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# Constitutional Law Survey

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# CONSTITUTIONAL LAW SURVEY

## I. FIRST AMENDMENT — SPEECH CASES

There are three 1991 Tenth Circuit Court of Appeals cases of interest that address First Amendment speech issues. The first, *Adolf Coors Company v. Brady*,[1] involved commercial speech. This appeal arose out of a suit by Coors against the Secretary of the Treasury and the Director of the Bureau of Alcohol, Tobacco and Firearms (BATF) in the Colorado District Court, alleging a violation of its First Amendment rights. Specifically, Coors argued that a federal statute prohibiting Coors from advertising the alcohol content of its beer was a violation of its right to free speech. BATF had denied an application by Coors which proposed to disclose the alcohol content of Coors and Coors Light in its advertising and labeling.[2] BATF based its decision on the language of 27 U.S.C. § 205(e) and § 205(f).[3] The district court[4] granted summary judgment for Coors, holding that the federal statute constituted an illegal restraint on speech.[5] The district court also enjoined BATF from enforcing the statute.

The Treasury Department and the House[6] both appealed the district court ruling. The court of appeals,[7] in an opinion authored by Judge Seymour, reversed and remanded the case, holding that there existed genuine issues of material fact precluding summary judgment on

1. 944 F.2d 1543 (10th Cir. 1991).

2. *Id.*

3. 27 U.S.C. §§ 205(e) and 205(f) (1988) state in relevant part:

§ 205. Unfair competition and unlawful practices. It shall be unlawful for any person engaged in business as a distiller, or brewer . . . of distilled spirits, wine, or malt beverages . . . directly or indirectly through an affiliate:

(e) Labeling

To sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce . . . any distilled spirits, wine, or malt beverages in bottles, unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, . . . labeling and size and fill of container . . . (2) as will provide the consumer with adequate information as to the identity and quality of the products, the alcohol content thereof (except that statements of, or statements likely to be considered as statements of, alcohol content of malt beverages are prohibited unless required by State law . . . .

(f) Advertising

To publish or disseminate . . . any advertisement of distilled spirits, wine or malt beverages . . . unless such advertisement is in conformity with such regulations . . . (2) as will provide the consumer with adequate information as to the identity and quality of the products advertised, the alcoholic content thereof (except the statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages and wines are prohibited) . . . .

4. Zita L. Weinshienk, J.

5. *Coors*, 944 F.2d at 1543.

6. The United States House of Representatives intervened to defend the constitutionality of the statute after both the Treasury and BATF admitted that the statute was unconstitutional. *Coors* 944 F.2d at 1546.

7. Before Circuit Judges McKay, McWilliams, and Seymour.

Coors' claim that the statute was unconstitutional.[8]

The court applied the following four part test from the Supreme Court opinion in *Central Hudson Gas v. Public Ser. Comm'n*[9] to determine whether the commercial speech is protected by the First Amendment:[10]

> For commercial speech to come within the First Amendment, it at least must concern lawful activity and not be misleading. Next, it must be determined whether the asserted governmental interest . . . is substantial. If both inquiries yield positive answers, it must be determined whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[11]

Applying the first prong, the court held that Coors' proposal to advertise alcohol content was commercial speech protected by the First Amendment.[12] This was not at variance with the district court's conclusion.

Under the second prong of the *Central Hudson* test, contrary to the district court's holding, the court of appeals held the governmental interest to be legitimate and substantial.[13] This interest, to protect the public against the "excesses" by the brewing industry, is supported by the fact that Coors wanted to advertise a higher alcohol content in order to "dispel Coors' image of being a "weak beer".[14]

To determine whether the regulation "directly advances" the government's interest in preventing beer strength wars, the court noted that the "party urging the prohibition on speech has the burden of justifying such a restriction."[15] The court refused to infer that the means directly advanced the ends simply from the legislature's presumptions.[16] The decision points out that the district court erred by not "separately consider[ing] whether the facts presented by both sides presented a genuine issue of material fact on whether the legislative means directly advanced the legislative ends."[17] If, on remand, the district court does conclude that the interest espoused by Congress is directly advanced by the regulation, the fourth prong of the *Central Hudson* test, dealing with less intrusive means, will then be triggered.

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8. *Coors*, 944 F.2d at 1554.
9. 447 U.S. 557 (1980).
10. Coors v. Brady at 1547.
11. *Central Hudson*, 447 U.S. at 557.
12. *Coors*, 944 F.2d at 1547.
13. *Coors*, 944 F.2d at 1549. The district court observed that the purpose behind the legislation is inapplicable to today's market. When the statute was enacted in 1935, Congress was concerned primarily with "strength wars" among breweries. These wars came about as a result of brewers marketing high alcohol content beers, which consumers would purchase over the competition. There was a legitimate interest by Congress to encourage a lower alcohol content of beer. The district court reasoned that factual circumstances had changed, and the statute no longer serves a substantial interest. *Id.*
14. *Id.*
15. *Coors*, 944 F.2d at 1550 (citing Board of Trustees v. Fox, 492 U.S. 469 (1989) (the reasoning in this case and the underlying Court of Appeals opinion were relied on heavily by this court).
16. *Id.* at 1551.
17. *Id.*

*Brown v. Palmer*[18], presented the issue of whether an Air Force base had, during their annual open house, intended to create a "public forum" for speech purposes. During 1985 and 1986 Peterson Air Force Base celebrated Armed Forces Day by hosting an open house at the base. The public was invited to the base and various groups distributed informational materials.[19] Appellee Brown and others sought to distribute anti-war leaflets, which resulted in bar letters issued by the Air Force Base. Appellees objected to these letters as restrictions on their First Amendment right to free speech.[20] After appellees received a judgment in their favor at the district court level, the court of appeals reversed.[21]

The court of appeals affirmed its prior decision,[22] which reversed the district court.[23] The en banc decision held that the Air Force intended to limit political and ideological debate, thereby not creating a "public forum".[24] The bar letters issued to plaintiffs were therefore not violative of the First Amendment.[25]

Appellees presented three arguments on rehearing: (1) that the "objective" evidence illustrated that Peterson Air Force Base intended to create a "public forum"; (2) that the court of appeals panel had given the Air Force Base special status in their determination of whether there had been a public forum; and (3) that the panel improperly substituted its judgment for the district court's in holding that the restrictions in question were viewpoint neutral.[26]

The court responded to the first contention, stating that there had been an objective analysis involved in the determination that Peterson had not intended to open up their base as a public forum.[27] The court examined prior denials by the base of political and ideological requests,[28] and despite the fact that the base had allowed certain religious activities during the open house, held there was no intent to create a public forum.[29]

The court next responded to the argument that the panel had been operating under the assumption that a military base can never be a public forum.[30] After citing case law holding military bases not to be public forums, the court stated, "the test is simply whether the government has intended to open up the facility to public debate on the particular sub-

18. 944 F.2d 732 (10th Cir. 1991).
19. *Id.* at 737.
20. *Id.* at 733.
21. *Id.* at 732.
22. A panel of the court previously held that Peterson Air Force Base was not a public forum during the open houses held in 1985 and 1986. Brown v. Palmer, 915 F.2d 1435 (10th Cir. 1990).
23. *Brown* 944 F.2d at 732.
24. *Id.* at 733.
25. *Id.*
26. *Id.*
27. *Id.* at 736-37.
28. *Id.* at 736.
29. *Id.* at 737.
30. *Id.* at 738.

ject matter sought to be addressed by the person seeking access to that government facility."[31] The court was careful to point out that the evidence must unequivocally support that the Air Force Base intended to abandon control over conduct or speech in order for it to be perceived as a public forum.[32] This stringent test has rarely led a court to determine that a military base is an open forum. Although the court vehemently denied giving the military base special status, it did acknowledge the special needs of the military to maintain security and avoid political and ideological debate.[33] The court did not address the contention that the panel improperly substituted its judgment for that of the district court.

The majority was met by a strong dissent authored by John P. Moore, Circuit Judge, joined by Holloway, Chief Judge, and McKay and Seymour, Circuit Judges.[34] Criticizing how the majority viewed the evidence, the dissent argued that what the Air Force did allow on the base, as opposed to what they prohibited, is a better indicator of whether there was intent to create a public forum.[35] Because the base had been opened for certain activities, it should be considered a public forum for all activities.

The court of appeals in *Miles v. Denver Public Schools*,[36] addressed the question of whether a teacher's in-class statements are constitutionally protected. Appellant sought damages and injunctive relief pursuant to 42 U.S.C. § 1983 in the district court, which in turn granted summary judgment in favor of the defendant school system.[37] Statements made by Miles during a ninth grade government class resulted in a four day paid administrative leave and a letter of reprimand which stated, "you will need to refrain from commenting on any items which might reflect negatively on individual members of our student body."[38] Appellant Miles asserted that his in-class statements[39] were constitutionally protected, and that the school's letter of reprimand "chilled" and violated his First Amendment right to free speech and expression.[40]

The court of appeals applied the test from *Mount Healthy City School*

31. *Id.* at 739.

32. *Id.* (citing Flower v. United States, 407 U.S. 197 (1972)).

33. *Id.* [T]he court voiced concerns regarding the policy ramifications of accepting the appellee's position, "[T]he flow of information to the public from Peterson Air Force Base would likely be restricted. The military, most likely, could not risk the possibility that Peterson AFB would be labeled as a public forum . . . . [hence] the public would lose the opportunity to come onto military bases; to learn about the weapon systems, . . . and then to take that information back out to the public fora that are available and there to debate, if they wish, the proper role of the military." *Id.* at 739-40.

34. *Id.* at 740.

35. *Id.*

36. 944 F.2d 773 (10th Cir. 1991).

37. *Id.* at 744.

38. *Id.*

39. Miles had commented to his ninth grade government class on the declining quality of the school, citing as an example an unfounded rumor that two students had been seen on the school grounds having sexual intercourse. *Id.* at 773-74.

40. *Id.* at 775.

*District Board of Education v. Doyle*[41] in order to determine whether a public employee's First Amendment rights have been violated by an adverse employment decision.[42] First, the employee must show that "the speech for which he was disciplined was constitutionally protected and [secondly], the protected speech motivated the adverse employment decision."[43] Once the employee has met this burden, the employer must show by a preponderance of the evidence that it would have made the same decision absent the protected speech.[44]

As in *Brown v. Palmer*, the court initially examined whether the school was a public forum.[45] The court concluded that there was no evidence that the school had intended to open up the school grounds as a public forum, and hence the speech was not protected.[46] The court found that the school had put forth legitimate pedagogical interests and its actions were legitimately related to those interests.[47] Because the appellant neither showed that his in-class comments were constitutionally protected nor raised any evidence to dispute that the school's interests were legitimate and related to the ends, judgment for the school was affirmed.[48]

This case is remarkable due to the court's choice of standards. It chose to apply the test set forth in *Hazelwood* as opposed to the standard set forth in *Pickering v. Board of Education*.[49] The *Pickering* decision balances the interests of the state (employer) in preventing certain expression in the workplace against the employee's interest in making the statements.[50] The court reasoned that this test is not applicable where the state is an educator.[51] In such an instance the more stringent test from *Hazelwood* better serves the purposes of reviewing speech in the classroom context.[52] The court also noted, in response to Miles' argument, that a secondary teacher does not enjoy the academic freedom accorded by the Supreme Court to those in a University setting.[53]

## II. First Amendment — Religion

In 1991, the Tenth Circuit addressed a number of cases involving First Amendment religion clause claims by prisoners. The court consistently applied the test set forth in *Turner v. Safely*,[54] which provides four

41. 429 U.S. 274 (1977).
42. *Miles*, 944 F.2d at 775.
43. *Id.*
44. *Id.*
45. *Id.* at 776.
46. The court relied heavily on the analysis set forth in Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).
47. *Miles*, 944 F.2d at 778.
48. *Id.* at 779.
49. 391 U.S. 563 (1968).
50. *Miles*, 944 F.2d at 777; *see also* Rankin v. McPherson, 483 U.S. 378 (1987); Connick v. Myers, 461 U.S. 138 (1983).
51. 944 F.2d at 777.
52. *Id.*
53. *Id.* at 779.
54. 482 U.S. 78, 89 (1987).

factors to assist in determining whether a prison regulation has impermissibly impinged upon an inmate's Constitutional rights.

> First, there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it . . . . A second factor . . . is whether there are alternative means of exercising the right that remain open to prison inmates . . . . A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally . . . . Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation.[55]

The Tenth Circuit, in *Clifton v. Craig*[56] and *Hall v. Bellmon*[57] applied these standards in holding for prison facilities. *Clifton* affirmed the district court's grant of summary judgment for Leavenworth Federal Penitentiary.[58] Clifton, a *pro se* appellant, brought an action against a chaplain for the Federal Bureau of Prisons, objecting to the restrictions imposed upon the members of the Church of Christ.[59] Specifically, Clifton was not permitted to hold Sunday services for his denomination apart from other groups of worshippers.[60] The court applied the four part *Turner* inquiry to conclude that the restriction on Clifton's religious practice was a reasonable one.[61] Similarly, in *Hall v. Bellmon*, the court recited the four *Turner* factors in holding that the cutting of Appellant's hair and confiscation of his medicine bag and talisman were reasonably related to legitimate penological interests. Thus, the court affirmed the district court's 12(b)(6) dismissal of plaintiff's claims.[62] Both of these opinions give a great deal of deference to prison officials.[63] The only allowances the court of appeals appeared to make for inmates is in situations in which the district court fails to apply the *Turner* factors at all.

*Mosier v. Maynard*[64] is such a case. *Mosier* involved the denial of an exception to the prison grooming standards. Plaintiff was seeking an exception based on his Native American religion. The Oklahoma institution had a policy in effect that would deny such an application unless the prisoner could prove through outside sources that he sincerely ad-

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55. Hall v. Bellmon, 935 F.2d 1106, 1113 (10th Cir. 1991) (quoted in Turner v. Safely, 482 U.S. 78, 89-90 (1987)(citations omitted)).

56. 924 F.2d 182 (10th Cir.1991)(before Anderson, Tacha, and Brorby, Circuit Judges).

57. 935 F.2d 1106 (10th Cir. 1991)(before Logan, Moore and Baldock, Circuit Judges).

58. *Clifton*, 924 F.2d at 183.

59. *Id.*

60. *Id.*

61. *Id.* at 184.

62. *Hall*, 935 F.2d at 1114. (It should be noted that the court primarily focused on the question of whether a *Martinez* report is proper to develop the record and to consider for the purposes of a 12(b)(6) motion, which it answered in the affirmative).

63. *Clifton*, 924 F.2d at 184. ("This standard gives corrections officials the necessary leeway to effectively confront the intractable difficulties of administering prison systems while, at the same time, it keeps the intrusion of the judiciary into such matters at a minimum." *Id.* (citing O'Lone v. Estate of Shabazz, 482 U.S. 342, 349-50 (1987))).

64. 937 F.2d 1521 (10th Cir. 1991)(before Logan, Moore, and Baldock, Circuit Judges).

heres to such religion.[65] Because the Plaintiff refused to supply the prison official with supporting evidence,[66] the official refused to grant the exception.[67]

The district court granted summary judgment for the institution, holding the grooming regulation valid and Plaintiff unqualified for an exception without referring to the *Turner* factors.[68] The Tenth Circuit, in an opinion written by Judge Baldock, reversed and remanded, articulating the necessity of applying the four *Turner* factors. The court stated that the question of whether religious beliefs are sincerely held is a question of fact,[69] which the district court should resolve after further inquiry and application of the *Turner* factors.[70]

The Tenth Circuit in *McKinney v. Maynard*,[71] reiterated the importance of the *Turner* factors. The district court dismissed McKinney's complaint as frivolous,[72] which alleged a violation of his First Amendment right to practice his Native American religion by the state (prison officials)[73]. The Tenth Circuit stated that plaintiff's complaint did contain " 'an arguable basis either in law or in fact,' "[74] and therefore vacated the dismissal and remanded the case to the district court for consideration in light of the *Turner* factors.[75] The court added, "[w]hile legitimate penological objectives remain in the balance, those interests do not categorically negate the mettle of Mr. McKinney's First Amendment claim."[76]

65. The prison required the inmate to establish that: "(1) the religion is recognized; (2) he is an adherent to the religion; (3) the practice of his religion is inhibited by a particular provision in the grooming code; and (4) the facility's interest in security does not outweigh his need to practice the religion." *Id.* at 1522.

66. The Plaintiff refused to identify non family members who would vouch for the sincerity of his beliefs. *Mosier*, 937 F.2d at 1526.

67. *Id.* at 1523.

68. The district court relied on Sixth Circuit law holding that a prison could enforce a blanket restriction on hair length even if it conflicted with sincere Native American beliefs. *See* Pollack v. Marshall, 845 F.2d 656, 657, 659-60 (6th Cir. 1988), *cert. denied*, 488 U.S. 987 (1988).

69. The court noted that the plaintiff had presented probative evidence of his religious beliefs in his compliant, which can be treated as an affidavit. *Mosier*, 937 F.2d at 1524 (citing Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991)).

70. *Mosier*, 937 F.2d at 1527.

71. 952 F.2d 350 (before Moore and Tacha, Circuit Judges, and Kane, District Judge, sitting by designation).

72. *Id.* at 351. The district court dismissed the complaint as frivolous under 28 U.S.C. sec 1915(d).

73. Specifically, plaintiff sought damages and injunctive relief to prohibit prison authorities from enforcing the grooming code against him, to have his medicine bag returned,and to permit the construction of a sweat lodge at the facility. *McKinney*, 352 F.2d at 351-52.

74. *Id.* (quoting Neitzke v. Williams, 490 U.S. 319, 325 (1989)).

75. *Id.* at 353.

76. *Id.* at 354.

## III. PROPERTY RIGHTS

### A. *Employment*

The Tenth Circuit Court of Appeals held in *Russillo v. Scarborough*[77] that an "at will" employee has no property interest in the manner of their termination.[78] Plaintiff appealed the district court ruling that he did not have a constitutionally protected property interest in his job[79] on the novel theory that he had a property interest in the expectation that he could only be terminated by his immediate employer.[80] Plaintiff's suit for wrongful termination followed his dismissal from the position of court administrator as a result of "lax procedures" and the theft of $29,000.00.[81] The court stated that a property interest cannot be had in the methods by which it is deprived.[82]

The court cited *Campbell v. Mercer*,[83] which held that a property interest is defined by substantive restrictions,[84] not procedural protections.[85] Employees cannot have a property interest in the procedures involved in their termination, because " 'such a right attaches only when there are *substantive* restrictions on the employer's discretion.' "[86]

### B. *Fifth Amendment — Takings*

The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. The Tenth Circuit Court of Appeals in *Sangre de Cristo Development Co.,Inc. v. United States*[87] held that the Department of Interior's (DOI) recision of its approval of a lease of Indian land did not constitute a taking.[88] Appellant, Sangre de Cristo Development Co., had their lease of 5,000 acres of Indian land approved by the U.S. Department of

77. 935 F.2d 1167 (10th Cir. 1991)(before Moore and Brorby, Circuit Judges, and Van Bebber, District Judge, United States District Court for District of Kansas, sitting by designation).

78. New Mexico law provides that a public employee has a protected property interest if they have an implied or express right to continued employment. This is distinguishable from "at will" status, which does not give the employee a legitimate expectation of continued employment. *Id.* at 1170 (citing Bishop v. Wood, 426 U.S. 341 (1976)).

79. *Id.* at 1170.

80. Russillo was employed by the metropolitan court, but was terminated by the New Mexico Supreme Court. *Id.* at 1170.

81. *Id.* at 1169-70. According to defendant Justice Scarborough, plaintiff was not accused of stealing the money.

82. *Id.* at 1170 (relying on Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)).

83. 926 F.2d 990 (10th Cir. 1991)(before Holloway, Chief Judge, Baldock, Circuit Judge, and Greene, District Judge, United States District Court for District of Utah, sitting by designation).

84. State law defines what substantive property rights employees have in their employment. *Campbell*, 926 F.2d at 992 (citing Board of Regents v. Roth, 408 U.S. 564 (1972)).

85. *Campbell*, 926 F.2d at 993.

86. *Id.* at 993 (quoting Asbill v. Housing Authority of Choctaw Nation, 726 F.2d 1499, 1502 (10th Cir. 1984)(emphasis added)).

87. 932 F.2d 891 (10th Cir. 1991)(before Logan, Anderson, and Ebel, Circuit Judges).

88. *Id.* at 895.

the Interior. Their hopes of developing the area into a residential community and golf course were dashed by DOI's subsequent recission of their prior approval.[89] In order to prevail on a takings claim, a plaintiff must first prove there is a vested interest protected by the Fifth Amendment that was present at the time the taking occurred, and second, that the government's action was a taking under the Fifth Amendment.[90]

Affirming the district court's dismissal of the Fifth Amendment takings claim, the court of appeals did not address the second prong as they found there was not a protected interest in the lease at the time of the recision.[91] The court reasoned that the lease of the Indian land is only valid if approved by the Department of the Interior.[92] The recision by the Department was subsequent to a finding by this court that the prior approval was invalid.[93] Because the approval was invalid, plaintiff's interest had never vested, making a taking impossible.

The Tenth Circuit also affirmed the dismissal of a Fifth Amendment takings claim in *Miller v. Campbell County*[94] as not ripe for review.[95] Plaintiffs claimed an excavation order given by the County Commissioners due to the discovery of methane and hydrogen gases seeping up through the ground constituted a "taking" of their homes for which adequate compensation should be given.[96] Because the plaintiffs had a reverse condemnation action pending in state court to recover compensation for their loss, an action for taking without just compensation was unwarranted.[97] The court also addressed the plaintiff's Fourteenth Amendment Due Process claim by refusing to impose additional due process obligations upon parties when the Fifth Amendment takings clause adequately addresses the issue.[98]

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89. *Id.* at 893.
90. *Id.* at 894.
91. *Id.*
92. *Id.* (citing 25 U.S.C. § 415(a) (1970)).
93. Davis v. Morton, 469 F.2d 593, 597 (10th Cir. 1972)(The court of appeals held that the approval of the lease required an Environmental Impact Statement under NEPA sec. 4332(2)(C), which the Department had failed to complete).
94. 945 F.2d 348 (10th Cir. 1991).
95. *Id.* at 350.
96. *Id.* at 352.
97. *Id.* at 351.
98. *Id.* at 352.