at 356.

4. *Cannon*, 998 F.2d at 869.

5. 983 F.2d 1544 (10th Cir. 1993).

6. *Id.* at 1547.

7. 2 F.3d 355 (10th Cir. 1993).

8. 316 U.S. 52 (1942). In *Valentine*, an entrepreneur brought suit to enjoin the New York City Police from enforcing a law which prohibited distribution of "commercial . . . advertising matter" in public places. *Id.* at 53 n.1.

9. *Id.* at 54. Oddly, the brief opinion (less than three pages) offered no supporting precedential authority. For further discussion of the Court's cursory handling of *Valentine*, see Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 754-58 (1993). Among other peculiarities, Kozinski and Banner note that *Valentine* ranks among the most quickly decided cases in the Court's history. *Id.* at 757 (opinion released 13 days after oral arguments and only 9 days after conference).

10. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 822 (1975) (giving newspaper right to publish advertisement for abortion referral service); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (upholding right of newspaper to publish paid political advertisement);

The Court's retreat from *Valentine* culminated in the 1976 decision, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[11] in which the Court found unconstitutional a state law that prohibited pharmacists from advertising the prices of their drugs.[12] The Court balanced the governmental and private interests but stopped short of articulating an actual test for determining when government action violated commercial speech rights.[13] In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[14] the Court resumed where it had left off in *Virginia Citizens* by articulating a four-part test for determining when a challenged commercial speech regulation is constitutional. First, the speech must "concern lawful activity and not be misleading."[15] Second, the government must be asserting a "substantial" interest.[16] If these two threshold tests are met, then the court must, third, "determine whether the regulation directly advances the governmental interest asserted," and fourth, "whether it is not more extensive than is necessary to serve that interest."[17]

In a 1986 decision, the Court created some confusion with its treatment of *Central Hudson*'s third prong. In *Posadas de Puerto Rico Associates. v. Tourism Co.*,[18] the Court found that a ban on casino gambling advertisements satisfied *Central Hudson*'s third prong because the Puerto Rico Legislature *reasonably believed* that the ban would directly advance its asserted interest.[19] To some commentators, the Court's reliance on the reasonable

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Commarano v. United States, 358 U.S. 498, 513-14 (1959) (Douglas, J., concurring) (asserting the holding in *Valentine* had not "survived reflection"); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (recognizing that motion pictures are protected by the First Amendment); Martin v. City of Struthers, 319 U.S. 141, 148-49 (1943) (invalidating city ordinance that prohibited door-to-door solicitation for the purpose of distributing handbills as applied to advertisements for a religious meeting). The Court distinguished most of these types of cases from *Valentine* based on the additional presence of other clearly protectable interests. *See, e.g.*, Jamison v. State, 318 U.S. 413, 417 (1943) (distinguishing distribution of commercial handbills from *Valentine* because challenged handbills invited the purchase of religious literature).

11. 425 U.S. 748 (1976). *Virginia Citizens* put squarely before the Court the issue of "whether speech which does no more than propose a commercial transaction . . . lacks all [constitutional] protection." *Id.* at 762 (quotation marks and citations omitted).

12. *Id.* at 770. For a discussion of the Court's retreat from *Valentine* leading up to its decision in *Virginia Citizens*, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-15, at 890-92 (2d ed. 1988). *See also* EDWIN P. ROME & WILLIAM H. ROBERTS, CORPORATE AND COMMERCIAL FREE SPEECH 41-49 (1985).

13. *Virginia Citizens*, 425 U.S. at 762-70 (1976). The Court strongly suggested, however, that commercial speech deserved less constitutional protections than other varieties. *Id.* at 770-73. For example, the Court said that false or misleading commercial speech would not be protected. *Id.* at 771. For some of the policy concerns underlying the Court's insistence on treating commercial speech differently than other types, see Ohralik v. Ohio State Bar Ass'n, 436 U.S 447, 456 (1978) (fear that giving equal protection to commercial speech would ultimately dilute the traditional protections afforded non-commercial speech).

14. 447 U.S. 557 (1980). In *Central Hudson*, a public utility company challenged a regulation that prohibited it from advertising to promote the use of electricity. *Id.* at 558-61.

15. *Id.* at 566.

16. *Id.*

17. *Id.*

18. 478 U.S. 328 (1986).

19. *Id.* at 341-42. The ban in question only affected advertising aimed at residents of Puerto Rico, not tourists. *Id.* at 330. The Court found that the Puerto Rico Legislature's asserted interest of protecting its citizens from the harmful effects of gambling was substantial, thus satisfying the second prong of the *Central Hudson* test. *Id.* at 341.

belief standard signalled the beginning of a more deferential approach toward government limitations on commercial speech.[20]

Recently, the Court indicated that *Central Hudson*'s third prong still provided significant constitutional protection to commercial speech. In *Edenfield v. Fane*,[21] the Court held that to satisfy the third prong of *Central Hudson* the government must show that a challenged restriction "will in fact alleviate [the recited harms] to a material degree."[22] The Court emphasized that challenged legislation could not be based on mere legislative "speculation."[23] The *Edenfield* decision directly contradicted *Posadas* with respect to *Central Hudson*'s third prong, but the Court made no effort to reconcile the two decisions.

B. Adolph Coors Co. v. Bentsen:[24] *The Tenth Circuit Gives Strong Protection to Commercial Speech*

In 1987, Adolph Coors Company ("Coors") made a request to the Bureau of Alcohol, Tobacco and Firearms ("BATF") seeking approval to incorporate the alcohol content of its beer into advertisements and labeling.[25] Pursuant to 27 U.S.C. § 205(e)(2) and (f)(2) (1988), the BATF refused to grant the approval.[26] Congress enacted the challenged bans to prevent malt beverage brewers from engaging in "strength wars" over the alcohol content of their beers.[27] Coors sued, claiming unconstitutional infringement of its speech in violation of the First Amendment.[28]

Coors's case against the BATF came before the Tenth Circuit Court of Appeals for the first time as *Adolph Coors Co. v. Brady*.[29] The court of appeals remanded the case to the district court because genuine issues of material fact existed as to whether the challenged regulation "directly ad-

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20. *See* Terrence Leahy, *A Game of Chance: Commercial Speech After Posadas*, A.B.A. J., Sept. 1, 1988, at 58, 60. More recently, the fourth prong of the *Central Hudson* test has come under undoubted revisionary weakening. In the 1989 case, Board of Trustees v. Fox, 492 U.S. 469 (1989), the Supreme Court held that the fourth prong of the test only requires that there be a reasonable "fit" between the legislative means and its asserted goal. *Id.* at 480. The Court rejected the idea that *Central Hudson* requires that the challenged regulation be "the least restrictive means" available. *Id.*; *see Central Hudson*, 447 U.S. at 564 ("[i]f the governmental interest could be served as well by a more limited restriction . . ., the excessive restrictions cannot survive"). One critic has argued that, taken together, the decisions in *Posadas* and *Fox* effectively lower the standard of review in commercial speech cases from intermediate scrutiny to a rational basis review. *See* Albert P. Mauro Jr., *Commercial Speech After Posadas and Fox: A Rational Basis Wolf in Intermediate Sheep's Clothing*, 66 TUL. L. REV. 1931, 1951-54 (1992).

21. 113 S. Ct. 1792 (1993).

22. *Id.* at 1800.

23. *Id.*

24. 2 F.3d 355 (10th Cir. 1993) (*Coors II*).

25. *Id.* at 356. Coors's request to make public the alcohol content of its beer stemmed from its desire to end its reputation as a brewer of weak beer. Adolph Coors Co. v. Brady, 944 F.2d 1543, 1549 (10th Cir. 1991) (*Coors I*), *appeal after remand*, 2 F.3d 355 (1993).

26. *Coors II*, 2 F.3d at 356. Section 205(e)(2) prohibits malt beverage brewers from including in their labeling "statements of, or statements likely to be considered statements of, alcohol content of malt beverages." 27 U.S.C. § 205(e)(2) (1988). Section 205(f)(2) proscribes the same statements from inclusion in advertising. 27 U.S.C. § 205(f)(2) (1988).

27. *Coors II*, 2 F.3d at 356.

28. *Id.*

29. 944 F.2d 1543 (10th Cir. 1991) (*Coors I*), *appeal after remand*, 2 F.3d 355 (1993).

vance[d] the government's asserted interest . . . and whether the complete prohibition of such advertising result[ed] in a 'reasonable fit' between the legislature's goal and the means chosen to reach it."[30] On remand, the district court found the ban constitutional with respect to advertising but unconstitutional in its prohibition against including statements of alcohol content in labeling.[31] The trial court concluded that the labeling ban failed the third and fourth prongs of *Central Hudson* in that it neither directly advanced nor reasonably fit the legitimate government goal of preventing strength wars.[32] The Government appealed.

The Government placed the Supreme Court's holding in *Posadas*[33] at the heart of its appeal. The Government argued that as long as Congress *reasonably believed* the labeling ban would help prevent strength wars, the ban satisfied *Central Hudson*'s third prong.[34] After the Government filed its appellate brief, the Supreme Court handed down its decision in *Edenfield v. Fane*.[35] This development gave the Tenth Circuit the opportunity to determine unequivocally the degree to which it would protect commercial speech.[36]

The court of appeals did not hesitate in asserting its preference for the decision in *Edenfield* over the one in *Posadas*. After noting with approval the Supreme Court's decision in *Edenfield*, the court said that the Government had the burden of showing that the labeling ban "in fact alleviate[s]" the harm of strength wars "to a material degree."[37]

The court of appeals went on to discuss why the labeling ban did not directly advance the legitimate government goal of preventing strength wars. The court noted that Coors only requested permission to publish purely factual information, as opposed to the kinds of descriptive labeling devices that would arguably lead to strength wars.[38]

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30. *Id.* at 1554. In other words, the court of appeals found that issues of fact remained with respect to the third and fourth prongs of the *Central Hudson* test.

31. *Coors II*, 2 F.3d at 357.

32. *Id.* The district court held that the ban failed to satisfy the first and second prongs of the *Central Hudson* test.

33. 478 U.S. 328 (1986).

34. *Coors II*, 2 F.3d at 358.

35. 113 S. Ct. 1792 (1993).

36. In *Coors I*, the Court of Appeals for the Tenth Circuit's language strongly suggested that it favored a more stringent reading of *Central Hudson*'s third prong than the Supreme Court had adopted in *Posadas*. Focusing on the Supreme Court's original articulation in *Central Hudson*, the court asserted that "[t]here must be an 'immediate connection' between the prohibition and the government's asserted end." *Coors I*, 944 F.2d at 1549 (quoting *Central Hudson*, 447 U.S. at 569). However, until *Edenfield*, *Posadas* was the Supreme Court's most recent interpretation of *Central Hudson*'s third prong. Under *Posadas*, the government's argument appeared sound.

37. *Coors II*, 2 F.3d at 357 (quoting *Edenfield*, 113 S. Ct. at 1800).

38. *Id.* at 358-59. Part of the Government's argument relied on its experiences in the relatively small malt liquor industry. *See id.* at 358 n.4 (malt liquors represent three percent of total market). Malt liquor is a generic description used to designate those malt beverages with the highest alcohol content. *Id.* It has been the BATF's experience that consumers of malt liquor favor it precisely because of this attribute. Accordingly, brewers have often tried illegally to advertise and label their malt liquors in a manner that is strongly suggestive of high alcohol content. *Id.* at 358 (citing use of descriptions such as "power," "dynamite," and "bull").

The court then pointed to three reasons why the Government's ban on purely factual labeling would not achieve its asserted goal. First, evidence elicited at trial suggested that strength wars did not pose a problem in states or other countries that required alcohol content labeling.[39] Second, according to undisputed evidence, American brewers had no intention of increasing the alcohol content of their beers, because increased alcohol detracts from taste and increases calories, both of which concern American consumers.[40] The court based its third reason on the fact Coors' request to publish the alcohol content of its beers was motivated by its reputation as a brewer of weak beers.[41] The court of appeals reasoned that if the BATF permitted Coors to publish this information on its labels, any incentive Coors might have to strengthen its beers would disappear.[42]

In light of these weaknesses, the court of appeals found the Government's assertion that the labeling was necessary to prevent strength wars "based on mere speculation and conjecture."[43] Continuing in the language of *Edenfield*, the court said the Government had failed "to show that the prohibition advances the Government's interest in a direct and material way."[44] The court of appeals concluded that the challenged ban did not satisfy the third prong of *Central Hudson* and therefore unconstitutionally infringed on Coors' First Amendment rights.[45]

C. *Analysis*

One of the most pervasive themes in the debate over how much protection commercial speech should receive has been the tension between government's role as a protector of its citizens and the opposing notion that consumers in a free market economy should be able to make their own decisions as to what is in their best interest.[46] The test devised by the

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39. *Id.* at 358. Section 205(e)(2) makes an exception for when alcohol content labeling is required by state law. *See* 27 U.S.C. § 205(e)(2) (1988).

40. *Coors II*, 2 F.3d at 359.

41. *Id.*

42. *Id.*

43. *Id.*; *see supra* note 27 and accompanying text.

44. *Coors II*, 2 F.3d at 359 (footnote omitted).

45. *Id.* at 359 n.6.

46. Nowhere in commercial speech commentary is this theme more evident than in the debate over restrictions on cigarette advertising. *See, e.g.*, Daniel Hays Lowenstein, *"Too Much Puff": Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205 (1988) (arguing that cigarette advertising can and should be constitutionally banned); *Remarks by Michael Gartner*, 56 U. CIN. L. REV. 1173, 1178-79 (1988) (arguing that there should be no limitations on commercial speech, including cigarette advertising). Collateral to the paternalism/consumer choice theme is the issue of whether commercial speech is the type of speech the authors of the First Amendment intended to protect. The Supreme Court tackled this issue in *Virginia Citizens* with the following reasoning:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public

Supreme Court in *Central Hudson* provided a balanced approach to this tension. Since *Central Hudson*, the Supreme Court has allowed this balance to slip in favor of government regulation.[47]

In recognizing that commercial speech is entitled to First Amendment protection, the Supreme Court did not hold that commercial speech "is wholly undifferentiable from other forms."[48] Despite its emphasis on the public's interest in being well informed, the Court asserted that commercial speech should not be entitled to the same protections as non-commercial varieties.[49] The justifications for this distinction were well-founded. Even though consumers may be seen as the end beneficiaries of commercial speech protection,[50] the demand for this protection is primarily driven by corporate profit motives. This characteristic, combined with consumer reliance on offered information, creates a serious threat of harm if the government is not able to regulate commercial speech. Part of the government's role in this respect is to keep the commercial information given to consumers from becoming disinformation. As the Supreme Court asserted in *Central Hudson*,[51]

> [t]he First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it.[52]

The paternalistic role of government, however, is tempered by the libertarian notion that citizens of a democratic society should be free to make enlightened decisions as "to their own best interests."[53] A foundational principle captured by the Court's rationale in *Virginia Citizens* is that consumers are the ultimate profiteers from commercial speech protection. It should be noted that the plaintiffs in *Virginia Citizens* were consum-

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> decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Virginia State Bd. of Pharmacy v. Virginia Citizens, 425 U.S. 748, 765 (1976)(citations omitted).

47. *See* Bd. of Trustees v. Fox, 492 U.S. 469 (1989); Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986); *see also* Mauro, *supra* note 20.

48. *Virginia Citizens*, 425 U.S. at 771 n.24.

49. *Id.* Distinguishing between speech that is commercial and other varieties is a complete issue in itself. The Court in *Virginia Citizens* said that the difference is a matter of "commonsense," *id.*, a means of distinction on which the Court continued to rely. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978). For a brief discussion of this issue, see TRIBE, *supra* note 12, at 894.

50. *See infra* notes 54-56 and accompanying text.

51. 447 U.S. 557 (1980).

52. *Id.* at 563 (citations omitted). The Supreme Court has also shown a concern for the diluent effect that might occur from treating commercial and non-commercial speech equally.

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection. . . .

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

53. *Virginia Citizens*, 425 U.S. at 770.

ers of prescription drugs, not sellers.[54] These consumers claimed "they would greatly benefit if the prohibition were lifted and advertising freely allowed."[55] The Court emphasized that a "particular consumer's interest in the free flow of commercial information" is often greater "than his interest in the day's most urgent political debate."[56] When the Supreme Court articulated the test in *Central Hudson*, it recognized that government's ability to regulate commercial speech should be carefully restricted to insure that consumers' interest in self-determination is protected.[57] The third prong of the *Central Hudson* test now acts as the primary repository of this protection.[58] According to the Court's decision in *Central Hudson*, this third prong requires direct advancement of the substantial government interest.[59]

When the Court of Appeals for the Tenth Circuit decided *Adolph Coors Co. v. Bentsen*,[60] the opposing parties presented conflicting Supreme Court precedent in support of their arguments. The government argued *Posadas de Puerto Rico Associates v. Tourism Co.*,[61] a decision that offered a weakened version of *Central Hudson*'s third prong. Coors countered by arguing that the more recent *Edenfield v. Fane*[62] decision reinvigorated the *Central Hudson* test. Unfortunately, the Supreme Court made no efforts to distinguish its decision in *Edenfield* from the irreconcilable position in *Posadas*. The Tenth Circuit had a choice between two interpretations of the law. It rightfully chose to follow the Supreme Court's lead in *Edenfield*, and consequently gave commercial speech the protection that consumers deserve.

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54. *Id.* at 753. The consumers challenged the validity of a state law forbidding licensed pharmacists from advertising the prices of prescription drugs. *Id.* at 749-50.

55. *Id.*

56. *Id.* at 763.

57. *See Central Hudson*, 447 U.S. at 561-66.

58. Since the Court's decision in Board of Trustees v. Fox, 492 U.S. 469 (1989), which held that *Central Hudson*'s fourth prong requires only a reasonable "fit" between the legislative means and the asserted goal, the third prong of the test is arguably left as the only significant check on government regulation of commercial speech. Most commentators agree that *Fox* severely weakened the fourth prong. *See* Mauro, *supra* note 20, at 1951-54; Todd J. Locher, Comment, Board of Trustees of the State University of New York v. Fox: *Cutting Back on Commercial Speech Standards*, 75 IOWA L. REV. 1335 (1990); David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 378-80 (1990); David Rownd, Comment, *Muting the Commercial Speech Doctrine:* Board of Trustees of the State University of New York v. Fox, 38 WASH. U. J. URB. & CONTEMP. L. 275 (1990).

59. *Central Hudson*, 447 U.S. at 566.

60. 2 F.3d 355 (10th Cir. 1993).

61. 478 U.S. 328 (1986).

62. 113 S. Ct. 1729 (1993).

II. THE FIGHTING WORDS DOCTRINE: *CANNON V. CITY AND COUNTY OF DENVER*[63]

A. *Background*

A fundamental and settled principle of constitutional law declares that government cannot limit speech because of its content.[64] This principle, however, is not absolute. There are circumstances in which the Supreme Court has given its approval to content-based limitations on speech.[65] In its 1940 decision *Cantwell v. Connecticut*,[66] the Supreme Court set the foundation for such an exception when it said that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under [the Constitution]."[67]

In *Chaplinsky v. New Hampshire*,[68] the Supreme Court borrowed this language from *Cantwell* to support its decision denying Constitutional protection to words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[69] The Court termed such utterances "fighting words."[70] The Court reasoned, "[i]t has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be

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63. 998 F.2d 867 (10th Cir. 1993).

64. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

65. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976) (untruthful or misleading commercial speech not protected); Roth v. United States, 354 U.S. 476, 485 (1957) (obscenity not constitutionally protected); Beauharnais v. Illinois, 343 U.S. 250, 263 (1952) (upholding state stature that prohibited libel); Feiner v. New York, 340 U.S. 315, 321 (1951) (speech that is an "incitement to riot" not constitutionally protected).

66. 310 U.S. 296 (1940).

67. *Id.* at 309-10. In *Cantwell*, a man was convicted for a breach of the peace for his solicitation of people on a public street to listen to a phonograph that contained strong verbal attacks on Catholicism, the religion of the listeners. *Id.* at 308-09. The phonograph provoked the listeners to near-violent reactions. *Id.* In reversing the defendant's conviction, the Court found that the defendant's conduct involved:

> no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.

Id. at 310.

68. 315 U.S. 568 (1942).

69. *Id.* at 572 (footnote omitted). In *Chaplinsky*, the Court upheld the conviction of a man who called a police officer "a God damned racketeer" and a "damned Fascist." *Id.* at 569.

The quoted statement of the law has been interpreted as articulating a two-part disjunctive test. *See* TRIBE, *supra* note 12, § 12-8, at 837-39. The Court based its decision in *Chaplinsky* on the tendency of the arrested speaker's words to "cause a breach of the peace." *Chaplinsky*, 315 U.S. at 574. The part of the test that denies protection to those words "which by their very utterance inflict injury" has never been the basis of a Supreme Court decision to validate speech suppression. Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for its Interment*, 106 HARV. L. REV. 1129, 1137 (1993).

70. *Chaplinsky*, 315 U.S. at 572.

derived from them is clearly outweighed by the social interest in order and morality."[71]

The Court's decision in *Chaplinsky* established what is known as the "fighting words doctrine."[72] Prior to this survey period, the United States Court of Appeals for the Tenth Circuit had not taken an opportunity to apply this exception to content-based limitations on speech.[73]

B. Cannon v. City and County of Denver:[74] *The Tenth Circuit Definitively Applies the Fighting Words Doctrine*

The issues in *Cannon* arose when police arrested two abortion protestors for carrying signs that read "The Killing Place" on the sidewalk in front of an abortion clinic.[75] The man and woman arrested sued the two arresting officers under § 1983 claiming that the arrests violated their First Amendment right to free speech.[76] The officers based their defense on qualified immunity, claiming that the plaintiffs' First Amendment rights were not clearly established at the time of the arrests.[77] They argued that signs reading "The Killing Place" constituted fighting words and were, therefore, not entitled to First Amendment protection.[78]

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71. *Id.* (citing ZECHARIA CHAFEE., FREE SPEECH IN THE UNITED STATES 150 (5th prtg. 1941)).

72. *See* Beth C. Boswell-Odum, Note, *The Fighting Words Doctrine and Racial Speech on Campus*, 33 S. TEX. L. REV. 261 (1992).

73. The Tenth Circuit has mentioned fighting words in three cases prior to the survey period, but in all three the court discussed the doctrine briefly and only in passing. *See* United States v. Rising, 867 F.2d 1255, 1258 (1989); Jones v. Wilkinson, 800 F.2d 989, 994 (1986), *aff'd*, 480 U.S. 926 (1987); Fisher v. Walker, 464 F.2d 1147, 1160 (1972).

74. 998 F.2d 867 (10th Cir. 1993).

75. *Id.* at 869. The officers charged the plaintiffs with disturbing the peace, and the city later dismissed the charges. *Id.* The day of the arrests was only one of many in an ongoing protest against the abortion services of the Rocky Mountain Planned Parenthood clinic at the corner of East 20th Avenue and Vine Street in Denver. *Id.*; Ann Carnahan, *Protestors, Denver Settle*, ROCKY MTN. NEWS, Sept. 29, 1993, at 4A. Police had arrested one of the plaintiffs several months before for assaulting a patient. *Cannon*, 998 F.2d at 869. Officer Ryan-Fairchild, one of the defendants, was an off-duty police officer whom the clinic had hired as a private security guard. *Id.* On the day of the arrests, Officer Ryan-Fairchild had to restrain a man who became incensed by the plaintiffs' signs. *Id.* The other officer, Officer Baca, was on duty and became involved in the arrest when he stopped to monitor the situation. *Id.* It is not clear from the court's presentation of the facts if the signs in question had always been part of the protests, but their content clearly provoked the arrests. *Id.* at 871 ("the activity which the police found objectionable was not the picketing itself but the specific content of the protestors' signs").

76. *Cannon*, 998 F.2d at 869. Section 1983 provides a federal tort remedy when persons acting under color of state law deprive a plaintiff of a federally protected right. 42 U.S.C. § 1983 (1988); Parrat v. Taylor, 451 U.S. 527, 535 (1981).

77. *Cannon*, 998 F.2d at 871. A government official who is performing a discretionary duty is exempt from liability for civil damages under § 1983 so long as her conduct "does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (emphasis added).

78. *Cannon*, 998 F.2d at 872. The police officers arrested the plaintiffs with the understanding that Denver County Judge Soja had ruled that words such as "killer" would be considered "fighting words." *Id.* at 869. Officer Ryan-Fairchild heard of this supposed ruling from another officer, Officer Yates, who had spoken with Judge Soja about abortion protestors and their legal rights. *Id.* at 869, 875 n.8. In fact, Judge Soja made no such ruling. *Id.* at 875 n.8. In the conversation on which Officer Ryan-Fairchild relied, Judge Soja was not speaking in his official judicial capacity but merely giving some informal advice to Officer

The federal district court granted the defendants qualified immunity.[79] The plaintiffs' appealed the issue of whether they had a clearly established constitutional right to carry signs reading "The Killing Place" at the time of their arrests.[80] A finding that the plaintiffs did have a clearly established right would remove the defendants' qualified immunity.[81] Resolving this issue required the court of appeals to determine whether the plaintiffs' signs fell within the definition of fighting words. If the defendant officers could make "a showing sufficient to establish the fighting words defense,"[82] then the plaintiffs' rights would be judged as not clearly established and the grant of qualified immunity would be upheld.

The court of appeals first turned its attention to the Supreme Court cases in an effort to synthesize the prior holdings into its own cogent statement of the law. The court looked for guidance from its *Chaplinsky v. New Hampshire*[83] decision and three subsequent Supreme Court decisions.[84] From *Chaplinsky* the court of appeals found the idea that fighting words "are no essential part of any exposition of ideas."[85] Looking at *Cohen*, the court emphasized that the alleged fighting words must be "directed to the person of the hearer."[86] From *Terminiello* and *Feiner* the court of appeals borrowed the notion that it is not enough for the suspect speech to arouse "some people to anger."[87] The speaker must exceed the "bounds of argument or persuasion" and undertake an "incitement."[88] The Tenth Circuit concluded that "[f]ighting words are thus epithets (1) directed at the person of the hearer, (2) inherently likely to cause a violent reaction, and (3) playing no role in the expression of ideas."[89]

Yates, who then relayed the conversation to Officer Ryan-Fairchild. *Id.* at 869, 875 n.8. Judge Soja told Officer Yates that there may be times when protestors' expressions could rise to the level of 'fighting words,' but his informal comments fell short of a ruling. *See id.* at 875 n.8.

Officers Ryan-Fairchild and Baca raised a second defense based on their good faith reliance on "a legal ruling or advice." *Id.* at 871; *see* V-1 Oil Co. v. Wyoming Dept. of Envt'l Quality, 902 F.2d 1482, 1488 (10th Cir. 1990) (good faith reliance on legal advice can create an "extraordinary circumstance" under which a defendant "should not be imputed with knowledge of an admittedly clearly established right") (quotation marks and citations omitted), *cert. denied*, 498 U.S. 920 (1990). This aspect of *Cannon* did not involve a constitutional issue and is not addressed by this survey.

79. *Cannon*, 998 F.2d at 870. The district court granted summary judgment on the federal claims. It then used its discretionary power to dismiss without prejudice the plaintiffs's collateral state tort claims. *Id.*

80. *See id.* at 870.

81. *See id.* at 870-71; *see also supra* note 77 (statement of law on qualified immunity).

82. *Cannon*, 998 F.2d at 872.

83. 315 U.S. 568 (1942).

84. *See* Cohen v. California, 403 U.S. 15 (1971) (reversing the conviction of a man arrested for wearing a jacket that read "Fuck the Draft" in a county courthouse); Feiner v. New York, 340 U.S. 315 (1951) (upholding conviction of man who encouraged violent uprising in support of civil rights); Terminiello v. Chicago, 337 U.S. 1, 5 (1949) (reversing conviction of man under city ordinance which allowed conviction for speech which "stirred people to anger, invited public dispute, or brought about a condition of unrest").

85. *Cannon*, 998 F.2d at 873 (quoting *Chaplinsky*, 315 U.S. at 572).

86. *Id.* (quoting *Cohen*, 403 U.S. at 20).

87. *Id.*

88. *Id.*

89. *Id.* (footnote omitted)

The court of appeals applied each leg of this tri-partite test to the facts in *Cannon* and accordingly found that the plaintiffs' signs did not rise to the level of fighting words. First, the court found that the plaintiffs did not focus their signs on a particular person, but instead aimed their protests at the activities of everyone involved in the abortion process.[90] Second, the court declared that although the signs tended to be offensive to people entering the clinic, they were not "inherently likely to cause an immediate breach of the peace."[91] Finally, the court found the signs served a role in the dialogue of ideas, because they asserted one of the anti-abortion movement's fundamental principles—that abortion is murder.[92]

Based on this analysis, the court of appeals found the plaintiffs had a clearly established constitutional right to employ signs that read "The Killing Place" in their lawful picketing of the abortion clinic.[93] The court reversed summary judgment in favor of the defendants and remanded the case back to the district court.[94]

C. *Analysis*

Cannon v. City and County of Denver[95] presented the Tenth Circuit Court of Appeals with its first attempt to apply the fighting words doctrine.[96] Alleged fighting words most often arise in extremely controversial situations, and the facts in *Cannon* held true to this stereotype. The abortion debate has become one of the most divisive issues in American society.[97] Clinic protests serve as the front lines of this debate, and these protests often become the sources of the most acrimonious exchanges between abortion rights opponents and advocates.[98]

In *Cannon*, one of the court's unarticulated tasks required it to take a disinterested approach to the political controversy underlying the issues[99] before it. The court rose to this task[100] and articulated a narrowly tailored test in order to avoid placing unnecessary restrictions on the important role of controversial speech in American society.

According to the Tenth Circuit, fighting words are "epithets (1) directed at the person of the hearer, (2) inherently likely to cause a violent

90. *See id.*
91. *Id.*
92. *See id.*
93. *See id.* at 874.
94. *Id.* at 879.
95. 998 F.2d 867 (10th Cir. 1993).
96. *See supra* note 73 and accompanying text.
97. *See generally* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990) (discussing two centuries of the abortion debate).
98. *See generally Clinic Blockades: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm'n on the Judiciary*, 102d Cong., 2d Sess. (1992) (taking testimony on who prevails when competing constitutional rights are asserted in the abortion debate).
99. The Court focused on the issues of fighting words, immunity, and the standards for summary judgment. *Cannon*, 998 F.2d at 867.
100. Throughout its opinion, the court avoided any comment on the propriety of the plaintiffs' conduct. Neither did it indulge in any language indicative of its stance on the abortion issue.

reaction, and (3) playing no role in the expression of ideas."[101] Taken individually, none of these three elements added anything new to the fighting words doctrine.[102] Never before, however, had the Supreme Court combined all three requirements into a precise conjunctive test.[103]

The result of the Tenth Circuit's holding is that only a very narrow type of public expression is left unprotected by the First Amendment. While each prong of the test plays a part in protecting speech, the requirement that the challenged speech play "no role in the expression of ideas" is clearly the farthest reaching. The potential of words, even obscene and offensive words, to contribute toward the expression of ideas is immense. Such contributions can be achieved even when a word's literal meaning adds little to the exposition of ideas. Aside from a detached definitional meaning, words can also convey an emotional quality that "may often be the more important element of the overall message."[104]

A twist on the facts in *Cannon* shows the value of emotion-laden words. For example, suppose the defendants arrested the plaintiffs, not for carrying signs, but for telling a prospective clinic client, "You're a damned murderer!" In this instance, the plaintiffs' conduct is undoubtedly "directed at the person of the hearer,"[105] as set forth in the *Cannon* fighting words test. Assume, arguendo, that the statement is inherently violence provoking, thus satisfying the second prong of the court of appeals' test. The question then becomes whether the epithet still plays a role in the expression of ideas. The statement undeniably makes a passionate and "forceful presentation of the anti-abortion viewpoint."[106] The words are raw and crude, but they convey an emotive element that would be difficult to achieve with niceties, an emotive element to which speech is entitled.

Controversial speech, while it may be provocative, serves important functions in our society. As the Supreme Court noted in *Terminiello v. Chicago*, speech often "invite[s] dispute"[107] and "stirs people to anger."[108] This is especially true if the speech relates to a politically controversial issue, but these results should not be thwarted. By giving broad protection to controversial speech, despite creating strong reactions in listeners,

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101. *Cannon*, 998 F.2d at 873.

102. *See supra* notes 83-89 and accompanying text.

103. Although the Supreme Court's articulation of the fighting words doctrine has never been as precise as that used by the Tenth Circuit in *Cannon*, the Court has consistently used a very narrow definition of fighting words. Boswell-Odum, *supra* note 72, at 270-75. In the half century since the Court decided Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), it has not upheld another conviction under the fighting words doctrine. Boswell-Odum, *supra* note 72, at 274. In fact, some commentators suggest the fighting words doctrine exists in the present only as a historical remnant that is no longer employed except perhaps in a constitutionally impermissive manner. *See* Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH U. L.Q. 531, 580 (1980); Thomas F. Shea, *"Don't Bother to Smile When You Call Me That"—Fighting Words and the First Amendment*, 63 KY. L.J. 1, 1-2 (1975).

104. Cohen v. California, 403 U.S. 15, 26 (1971).

105. *Cannon*, 998 F.2d at 873.

106. *Id.*

107. *Terminiello*, 337 U.S. at 4.

108. *Id.*

courts ensure that political dialogue is a true exchange of views. A democratic form of government requires leaving the public forum open to all ideas, no matter how controversial or how offensive.[109] As the Tenth Circuit implicitly recognized in *Cannon*, the continued health of the American democratic system is inextricably bound to the ability of American citizens to vent their frustrations, their dislikes, and their disagreements. The court of appeal's narrow interpretation of the fighting words doctrine helps protect speech that often makes the most poignant contribution to the highly-valued exchange of ideas.

III. THE RIGHT OF FAMILIAL ASSOCIATION: *GRIFFIN V. STRONG*[110]

A. *Background*

The right of familial association is relatively new to constitutional jurisprudence.[111] This new constitutional right has several distinguishing hallmarks. First, the right is virtually always asserted in the context of a § 1983[112] action.[113] Second, and most importantly, a cause of action is created in a person who is not the primary target of state conduct.[114] Typically, a plaintiff asserts that a state actor's conduct toward her family member impermissibly interfered with her relationship with that family member.[115] The right of familial association is similar to the common law tort claim of loss of consortium, because the plaintiff is related to the primary victim.[116]

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109. Alexander Meiklejohn, one of the founders of this position, makes the point more eloquently than I:

> When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. Just so far, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.

ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 27 (1979).

110. 983 F.2d 1544 (10th Cir. 1993).

111. *See* Wrigley v. Greanias, 842 F.2d 955, 957 n.3 (7th Cir.) (noting that most familial association cases were decided since 1980), *cert. denied*, 488 U.S. 850 (1988).

112. 42 U.S.C. § 1983 (1988).

113. *See* Michael S. Bogren, *The Constitutionalization of Consortium Claims*, 68 U. DET. L. REV. 479, 479 (1991). There do not appear to be any published decisions involving the right of familial association that arose outside of the § 1983 context.

114. *Id.*

115. *See, e.g.*, Manarite v. City of Springfield, 957 F.2d 953 (1st Cir.), (upholding grant of summary judgment against daughter who sued police chief for failing to prevent the suicide of her father while he was in protective custody), *cert. denied*, 113 S. Ct. 113 (1992). Different types of fact patterns have given rise to familial association claims. *See, e.g.*, Hameetman v. City of Chicago, 776 F.2d 636, 642-43 (7th Cir. 1985) (dismissing fireman's claim that city ordinance requiring him to live within city limits interfered with his filial relationship with his hyperkinetic son whose well-being required that he stay in a familiar environment).

116. *See* Bogren, *supra* note 112, at 479.

The circuits are split over the recognition of the right of familial association. The Seventh, Ninth, and Tenth Circuits are the leading proponents of the right,[117] while the First Circuit is its most steadfast opponent.[118]

In 1984, the United States Supreme Court upheld the application of a state law requiring the United States Jaycees to accept women as regular members.[119] In distinguishing the rights asserted by the Jaycees from those relationships protected under the Constitution, the Court emphasized that "[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."[120]

A year later, in *Trujillo v. Board of County Commissioners*,[121] the Tenth Circuit used the Court's reasoning in *Roberts*[122] as a springboard for its decision to recognize the constitutionally protected right of "familial association."[123]

In *Trujillo*, a woman and her daughter sought relief under § 1983,[124] claiming that the wrongful death of their son and brother, Richard Trujillo, while in custody at the Santa Fe County jail, deprived them of their constitutional right of familial association.[125] The plaintiffs claimed that this right existed under the First and Fourteenth Amendments.[126] After holding that the plaintiffs had standing to assert this claim,[127] the court of appeals declared that the Trujillos "had constitutionally protected interests in their relationship with their son and brother."[128]

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117. *See, e.g.*, Trujillo v. Bd. of County Comm'rs, 768 F.2d 1186, 1188-89 (10th Cir. 1985); Kelson v. City of Springfield, 767 F.2d 651, 653-55 (9th Cir. 1985); Bell v. City of Milwaukee, 746 F.2d 1205, 1243-50 (7th Cir. 1984).

118. *See, e.g.*, *Manarite*, 957 F.2d at 960; Pittsley v. Warish, 927 F.2d 3, 7-9 (1st Cir.), *cert. denied*, 112 S. Ct. 226 (1991); Valdivieso Ortiz v. Burgos, 807 F.2d 6, 7-10 (1st Cir. 1986).

119. *See* Roberts v. United States Jaycees, 468 U.S. 609 (1984). In *Roberts*, the Jaycees argued that the application of the act denied its members the freedom of association protected by the First and Fourteenth Amendments. *See id.* at 617-18.

120. *Id.* at 619-20. The Jaycees raised two separate constitutional claims: freedom of association as a personal liberty under the Fourteenth Amendment and freedom to associate, as a guarantee of the rights to speech, assembly, and religion, under the First Amendment. *See id.* at 617-18. The Court analyzed these claims individually. *Id.* at 618-29.

121. 768 F.2d 1186 (10th Cir. 1985).

122. 468 U.S. 609 (1984).

123. *Trujillo*, 768 F.2d at 1188. The language and reasoning that the court of appeals borrowed in *Trujillo* comes from the section in *Roberts* in which the Supreme Court analyzed the Fourteenth Amendment claim, freedom of association, as a personal liberty interest. *See id.* at n.4.

124. 42 U.S.C. § 1983 (1988).

125. *Trujillo*, 768 F.2d at 1187.

126. *Id.* The Trujillos' complaint apparently relied upon the First Amendment for its substantive foundation and the Fourteenth Amendment to apply this claim to the state action. *Id.* at 1188 n.4. Importantly, the court of appeals liberally read the complaint "as an assertion of the [Fourteenth Amendment] liberty interest discussed in Roberts v. United States Jaycees." *Id.*

127. *Id.* at 1187-88.

128. *Id.* at 1189. The court of appeals cited to a number of decisions in support of this declaration. *See id.* at 1188-89. One of the sub-issues presented by these cases was whether a liberty interest in familial association should be extended beyond the parental relationship to

The court of appeals then turned to the issue of what conduct would constitute a deprivation of this right. Having recognized a nascent right, the court found itself without a test for when this right had been violated. The court opted to look to other well established constitutional protections for some guidance.[129] It found a satisfactory analytical analogy in the freedom of expressive association protected by the First Amendment.[130] Based on this analogy, the court of appeals concluded that for a plaintiff to establish a deprivation of the right of familial association, a showing must be made that the defendant had the "intent to interfere with a particular relationship."[131]

Because the plaintiffs in *Trujillo* failed to allege intent in the complaint, the court affirmed the district court's decision to dismiss the claims.[132] The court refined its holding by stating that any intent which the defendants might have had with respect to the harms done to the victim could not be transferred to establish the intent to deprive the plaintiffs of their constitutional rights.[133] In the court's words, "[t]he alleged conduct by the State, however improper or unconstitutional with respect to the son, will work an unconstitutional deprivation of the freedom of intimate association only if the conduct was directed at that right."[134]

Until the survey period, the Tenth Circuit Court of Appeals followed *Trujillo* faithfully. It continued to insist that the defendant's conduct be intentionally directed at the plaintiff.[135] In the process, the court of appeals failed to address an important issue left open by its decision in *Trujillo*, where it categorized the plaintiffs' claim as a Fourteenth Amendment liberty interest,[136] while formulating a test borrowed from First Amendment jurisprudence.[137] This dichotomous treatment created an unanswered question: what is the constitutional source for the right of familial association?[138] The importance of this question is not merely academic.

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include sibling relationships. *Id.* The Seventh Circuit, although it was among the first circuits to recognize a right of familial association, refuses to extend this right to siblings. *See* Bell v. City of Milwaukee, 746 F.2d 1205, 1245-48 (7th Cir. 1984). The Tenth Circuit declined to follow this lead. Refusing to let other intimate relationships go unprotected, the court of appeals in *Trujillo* recognized a right of familial association in Richard Trujillo's sister. *Trujillo*, 786 F.2d at 1189. The court even suggested that the types of intimate relationships falling under this protection would not be limited to familial ones. *Id.* at 1189 n.5. The Eleventh Circuit has gone so far as to recognize a protected liberty interest in dating. *See* Wilson v. Taylor, 733 F.2d 1539, 1542-44 (11th Cir. 1984).

129. *See Trujillo*, 768 F.2d at 1189-90.

130. *Id.* at 1189 (stating "that freedom of expressive association provides the most appropriate analogy for freedom of intimate association").

131. *Id.* at 1190.

132. *Id.*

133. *Id.*

134. *Id.*

135. *See, e.g.*, Archuleta v. McShan, 897 F.2d 495, 499 (10th Cir. 1990).

136. *Trujillo*, 768 F.2d at 1188 n.4.

137. *See supra* notes 129-31 and accompanying text.

138. *See* Griffin v. Strong, 983 F.2d 1544, 1546 (10th Cir. 1993). The Tenth Circuit's failure to resolve this issue created confusion and inconsistency among courts who looked to *Trujillo* for guidance. For example, the Fourth Circuit has cited *Trujillo* for the proposition that the right of familial association arises out of the First Amendment in Rucker v. Harford County, 946 F.2d 278, 282 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1175 (1992), while the

The typical liberty interest test under the Fourteenth Amendment is markedly different than the intent-based test applied by the Tenth Circuit in *Trujillo*. According to the United States Supreme Court, determining whether an individual's Fourteenth Amendment liberty interests have been violated requires balancing the asserted liberty interest against the governmental interests.[139]

B. *Griffin v. Strong*[140]

In 1986, Salt Lake County Deputy Sheriff James Strong arrested Steven Griffin for alleged sexual abuse of a child.[141] Mr. Griffin's wife, Dorothy, filed a § 1983 complaint alleging that Officer Strong violated her constitutional rights by the manner in which he conducted the investigation and arrest of her husband.[142] The jury returned special verdicts in favor of Mrs. Griffin, finding that Officer Strong had violated her rights of familial association.[143] Officer Strong appealed. He argued that the jury's finding was not sufficiently supported by the evidence.[144] His appeal raised important unresolved questions about the right of familial association, one concerning its constitutional foundations and a second concerning the proper test for determining when the right of familial association has been violated.

The court began its analysis by exploring the jurisprudential history of the right of familial association. Judge Ebel, writing for the court, quickly returned to the issue left open by *Trujillo* and refused to continue the court's reliance on the analogy it drew between the First Amendment right of expressive association and the right of familial association. Instead, the court retreated from its reasoning in *Trujillo* and found that "the

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Seventh Circuit contends that *Trujillo* based this same right on the Fourteenth Amendment. *See* Mayo v. Lane, 867 F.2d 374, 375 (7th Cir. 1989). The Tenth Circuit itself has not been immune to this confusion. In Apodaca v. Rio Arriba County Sheriff's Dept., 905 F.2d 1445 (10th Cir. 1990), the court of appeals perfunctorily suggested that *Trujillo* established a First Amendment right. *Id.* at 1448.

139. Youngberg v. Romeo, 457 U.S. 307, 320-21 (1982).

140. 983 F.2d 1544 (10th Cir. 1993).

141. Griffin v. Strong, 739 F. Supp. 1496, 1497-98 (D. Utah 1990), *rev.'d*, 983 F.2d 1540 (10th Cir. 1993). The jury in the criminal trial convicted Mr. Griffin of two counts of sexual abuse of a child, but two years later the Utah Court of Appeals reversed the conviction and remanded the case for a new trial. *Id.* at 1498 (citing State v. Griffin, 754 P.2d 965 (Utah Ct. App. 1988)). The Utah Court of Appeals found that of two confessions Mr. Griffin gave to Officer Strong, one was given under coercion and the second was given without a valid waiver of his *Miranda* rights. *Id.* (citing *Griffin*, 754 P.2d at 971).

142. *Id.* For the alleged conduct on which Dorothy Griffin based her claim, see *infra* notes 155-59 and accompanying text. Mrs. Griffin also sued a social worker, Dennis Gale, but because the jury found Gale not liable for any of the plaintiff's claims, the Court of Appeals for the Tenth Circuit concerned itself only with the claim against Strong. *See Griffin*, 983 F.2d at 1545 (10th Cir. 1993).

143. *Griffin*, 983 F.2d at 1545. Steven Griffin and the Griffin's daughter, Angie, also brought § 1983 claims. The jury found no violation of Steven's or Angie's constitutional rights, so the only issues before the court on appeal concerned the violation of Dorothy Griffin's rights. *See id.*

144. *Id.* at 1546.

familial right of association is properly based on the 'concept of liberty in the Fourteenth Amendment.' "[145]

The court of appeals characterized the right of familial association as a "subset" of intimate association.[146] It then asserted that to determine whether a violation of this right has occurred requires balancing the "liberty interests against the relevant state interests."[147] The court articulated the necessary weighing in terms of the facts before it.

> [W]e must weigh two factors: the state's interests in investigating reports of child abuse, which is the interest served by Strong's conduct in investigating the claims against Steven Griffin, and Dorothy Griffin's interest in her familial right of association. Initially, we examine these factors objectively, that is, outside of the facts or subjective positions of the parties. Nonetheless . . . [u]ltimately, we must examine the parties' interests in light of the facts of this particular case.[148]

Thus, the court purported to set up a two-part balancing test that evaluated the asserted interests first objectively and then subjectively.

The court of appeals looked first to the state's overarching interest in investigating potential child abuses. Based on the typically covert nature of child abuse and society's well-founded disdain for such crimes, the court placed great importance on the state's "traditional and 'transcendent' investigatory interests" in protecting the welfare of children.[149] The court recognized that "[t]he right to associate with one's family members is a very substantial right."[150] After establishing the individual importance of these rights, however, the court of appeals made no effort to compare their importance relative to each other.[151]

Next, the court of appeals turned to the subjective portion of its test and focused on "the facts surrounding the parties' interests."[152] The court broke this analysis into two parts. First, it looked to *Trujillo* and asserted that for a defendant's behavior to become unconstitutional, it must be directed "at the intimate relationship with knowledge that the statements or conduct will adversely affect that relationship."[153] Second, the court indicated that it must "also examine the evidence to determine [1]

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145. *Id.* at 1547 (quoting Mayo v. Lane, 867 F.2d 374, 375 (7th Cir. 1989)).

146. *Id.* (citing Shondell v. McDermott, 775 F.2d 879, 865-66 (7th Cir. 1985)).

147. *Id.* (quoting Youngberg v. Romero, 457 U.S. 307, 321 (1982)) (internal quotation marks omitted). The court called this balancing "classic fourteenth amendment liberty analysis." *Id.*

148. *Id.*

149. *Id.* at 1548 (citing Maryland v. Craig, 497 U.S. 836, 855 (1990)); *see also* New York v. Ferber, 458 U.S. 747, 757 (1982); State v. Jordon, 665 P.2d 1280, 1285 (Utah 1983), *appeal dismissed*, 464 U.S. 910 (1983)).

150. *Griffin*, 983 F.2d at 1548 (citing Mayo v. Lane, 867 F.2d 374, 375 (7th Cir. 1989)).

151. *See id. But see id.* at 1549 (court concludes the infringement of these important rights is slight).

152. *Id.* at 1548.

153. *Id.* (citing *Trujillo*, 768 F.2d at 1190). The court does not indicate why it felt compelled to retain the *Trujillo* First Amendment intent test after spending the first part of the opinion explaining why familial association claims properly derive from the Fourteenth Amendments' substantive due process protections. *See id.* at 1546-47. For further discussion of the issue, see *infra* notes 178-182 and accompanying text.

the severity of the alleged infringement, [2] the need for the defendant's conduct, and [3] any possible alternatives."[154]

The court began by presenting the evidence supporting Dorothy Griffin's allegation that Strong directed his conduct at the spousal relationship with knowledge that his conduct would adversely affect the relationship. First, the defendant lied when he told Dorothy Griffin that her husband had already confessed to child abuse.[155] Second, the defendant doubted Mrs. Griffin's morals when she told him that she did not believe her husband committed child abuse.[156] Third, during an interview in which Steven Griffin finally confessed, the defendant told him that he had not heard from his wife "because you won't confess to what you've done and get the help that you need."[157] Fourth, the defendant encouraged Mrs. Griffin to move to another state and start her life over.[158] Fifth, Mrs. Griffin testified that the defendant used her against her husband when she tried to explain to Steven "she was told to leave him not help him."[159]

The court of appeals next turned to the second half of its subjective test and examined the "severity of the alleged infringement."[160] Noting that both Steven and Dorothy Griffin consensually talked to the defendant, the court said that "consensual interviews are less likely to infringe on familial interviews because the parties can always decline to talk."[161] The court next asserted that Dorothy Griffin presented no evidence indicating that the defendant acted with "physical coercion or conduct that shocks the conscience."[162] The court conceded that Strong's lie to Dorothy Griffin about her husband confessing to child abuse increased the severity of the alleged infringement.[163] Although the court of appeals asserted that additionally it would examine "the need for the defendant's conduct, and any possible alternatives,"[164] these examinations did not make it into the court's opinion.[165]

After this analysis of the facts, the court of appeals concluded, amidst scanty and elusive reasoning, that no reasonable juror could appropriately balance the competing interests and determine that the defendant violated the plaintiff's rights.[166] In support of this conclusion, the court sim-

154. *Griffin*, 983 F.2d at 1548.
155. *Id.* at 1549.
156. *Id.* at 1548.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 1548-49 (citing Pittsley v. Warish, 927 F.2d 3, 6 (1st Cir.), *cert. denied*, 112 S. Ct. 226 (1991)). In its prior familial association decisions, the Tenth Circuit had never indicated that a showing of physical coercion or conduct that shocks the conscience is necessary to a successful claim. *See* Apodaca v. Rio Arriba County Sheriff's Dept., 905 F.2d 1445 (10th Cir. 1990); Bryson v. City of Edmond, 905 F.2d 1386 (10th Cir. 1990); Archuleta v. McShan, 897 F.2d 495 (10th Cir. 1990); Trujillo v. Board of County Comm'rs, 768 F.2d 1186 (10th Cir. 1985).
163. *Griffin*, 983 F.2d at 1549 n.5.
164. *Id.* at 1548.
165. *See id.* at 1548-49.
166. *Id.* at 1549.

ply stated, "on the balance, the infringement of familial rights of association in this case is slight."[167] Based on these findings, the court of appeals remanded the case to the district court with a direction to enter judgment in favor of the defendant, Officer Strong.[168]

C. *Analysis*

While *Griffin v. Strong*[169] might have ended the confusion concerning the right of familial association's constitutional source,[170] the resulting modification of the law left familial association jurisprudence more perplexing than ever.[171] The court of appeals' definitive placement of familial association among the Fourteenth Amendment's substantive due process protections led it to alter its legal analysis.[172] According to the Supreme Court, determining if someone's Fourteenth Amendment liberty rights have been violated requires balancing the claimed "liberty interests against the relevant state interests."[173] After noting that courts have applied this balancing test in intimate association cases,[174] the *Griffin* court

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167. *Id.*

168. *Id.*

169. 983 F.2d 1544 (10th Cir. 1993).

170. *See supra* note 144 and accompanying text (court explicitly placed right of familial association under the Fourteenth Amendment's substantive due process protection).

171. Although Trujillo v. Board of County Commissioners, 768 F.2d 1186 (10th Cir. 1985), created confusion with respect to the constitutional source of the right of familial association, it is worth noting that the court of appeals' statement of the law lent itself to easy application. In the three familial association cases heard by the Tenth Circuit since *Trujillo* and prior to *Griffin*, the court applied the law with appreciable consistency. *See* Apodaca v. Rio Arriba County Sheriff's Dept., 905 F.2d 1445, 1147 (10th Cir. 1990) (refusing to reverse dismissal of plaintiff's claim because no evidence of defendant's intent to interfere with the plaintiff's protected relationship); Bryson v. City of Edmond, 905 F.2d 1386, 1393-94 (10th Cir. 1990) (upholding judgment for defendant because intent cannot be transferred and no allegation of intent directed at family relationship); Archuleta v. McShan, 897 F.2d 495, 498-99 (10th Cir. 1990) (emphasizing necessity of intent and that plaintiff be "deliberate object" of conduct). Nor did the Tenth Circuit's district courts have much trouble applying the court's *Trujillo* holding. *See* Sollars v. City of Albuquerque, 794 F. Supp. 360, 362 (D.N.M. 1992) (granting motion to dismiss because plaintiff did not allege intent); Beck v. Calvillo, 671 F. Supp. 1555, 1557-58 (D. Kan. 1987) (granting summary judgment because no allegation of intent); White v. Talboys, 635 F. Supp. 505, 507 (D. Colo. 1986) (motion to dismiss denied because plaintiff alleged intent to interfere with particular family relationship); Trejo v. Wattles, 636 F. Supp. 992, 997 (D. Colo. 1985) (denying motion to dismiss because plaintiff alleged intent directed at relationship). *But see* Franz v. Lytle, 791 F. Supp. 827, 832-33 (D. Kan. 1992) (refusing to recognize right of family integrity based on *Trujillo*), *aff'd*, 997 F.2d 784 (10th Cir. 1993).

However, the Tenth Circuit's decision to place definitively the right of familial association among the Fourteenth Amendment's liberty interest was a good one. The First Amendment's protection of associational rights is ancillary to its protection of speech, religion, and assembly. Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984). These rights do not embrace the relationship shared by family members nearly as well as the right of intimate association that has been recognized under the Fourteenth Amendment's substantive due process protections. *See* Bell v. City of Milwaukee, 746 F.2d 1205, 1243-45 (7th Cir. 1984). The court of appeals' decision to position the right of familial association as a subset of the right of intimate association is also consistent with the Seventh Circuit's approach. *See Griffin*, 983 F.2d at 1547.

172. *Griffin*, 983 F.2d at 1547.

173. *Id.* (quoting Youngberg v. Romero, 457 U.S. 307, 321 (1982)) (internal quotation marks omitted).

174. *See id.* at 1547.

articulated its two part balancing test.[175] The first part of the test, which objectively examines the interests represented by each party, poses little difficulty.[176] The problems arise primarily out of the second half of the test, that part which requires courts to examine subjectively "the facts surrounding the parties' interests."[177]

The court of appeals broke this second prong into two stages of analysis. First, it returned to the familiar *Trujillo* test and asserted that "to rise to the level of a constitutional claim, the defendant must *direct* his or her statements or conduct at the intimate relationship with knowledge that the statements or conduct will adversely affect the relationship."[178] Second, the court claimed it would look at three things: the severity of the alleged infringement, the necessity of the defendant's conduct, and any alternatives to the defendant's conduct. The examinations into each of these two prongs presents problems.

After categorically placing familial association among Fourteenth Amendment liberty interests, the court asserted that appropriately it would apply a balancing test.[179] However, the court called upon the *Trujillo* test,[180] an inquiry into the defendant's state of mind that admits to no semblance of balancing. The court listed five allegations supported by the record that taken together easily satisfied *Trujillo*.[181] Oddly, the court offered no explanation as to how the *Trujillo* standard fit into balancing "the facts surrounding the parties interests."[182] In light of the fact the court decided in favor of Officer Strong, it is undeniable that it relied on some counterbalance to *Trujillo*'s satisfaction—intending to balance the *Trujillo* inquiry against its subsequent examination into the severity of the alleged infringement.[183]

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175. *See supra* notes 153-54 and accompanying text.

176. It can be argued the aspect of the test that asks the court to evaluate objectively the interest of the plaintiff is redundant. By recognizing that familial association is a protected liberty interest, the Tenth Circuit is already concluding that in the abstract relationships between family members are important. The court's reason for including this objective threshold test may be out of a felt need for a limitation on the types of familial relationships that are protected. If this is the court's concern, then it should articulate absolute limitations, not leave it up to a discretionary balancing test. For example, the Seventh Circuit has categorically declined to recognize a protected relationship between siblings. *See* Bell v. Milwaukee, 746 F.2d 1205 (7th Cir. 1984).

177. *Griffin*, 983 F.2d at 1548.

178. *Id.*

179. *Id.* at 1547.

180. *Id.* at 1548.

181. *See supra* notes 155-59 and accompanying text. By pulling from the record five separate ways in which the defendant allegedly used Mrs. Griffin against her husband in an attempt to get him to confess, the court all but conceded that Officer Strong's conduct satisfied the *Trujillo* test.

182. *Griffin*, 983 F.2d at 1549.

183. Along with examining the severity of the alleged infringement, the court of appeals also claimed that it would look into the necessity of the defendant's conduct and possible alternatives to the conduct. The court made no attempt at the last two inquiries and offered no explanation for this noticeable failure. *See id.* at 1548-49. Without becoming to speculative, the argument can easily be made that deceptively using a wife against her husband to secure his unwilling confession is not necessary to a child abuse investigation. Furthermore, less egregious alternatives are probably available to the properly trained investigator.

The court of appeals concluded the defendant only slightly infringed on Dorothy Griffin's rights.[184] The court supported this conclusion by looking to two considerations. First, the Griffins talked with officer Strong consensually.[185] Second, no evidence suggested that Strong used "physical coercion or conduct that shocks the conscience."[186] The Tenth Circuit has never indicated that the presence of physical coercion or conscience shocking conduct is an element of a successful familial association claim.[187] The Tenth Circuit borrowed the notion that the defendant's conduct must shock the conscience from *Pittsley v. Warish*,[188] a First Circuit decision.[189] The court's reliance on *Pittsley* is improper.

In *Pittsley*, the First Circuit found that conduct which shocks the conscience is only necessary when a plaintiff is unable to identify a specifically recognized Fourteenth Amendment liberty interest.[190] In *Griffin*, the Tenth Circuit spent an entire section of its opinion explaining that familial association is included within the Fourteenth Amendment's substantive due process protections.[191] The court specifically characterized familial association as a "subset" of intimate association.[192] Inexplicably, the court of appeals held Dorothy Griffin responsible for an evidentiary showing that is appropriate only when the plaintiff is unable to identify a specific liberty interest.

The Tenth Circuit's reliance on *Pittsley* also becomes suspect in light of the fact the First Circuit does not recognize familial association as a protected right. Concerned with the possibility of an unlimited source of claims, the First Circuit held in *Pittsley* that "only the person toward whom the state action was directed, and not those incidentally affected, may maintain a § 1983 claim."[193] There is something amiss when a court denies a plaintiff relief under a recognized claim and then bolsters its hold-

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184. *Id.* at 1549.

185. *Id.*

186. *Id.*

187. *See* Apodaca v. Rio Arriba County Sheriff's Dept., 905 F.2d 1445 (10th Cir. 1990); Bryson v. City of Edmond, 905 F.2d 1386 (10th Cir. 1990); Archuleta v. McShan, 897 F.2d 495 (10th Cir. 1990); Trujillo v. Board of County Commr's, 768 F.2d 1186 (10th Cir. 1985).

188. 927 F.2d 3 (1st Cir.), *cert. denied*, 112 S. Ct. 226 (1991).

189. *Griffin*, 983 F.2d at 1549 (citing *Pittsley*, 927 F.2d at 9). The court does not indicate where it got the idea that the presence of physical coercion is necessary to show a violation of the right to familial association. The *Pittsley* opinion does not discuss physical coercion. *See Pittsley*, 927 F.2d 3 (1st Cir), *cert. denied*, 112 S. Ct. 226 (1991).

190. *Pittsley*, 927 F.2d at 6 (citing Rochin v. California, 342 U.S. 165, 172-73 (1952)). The First Circuit articulated two theories under which a plaintiff could proceed in a substantive due process claim:

> Under the first theory, it is not required that the plaintiffs prove a violation of a specific liberty or property interest; however, the state's conduct must be such that it "shocks the conscience." To succeed under the second theory, a plaintiff must demonstrate a violation of an identified liberty or property interest protected by the due process clause.

Id. (citations omitted).

191. *See Griffin*, 983 F.2d at 1546-47 (section III of the court's opinion).

192. *Id.* at 1547.

193. *Pittsley*, 927 F.2d at 8. The First Circuit seems to define "those incidentally affected" very broadly to mean all those who were not the primary victim of state action. *See id.* at 7-8; Ortiz v. Burgos, 807 F.2d 6, 8 (1st Cir. 1986).

ing with precedent from a court that has refused to recognize that the plaintiff's interest is even entitled to protection.

The Tenth Circuit ultimately held that "no reasonable juror, when confronted with *balancing the interests* on the record before us under *the appropriate standard,* could determine" that Officer Strong unduly violated Dorothy Griffin's right of familial association.[194] This holding does not satisfy because it strikes a sustained chord of injustice. The court's arrival at this holding leaves the appropriate legal analysis nearly unintelligible. Although a clear statement of the law proves elusive, important ideas emerge. Even if a plaintiff satisfies the *Trujillo* test, the Tenth Circuit is likely to approach a defendant's conduct with great deference unless it amounts to physical coercion or is so egregious that it shocks the conscience. Perhaps the most important lesson that can be gleaned from *Griffin* is that the Court of Appeals for the Tenth Circuit does not favor the right of familial association. A plaintiff has never prevailed on a familial association claim at the appellate level in the Tenth Circuit,[195] and the court's jurisprudential gymnastics in *Griffin v. Strong* suggest that this tradition is likely to continue.

CONCLUSION

The Tenth Circuit's decisions in the two speech cases exhibit a laudable recognition of the importance of speech in American society. Thematic to both opinions is the idea that participants in a democratic society can make proper decisions as to what is in their best interest only if they are exposed to the full breadth of ideas. The court's decision in *Griffin v. Strong*[196] suggests that the court of appeals may be having second thoughts about its decision to recognize the right of familial association. The court's confusing modification of the law combined with its opaque reasoning casts a pessimistic cloud over the likelihood of plaintiff success in the future.

J. Bartlett Johnson

194. *Griffin*, 983 F.2d at 1549 (emphasis added). The court of appeals said that the trial judge should have directed a verdict or granted a judgement N.O.V. *Id.* at 1549 n.6.

195. *See* Apodaca v. Rio Arriba County Sheriff's Dept., 905 F.2d 1445, 1447 (10th Cir. 1990) (refusing to reverse dismissal of plaintiff's claim because no evidence of defendant's intent to interfere with the plaintiff's protected relationship); Bryson v. City of Edmond, 905 F.2d 1386, 1393-94 (10th Cir. 1990) (upholding judgment for defendant because intent cannot be transferred and no allegation of intent directed at family relationship); Archuleta v. McShan, 897 F.2d 495, 498-99 (10th Cir. 1990) (emphasizing necessity of intent and that plaintiff be "deliberate object" of conduct).

196. 983 F.2d 1544 (10th Cir. 1993).