Denver Law Review

Volume 55
Issue 3 *Tenth Circuit Surveys*

Article 6

February 2021

Constitutional Law

James E. Bosik

Margaret N. Dillon

Bette A. Lingis

Karen A. Perez

CONSTITUTIONAL LAW

OVERVIEW

The term of the Tenth Circuit Court of Appeals covered by this survey was not a particularly fruitful one for breaking new ground in the area of constitutional law. Few cases of major importance were presented to the court for its consideration. The more interesting cases presented for review were in the general areas of employment, prison inmates' rights, guest statutes, social security, and color of state law. This overview will highlight some of the more significant aspects of these cases.

I. FIRST AMENDMENT: EMPLOYMENT

The Tenth Circuit Court of Appeals decided four cases of alleged employment discrimination wherein the plaintiffs-employees claimed that constitutionally protected conduct prompted their termination or job denial. The Court of Appeals disagreed, and decided all of the cases in favor of the defendants-employers.

The disposition of three of the employment cases turned upon the resolution of two key issues: 1) Whether the conduct in question was protected under the first amendment and, if so, 2) whether the protected conduct was the cause of the plaintiff's termination or job denial. In *Mt. Healthy City School District Board of Education v. Doyle,*[1] the Supreme Court premised the success of the plaintiff's first amendment claim on the affirmative resolution of both issues.[2] In addressing the first issue, the Court reaffirmed the balancing test prescribed in *Pickering v. Board of Education of Township High School District 205,*[3] in which the teacher's interest in commenting on matters of public concern was weighed against the school's interest in promoting

[1] 429 U.S. 274 (1977). In this case, a school principal circulated to the teachers a memo relating to teacher dress and appearance. One of the school's untenured teachers conveyed the substance of the memo to a radio station which announced the adoption of the dress code as a news item. The teacher was subsequently dismissed. These facts gave rise to the two questions: What constitutes protected conduct and what role does the protected conduct play in the subsequent termination?

[2] *Id.* at 284, 287.

[3] 391 U.S. 563 (1968).

the efficient delivery of public services.[4] With regard to the second issue, the *Mt. Healthy* court determined that the causal requirement is satisfied when the plaintiff shows that the protected conduct was a substantial or motivating factor in the termination, *i.e.*, that termination would not have occurred absent the protected conduct.[5] The Tenth Circuit plaintiffs' failure to establish definitive first amendment violations is attributable to their failure to meet these *Mt. Healthy* standards.

In *Schmidt v. Fremont County School District No. 25*,[6] a Wyoming school principal alleged that his public disapproval of school programs and policies triggered his termination. The school district justified the termination by reference to the principal's failure to improve the school's serious absenteeism problem and other instances of unsatisfactory work performance. By applying the *Pickering* balancing test, the court found the principal's expressions of disapproval to be undeserving of first amendment protection.[7] The court also found ample factual support for the termination apart from the allegedly protected expression,[8] thereby dismissing the principal's first amendment claim.

Similar issues arose in *Franklin v. Atkins*.[9] Franklin was refused a teaching position at the University of Colorado on the basis of a report prepared by his former employer. Franklin alleged that the Colorado regents' reliance on this report was unjustified since the report referred to constitutionally protected conduct.[10] In affirming the decision for the regents, the court stressed

---

[4] "The problem in any case is to arrive at a balance between the interests of the teacher, *as a citizen*, in commenting upon *matters of public concern* and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568 (emphasis added). For further interpretation and discussion of what constitutes a matter of "public concern," see Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972) and Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972). *See also* Bertot v. School Dist. No. 1, 522 F.2d 1171 (10th Cir. 1975).

[5] 429 U.S. 274, 287 (1977).

[6] 558 F.2d 982 (10th Cir. 1977).

[7] *Id.* at 985. The statements concerned the internal operation of the school system and were not matters of general public concern, as stipulated in *Pickering*. *See generally* cases cited note 4, *supra*.

[8] 558 F.2d 982, 985 (10th Cir. 1977).

[9] No. 76-1256 (10th Cir., June 20, 1977).

[10] The report discussed Franklin's participation in several incidents amounting to "improper conduct" and served to support a recommendation for Franklin's termination as a teacher at Stanford University.

that Franklin had failed to satisfy the *Mt. Healthy* standards; *i.e.*, Franklin demonstrated neither that the conduct described in the report was constitutionally protected nor that the regents' consideration of the conduct was the motivating factor in their decision to turn down his application for employment.[11]

In *Butler v. Hamilton*,[12] two staff counselors in the Black Education Program at the University of Colorado were fired after holding a press conference designed to pressure the university into investigating the alleged misuse of program funds. The newly hired program director staunchly opposed the press conference, and the counselors contended that their exercise of their first amendment freedoms prompted their dismissals. The program director alleged that the counselors had consistently failed to comply with certain directives concerning the discharge of their employment duties and that the counselors' insistence on holding the press conference merely represented a culmination of their insubordinate conduct. In determining that the counselors' poor work performance and antipathetic attitudes were the chief factors motivating the terminations, the court noted that the exercise of a constitutionally protected right does not absolve the employee of responsibility for prior transgressions committed during the course of employment.[13]

The court's strict application in these cases of the *Pickering* balancing test and the *Mt. Healthy* standards reveals the court's underlying interest in preventing employees from claiming the exercise of first amendment rights as a blanket defense against termination or job denial. The *Pickering* test may be used to exclude from first amendment protection an employee's commentary relating to the internal affairs of the employing organization and the *Mt. Healthy* causal requirement insures that exercise of first amendment rights does not excuse substandard work performance.[14] The latter requirement is especially pertinent in cases

---

[11] No. 76-1256 at 7.

[12] 542 F.2d 835 (10th Cir. 1976).

[13] *Id.* at 839.

[14] "A discharge for exercise of first amendment rights is impermissible . . . . The exercise of a first amendment right, however, does not insulate a public employee from being discharged for occurrences prior to the exercise of the right. Furthermore, the exercise of a constitutional right does not provide a grace period for a public employee immunizing him from discharge immediately following such exercise, as long as the exercise of

such as *Schmidt* and *Butler* where several disparate factors culminated in the plaintiff's termination.

In *United States v. City of Albuquerque,*[15] the court considered the dismissal of a Seventh Day Adventist for his refusal to work on Saturday.[16] The 1964 Civil Rights Act protects employees from discriminatory dismissal on religious grounds[17] and requires the employer to "reasonably accommodate" an employee's religious practice unless such accommodation would pose an "undue hardship" on his business.[18] The trial court found that the employer had a liberal policy governing time off and that the plaintiff had taken little initiative in attempting to trade shifts with other workers so as to avoid Saturday work. The appellate court, in affirming that the employer had acted reasonably, stressed that "reasonably accommodate" and "undue hardship" are relative terms whose meanings must be interpreted within the framework of particular facts and circumstances surrounding each case,[19] and that such determinations are essentially findings of fact.[20] Since from the record none of these findings were clearly erroneous, the appellate court was obliged to uphold the trial court's decision.[21]

II. DUE PROCESS: EMPLOYMENT

In *Staton v. Mayers,*[22] the plaintiff claimed that his right to due process was violated by the inadequacy of the notice of his hearing and by the bias of the hearing tribunal in his dismissal as superintendent of a school district in Oklahoma on grounds of willful neglect of duty and incompetence. The threshold question before the court was whether Staton's dismissal burdened a liberty or property interest so that his right to due process was in issue. The court held that Staton was protected by due process

---

the right did not motivate the dismissal." Butler v. Hamilton, 542 F.2d 835, 839 (10th Cir. 1976).

[15] 545 F.2d 119 (10th Cir. 1976).

[16] The plaintiff was a fireman whose schedule frequently included Saturday work.

[17] 42 U.S.C. § 2000e-2.

[18] 42 U.S.C. § 2000e(j).

[19] 545 F.2d 110, 114 (10th Cir. 1976). *See* Williams v. Southern Union Gas Co., 529 F.2d 483 (10th Cir. 1976).

[20] 545 F.2d 110, 115.

[21] The court relied on FED. R. CIV. P. 52(a) and on Williams v. Southern Union Gas Co. in support of its reluctance to overturn the trial court's findings.

[22] 552 F.2d 908 (10th Cir. 1977).

because he had a legitimate claim of entitlement to his job derived from his contract with the school district which was in effect at the time of his dismissal,[23] and because he was deprived of liberty and property by the stigma of being branded incompetent and guilty of willful neglect of duty.[24]

Staton claimed that the notice of his hearing was inadequate because it did not specify the act or deficiencies considered by the board to amount to willful neglect of duty or incompetence; nor did it specify any of the adverse witnesses. The Tenth Circuit held that the undetailed charges were insufficient to constitute *meaningful* notice,[25] but that, since Staton failed to make a timely objection, his belated claim of insufficiency did not demonstrate a denial of due process.[26]

Staton further claimed that the three members of the school board who voted for his dismissal had made public statements against him, showing a biased tribunal. After a lengthy analysis of the background and system of school administration involved, the Tenth Circuit held that the tribunal did not meet due process demands for a fair hearing with the appearance of fairness.[27] At the time Staton was dismissed there were no procedures available for providing an alternate tribunal, but subsequent to his dismissal, the Oklahoma legislature provided for appeal remedies including a full hearing and review on the facts by a special commission and further appeal to the State Board of Education. In setting aside Staton's dismissal, the Tenth Circuit noted that if the board should renew its decision to dismiss Staton, he could then use the new appeal remedies to challenge the fairness of the tribunal.[28]

---

[23] *Id.* at 911. For this decision, the court cited Board of Regents v. Roth, 408 U.S. 564, 577 (1972), wherein the Supreme Court stated: "To have a property interest in a benefit, a person clearly must have . . . a legitimate claim of entitlement to it."

[24] 552 F.2d at 911. Where a person's good name, reputation, honor, or integrity is at stake because of governmental action, procedural due process insures that person fair procedures. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 573 (1972); Powers v. Mancos School Dist. RE-6, 539 F.2d 38, 42 (10th Cir. 1976).

[25] 552 F.2d at 912. The minimum requirements of procedural due process are notice and an opportunity for a hearing appropriate to the nature of the case before deprivation of the liberty or property interests of the plaintiff. *Id.* (citing Goss v. Lopez, 419 U.S. 565, 579, 581 (1975) and Board of Regents v. Roth, 408 U.S. 564, 573, 576 n.15 (1972)).

[26] 552 F.2d at 912.

[27] *Id.* at 914.

[28] *Id.* at 915.

In *Schultz v. Parsons,*[29] the Tenth Circuit held that a valid expectation of continued employment does not arise until a teacher has tenure and, therefore, the plaintiff's right to due process was not violated when the school district informed him that his teaching contract would not be renewed without giving him an opportunity for a hearing.[30]

Schultz filed a civil rights action against the Denver Public School System alleging that his public criticism of the school system's curriculum was the basis upon which the defendants changed his positive evaluation to a negative "do not rehire" evaluation which resulted in the nonrenewal of his contract. Schultz contended that this change in his evaluation was retaliatory and violative of his first amendment rights of freedom of expression and speech as well as violative of his rights to due process and equal protection of the law.

The trial court held Schultz's due process claims to be without merit and dismissed the cause of action.[31] On appeal, the Tenth Circuit affirmed the trial court's holding that Schultz did not have a property right in his employment since he did not have tenure,[32] and, therefore, his contract nonrenewal need not be preceded by a hearing since it was not predicated on his character.[33]

---

[29] No. 76-1389 (10th Cir. July 18, 1977).

[30] *Id.* at 6.

[31] *Id.* at 4.

[32] *Id.* at 6. Since there is no federal constitutional right to public employment, the issue of whether a teacher has a property right within the meaning of the fourteenth amendment must be determined by the law of the state where the teacher is employed. Powers v. Mancos School Dist. RE-6, 369 F. Supp. 648, 649 (D. Colo. 1973), *aff'd,* 539 F.2d 38 (10th Cir. 1976). According to the court, a nontenured teacher does not have a property right in his employment unless a legitimate objective expectancy of continued employment is reasonable, based upon implied agreements or statutory or administrative procedures governing nonrenewal of contracts. Weathers v. West Yuma Cty. School Dist. R-J-1, 530 F.2d 1335, 1337, 1338 (10th Cir. 1976).

[33] While recognizing that any reason assigned for dismissal of a teacher is likely to negatively reflect on his character, the court, in *Schultz,* held that only a dismissal "which assumes a constitutional magnitude is one which carries a stigma that seriously damages the individual's ability to obtain other employment opportunities." No. 76-1389 at 7. Using this test for determining whether a hearing was required prior to nonrenewal of Schultz's contract, the court determined that no such stigma attached in Schultz's case and that the issue was settled by Board of Regents v. Roth, 408 U.S. 564 (1972) wherein the Supreme Court stated that due process would accord an opportunity to refute charges where a person's good name, reputation, honor, or integrity is at stake. *Id.* at 573, *quoted at* No. 76-1389 at 7.

In regard to Schultz's first amendment claim, the Tenth Circuit held that because he did not have tenure, he had the burden of proving he was not rehired for constitutionally impermissible reasons, and that he had failed to meet this burden.[34]

III. Residency Requirements: Municipal Employee

In *Ousdahl v. Sanders*,[35] plaintiff's employment as a Lawrence, Kansas fireman was terminated pursuant to a city ordinance requiring the policemen and firemen of the city to maintain their residence within Lawrence city limits. Those who failed to do so would be discharged.

Ousdahl challenged the ordinance as being unconstitutional on three grounds: 1) "[I]t denies him the right to live where he chooses, presumably limiting his right to travel and associate, and yet maintain his employment;"[36] 2) it denies him equal protection; and 3) it denies him due process. The United States District Court for the District of Kansas held that the ordinance was constitutional. The Tenth Circuit affirmed.

Citing *McCarthy v. Philadelphia Civil Service Commission*,[37] the court stated that no constitutional right exists to allow one to continue living outside a city while maintaining employment with the city. Ousdahl could live outside the city limits—he was simply precluded from working for the Lawrence police or fire department if he chose to do so.

Having concluded that no fundamental constitutional right was involved,[38] the court turned to an examination of the "rational relationship" test to determine whether Ousdahl's equal protection rights had been violated. The ordinance itself stated two city interests which the ordinance was supposed to further: improved community relations between the policemen and firemen and the citizens of Lawrence, and greater protection for the public in case of emergency. The court held that the ordi-

---

[34] No. 76-1389 at 4-5.

[35] No. 76-2111 (10th Cir. July 13, 1977).

[36] No. 76-2111 at 3.

[37] 424 U.S. 645 (1976).

[38] Therefore, the "compelling governmental interest" test did not have to be satisfied. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

[39] *E.g.* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

nance's residency requirement bore a rational connection to these legitimate city interests, and thus, the equal protection test was satisfied.

The court held that Ousdahl had failed to establish a cognizable liberty or property interest in his employment. The city commission could fire him at will, and Ousdahl's claim amounted to nothing more than a "unilateral expectancy of continued employment."[40] Thus, under the principles of *Board of Regents v. Roth*,[41] and *Perry v. Sindermann*,[42] no pre-termination right to notice and hearing existed.

IV. FIRST AMENDMENT: PRISON INMATES

In *Green v. Director, Colorado State Department of Corrections*,[43] a prisoner, incarcerated in the Missouri State Penitentiary serving a Missouri sentence, requested that he be transferred to the Colorado State Penitentiary, presumably to be near his relatives and to prepare himself for post-release residency in Colorado. The Colorado authorities refused to accept the transfer.

Green claimed in his suit under 42 U.S.C. § 1983 that his transfer was denied due to his exercise of his rights of free speech, of freedom of religion,[44] and of freedom to petition the government for redress of grievances.[45] His action was dismissed by the United States District Court for the District of Colorado. The Tenth Circuit affirmed.

The court held that "[n]on-transfer of a prisoner under a discretionary provision of the Interstate Correction Compact does not infringe upon the constitutional rights of the appellant."[46] Green could continue to exercise at the Missouri State Penitentiary all the rights which one possesses by virtue of the Constitution. There is no additional constitutional right to have granted

---

[40] No. 76-2111 at 5.

[41] 408 U.S. 564 (1972). "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Id.* at 569.

[42] 408 U.S. 593 (1972).

[43] No. 76-2014 (10th Cir. Apr. 26, 1977).

[44] Green was "assertedly also a minister of the Human Awareness Universal Life Church, basic tenets of which include, in his view, that prisoners are special Christians and support for a policy of conjugal visits for prisoners." No. 76-2014 at 2.

[45] Green was cited as "a notorious and prolific jailhouse lawyer." *Id.*

[46] *Id.* at 3.

a requested transfer to the penal institution of another state. The dismissal of the action was thus proper. The court distinguished those cases wherein prison authorities affirmatively take actions which raise questions of constitutional magnitude, for example, the imposition of solitary confinement,[47] or the unrequested transfer to another state.[48]

The Tenth Circuit saw the case of *Kennedy v. Meachem*[49] as raising some fundamental constitutional questions. Weldon M. Kennedy, Richard B. Reeder, and Robert R. Collingwood were inmates of the Wyoming State Penitentiary. The three were followers of Satanism. They brought this civil rights action, alleging that the defendant prison authorities had violated the plaintiffs' first amendment rights by restricting the practice of their religion.[50] The United States District Court for the District of Wyoming dismissed the complaint.[51] Plaintiffs appealed.[52] The Tenth Circuit vacated the judgment of dismissal and remanded the cause for further proceedings.[53]

At issue was whether the dismissal was proper. The defendants argued in favor of its propriety, claiming that the complaint failed to establish that Satanism is a religion and thus no first amendment protection was due, and that, in any case, there were reasonable restrictions on the *practice* of Satanism only, with no restriction on the plaintiffs' *belief* in it.

The court first pointed out that the lower court had not held that Satanism was not a religion. Rather, it had concluded from its analysis of the complaint that there were reasonable restrictions on the practice of Satanism, "apparently either accepting

---

[47] *E.g.*, Cruz v. Beto, 405 U.S. 319 (1972) (Buddhist prisoner alleged that he was put in solitary confinement as a penalty for sharing his religious materials with other inmates).

[48] *E.g.*, Fajariak v. McGinnis, 493 F.2d 468 (9th Cir. 1974) (Black Muslim and Christian Scientist prisoners alleged that their transfers resulted from their religious activities).

[49] 540 F.2d 1057 (10th Cir. 1976).

[50] The allegations included denial of plaintiffs' right to have certain ritual items in their cells; prohibition of plaintiffs' posting of religious information; refusal of plaintiffs' request to have a religious study group; discrimination against Satanist inmates in assignment of employment; and general harassment of plaintiffs. *Id.* at 1059.

[51] 382 F. Supp. 996 (D. Wyo. 1974).

[52] The district court had granted defendants' motion to proceed in forma pauperis, but had ordered dismissal of the case after denying defendant's motions for appointment of counsel and disqualification of the presiding district judge. Defendants appealed all three rulings. 540 F.2d at 1059.

[53] *Id.* at 1062.

the allegations that for constitutional purposes a religion was involved, or reasoning that even assuming that a religion was involved the restrictions were permissible.[54]

The Tenth Circuit admonished that the dismissal of the case, without a responsive pleading or an evidentiary hearing, precluded any attempts by the parties to prove that Satanism is or is not a religion within the meaning of the first amendment.[55]

The court acknowledged that the practice of one's religion is subject to certain restrictions,[56] and that the fact that these plaintiffs were prison inmates bore consideration, in that "[w]hile in custody inmates have only such rights in practice of their religion as can be exercised without impairing requirements of prison discipline."[57] But the court pointed out that the dismissal precluded any arguments that the restrictions imposed by the defendants were or were not "taken as necessary security or control measures in the prison."[58]

The Tenth Circuit, in remanding the case, instructed the lower court on the balancing test it would be required to apply if it found on remand that a religion was involved and that restrictions on the exercise of such religion were being imposed. The district court would have to "determine whether any incidental burden on fundamental First Amendment rights is justified by a compelling state interest in the regulation of prison affairs, within the State's constitutional power."[59]

The court in *Kennedy* was properly responsive to the claims of the inmates. There is no inconsistency in its treatment of Green's case, the realization being clearly expressed in *Green* that

---

[54] *Id.* at 1060.

[55] The court pointed out that the plaintiffs might be able to prove that Satanism is entitled to first amendment protection, citing Remmers v. Brewer, 494 F.2d 1277 (8th Cir. 1974), *cert. denied*, 419 U.S. 1012 (1974), (upheld a finding that the Church of the New Song was a religion within the meaning of the first amendment) and United States v. Ballard, 322 U.S. 78 (1944), (discussed the "I Am" movement in terms of the first amendment).

[56] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403 (1963); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

[57] 540 F.2d at 1061. *See* Long v. Harris, 332 F. Supp. 262, 270 (D. Kan. 1971), *aff'd*, 473 F.2d 1387 (10th Cir. 1973).

[58] 540 F.2d at 1061.

[59] *Id. See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403 (1963); Hoggro v. Pontesso, 456 F.2d 917, 919 (10th Cir. 1972); Barnett v. Rodgers, 410 F.2d 995, 1000-01 (D.C. Cir. 1969).

prisoners as well as other persons possess constitutional rights, and whether such rights exist depends on the factual setting of the case.[60]

V. EQUAL PROTECTION: GUEST STATUTE

In *Neu v. Grant*,[61] a gratuitous passenger in an automobile which was involved in an accident was injured and brought suit for damages against the operator of the vehicle in which she was traveling. The jury verdict and judgment of the United States District Court for the District of Wyoming denied her recovery. Neu appealed.

Neu attacked the instruction given by the lower court to the jury that she was a guest in the automobile in which she was traveling, and therefore, under the Wyoming guest statute,[62] she had the burden of proving that the operator of said vehicle was grossly negligent. Neu challenged the constitutionality of the statute, mainly on the ground that it denied her equal protection,[63] guaranteed by the Federal Constitution[64] and the Wyoming Constitution. The Tenth Circuit affirmed the jury verdict and judgment.[66]

The main obstacle to a successful argument by Neu was the decision in *Silver v. Silver*,[67] wherein the United States Supreme Court upheld, against an equal protection challenge, the Connecticut guest statute which required a showing by the guest that the operator of the automobile intentionally caused the accident

---

[60] No. 76-2014 (10th Cir., Apr. 26, 1977).

[61] 548 F.2d 281 (10th Cir. 1977).

[62] WYO. STAT. § 31-5-1116 (1977).

[63] Neu's case was also based on due process grounds in that the statute "deprives [her] of any opportunity to recover damages for her personal injuries from those responsible for their infliction, which does not lend any reasonable furtherance of any object protective of the public welfare . . . ." 548 F.2d at 283. *See* U.S. CONST. amend. XIV; WYO. CONST. art. I, § 6.

Neu also claimed that "by effectively denying [her] recovery of money damages, she is barred from the 'courthouse door' . . . ." 548 F.2d at 283. *See* WYO. CONST. art. I, § 8; WYO. CONST. art. 10, § 4.

The above claims were not specifically discussed by the Tenth Circuit.

[64] U.S. CONST. amend. XIV.

[65] WYO. CONST. art. I, § 34; WYO. CONST. art. III, § 27.

[66] Also dealt with in this decision was whether Neu had adequately preserved for appellate consideration her objections to the statute. The court's analysis of this issue is not within the scope of this note.

[67] 280 U.S. 117 (1929).

or operated the automobile with reckless disregard for the rights of other persons. The court in *Silver* focused on the argument that the statute created an unconstitutional distinction between gratuitous passengers in automobiles and those in other kinds of vehicles, rather than an attack based on the distinction between gratuitous passengers and those who pay. The conclusion was that, "It is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs."[69]

Neu argued that *Silver* should be cast aside.[70] There was indeed substantial authority for her plea.[71] On the other hand, there was a good deal of case law on the other side,[72] and the court in *Neu* pointed out that the United States Supreme Court had summarily dismissed an appeal involving an equal protection attack on the constitutionality of the Utah guest statute as not presenting a substantial federal question,[73] such decision constituting an adjudication on the merits, binding on state and lower federal courts.[74]

The court proceeded to discuss the United States Supreme Court's reaffirmance of *Silver* in *Sidle v. Majors*,[75] although the

---

[68] This was not made clear in the *Neu* opinion. *See* 548 F.2d at 284; Brown v. Merlo, 8 Cal. 3d 855, 863-64 n.4, 506 P.2d 212, 217-18 n.4, 106 Cal. Rptr. 388, 393-94 n.4 (1973).

[69] 280 U.S. at 123-24.

[70] Neu's opening brief on appeal stated, *inter alia*, that:

> Factors, such as the great lengths of time that have passed since that decision and the very limited extent of the Supreme Court's analysis, made for disposal of the case, which is a relic that cannot stand in the way of contemporary understanding of the equal protection clause of the 14th Amendment as provided in such cases as . . . [citations omitted]. Indeed Silver, as the only real obstacle to invalidation, is a weak basis on which to found equal protection.

548 F.2d at 284.

[71] *See, e.g.*, Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973); Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974); Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974); Laakonen v. Eighth Judicial Dist., 91 Nev. 506, 538 P.2d 574 (1975); Johnson v. Hassett, 217 N.W. 2d 771 (N.D. 1974); Primes v. Tyler, 43 Ohio St. 2d 195, 331 N.E. 2d 723 (1975).

[72] *See, e.g.*, Richardson v. Hansen, 186 Colo. 346, 527 P.2d 536 (1974); Justice v. Gatchell, 325 A.2d 97 (Del. 1974); Keasling v. Thompson, 217 N.W. 2d 687 (Iowa 1974); Behrns v. Burke, 229 N.W. 2d 86 (S.D. 1975).

[73] Cannon v. Oviatt, 419 U.S. 810, *dismissing appeal from* 520 P.2d 883 (Utah), *rehearing denied*, 419 U.S. 1060 (1974).

[74] *See* Hicks v. Miranda, 422 U.S. 332, 344 (1975).

[75] 429 U.S. 945 (1976), *denying cert. to* 536 F.2d 1156 (7th Cir.). The Seventh Circuit was convinced that the Indiana guest statute was unconstitutional but, based on *Cannon*

dissenters expressed regret that "a statute [the Indiana guest statute] whose constitutionality is patently open to serious debate"[76] had to be upheld, and would have granted the petition for certiorari "so that [they might] give plenary consideration to the constitutional issue that has stirred such conflict among state and lower federal courts."[77]

In conclusion, the Tenth Circuit felt compelled to follow *Silver,* and "[t]hus, Neu's federal constitutional challenges under the Fourteenth Amendment to the United States Constitution [were] foreclosed."[78] The *Neu* opinion once again points out some of the strong arguments which can be made against *Silver,* and at least hints that we have not heard the last of the conflict surrounding the constitutionality of guest statutes.

VI. DUE PROCESS: SOCIAL SECURITY

In *McGrath v. Weinberger,*[79] the Tenth Circuit held that due process does not require that prior notice and an opportunity for a hearing be afforded Social Security beneficiaries who are determined to be incapable of managing their benefits.

McGrath's sister was appointed to serve as representative payee for his Social Security benefits after he was released from a mental hospital and a determination made by the Social Security Administration that he was incapable of managing his benefits. In a class action suit, McGrath claimed that certain Social Security provisions[80] were unconstitutional because they violated the due process clause by allowing the appointment of a representative payee without affording the beneficiary prior notice and an opportunity to contest the determination that the beneficiary is incapable of managing his own benefits.

The trial court applied a balancing-of-interests standard of review and concluded that prior notice and an opportunity to be heard were not required by the due process clause because the

---

and *Hicks,* felt required to affirm the district court which had applied the statute to grant summary judgment to the driver of an automobile. 536 F.2d at 1159-60.

[76] 429 U.S. at 950 (Brennan, J., dissenting).

[77] *Id.* at 951 (Brennan, J., dissenting).

[78] 548 F.2d at 285.

[79] 541 F.2d 249 (10th Cir. 1976).

[80] The provisions challenged were 42 U.S.C. § 405(j) (1976) and 20 C.F.R. 404.1601, (1970) both of which govern the authority and procedures of the Social Security Administration to make a beneficiary's payments to a representative payee.

denial of McGrath's right to manage his own benefits was not such a grievous loss that it outweighed the governmental interest involved.[81] McGrath appealed, contending that the trial court erred in using the balancing-of-interests standard of review.

The Tenth Circuit affirmed the trial court's holding and stated that the issue was settled by *Mathews v. Eldridge*,[82] a recent United States Supreme Court decision, where the balancing-of-interests test was recognized as the appropriate standard of review for due process claims.[83]

In weighing the competing interests of the parties, the Tenth Circuit found the government's interest substantial since oral hearings in capability-determination matters would involve considerable time and expense. The court affirmed the trial court's holding that the governmental interest outweighed McGrath's loss of the right to manage his own benefits. Underlying the court's application of the balancing-of-interests test were the facts that there are procedures available for reviewing such a determination and that the Social Security Administration modi-

---

[81] 541 F.2d at 253.

[82] 424 U.S. 319 (1976). In light of *Eldridge*, the Tenth Circuit in *McGrath* stated that it would be unwarranted for it to hold that due process requires prior notice and an opportunity for a hearing where there has been no termination of benefits. 541 F.2d at 253. The Tenth Circuit relied upon the Supreme Court's distinction in *Eldridge* between substance and process. The Supreme Court held that Eldridge's substantive claim to a pre-deprivation hearing as a matter of constitutional right must fail since he could obtain full relief at a post-deprivation hearing. In regard to the procedural issue of jurisdiction, however, the Supreme Court recognized that the termination of Eldridge's benefits did satisfy the requirements of finality sufficiently to constitute a final decision reviewable by the Court. *Id.* at 331 n.11.

[83] The Supreme Court stated in Eldridge that due process generally requires the consideration of three factors:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

It is well recognized that the balancing-of-interests test is the appropriate standard of review in procedural due process claims. *See generally* Comment, *Irrebuttable Presumptions as an Alternative to Strict Scrutiny: From Rodriguez to LaFleur*, 62 GEO. L.J. 1173, 1176 (1974). Stanley v. Illinois, 405 U.S. 645 (1972) and Goldberg v. Kelly, 397 U.S. 254 (1970) are examples of the Supreme Court's application of procedural due process balancing by which the Court weighs governmental interests such as administrative efficiency and economy against the importance of the interest asserted by the individual.

fied its procedures subsequent to the filing of this suit to require a ten-day notice of a proposed payee action.

VII. Color of State Law

The issue of acting under color of state law came before the Tenth Circuit twice during 1977. In *Taylor v. Nichols*[84] the court of appeals upheld the district court's ruling that the defendants in the section 1983 action were all either immune from civil suit or had not been acting under color of state law. *Taylor* involved a civil rights action, brought by police officer Brian Taylor, which grew out of the apprehension and detention of Michael Allen. When Allen refused to get in the police car, Officer Taylor put Allen in by force. A subsequent police internal affairs investigation exonerated Officer Taylor, but Michael Allen's mother filed criminal assault and battery charges against the officer. Allen's attorney, Latimer, was later appointed special prosecutor after the county attorney refused to file criminal charges against Officer Taylor. Latimer prosecuted the assault and battery charges against Officer Taylor under his special appointment by the county attorney and three county commissioners. Officer Taylor was acquitted of the criminal charges and subsequently brought the instant section 1983[86] civil rights action against everyone involved in his assault trial. The district court granted a summary judgment for all the defendants.

The court of appeals considered whether the district court erred in dismissing the claims against all the defendants. One by one the defendants were held to have been either immune or acting under color of state law, the vital ingredient necessary to support a section 1983 civil rights action. Michael Allen and his father were held not to have acted under color of state law because their acts of filing a claim and testifying at the trial did not constitute state action.[87] Latimer, the special prosecutor, was held to be immune from a civil suit for damages under section 1983. The court, quoting *Imbler v. Pachtman*,[88] declined to draw a distinction between a special prosecutor and an official prosecu-

[84] 558 F.2d 561 (10th Cir. 1977).

[85] *Id.*

[86] 42 U.S.C. § 1983 (1970).

[87] Filing a claim and testifying at trial are private acts. Grow v. Fisher, 523 F.2d 875 (7th Cir. 1975).

[88] 424 U.S. 409 (1976).

tor, stating that Latimer was entitled to the same protection as the permanent prosecutor.[89] The judge in the assault case was "unquestionably entitled to absolute immunity."[90] The county commissioners' involvement entitled them to qualified immunity absent a showing by plaintiff that they had acted in a manner which disqualified them from claiming immunity.[91]

In upholding the district court's ruling for the defendants, the court of appeals additionally declared that plaintiff Taylor's other allegations under sections 1985 and 1986 must fail because he "failed to make even a minimal showing that he was denied equal protection or equal privileges and immunities guaranteed by federal law . . . ."[92]

The Tenth Circuit decided in *Mondragon v. Tenorio*[93] that there had been no state involvement in the leasing of the common lands of a New Mexico land grant to bring the leasing under color of state law. The action, asserted under 42 U.S.C. § 1983,[94] urged that appellants, inhabitants of Anton Chico land grant, were discriminated against in the leasing of common lands in a community land grant originally made in 1822. The defendants were members of the Board of Trustees of Anton Chico Land Grant who were authorized under New Mexico statutes[95] to issue leases of the common lands. The grant of powers to the trustees included the power to control and manage the land grant.[96]

The issue before the court of appeals was whether the trustees were acting under color of state law in leasing the common lands in an allegedly discriminatory manner. The district court concluded that there was no such color of state law and the court of appeals affirmed. The Tenth Circuit ruled that the state statute was the limit of the state involvement in the grant and that its scope was narrow. No governmental functions were contemplated by the statute nor was there any ongoing relationship[97]

---

[89] 558 F.2d at 566.
[90] *Id.*
[91] 558 F.2d at 567.
[92] 558 F.2d at 568.
[93] 554 F.2d 423 (10th Cir. 1977).
[94] 42 U.S.C. § 1983 (1970).
[95] N.M. STAT. ANN. § 8-1-1 (1953).
[96] N.M. STAT. ANN. § 8-1-1 (1953).
[97] See Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

which would bring the actions of the trustees under color of state law. The Tenth Circuit further concluded there was no legislative ratification of the acts of the trustees and that there was "shown no state action and no state involvement in a private entity"[98] which would bring it under color of state law.

VIII. THE SUPREMACY CLAUSE

In *Los Alamos School Board v. Wugalter*[99] the Los Alamos, New Mexico, School Board challenged the constitutionality of subsection 19(G) of the New Mexico Public School Finance Act[100] on the ground that it conflicted with the federal Atomic Energy Community Act (AECA) of 1955.[101] Defendants were the New Mexico state education officials who administer funds to the state school districts. Because Los Alamos received education funds under the AECA, it received state education funds expressly under subsection 19(G) of the School Finance Act.[102] The School Finance Act provided that Los Alamos would come under the general school funding formula only if received no AECA funds in a given year. This provision resulted in less state education funding for Los Alamos and thus "Los Alamos [was] singled out for special treatment merely because it [received] AECA funds."[103] Los Alamos did not contend that New Mexico had denied it equal protection by virtue of the special statutory treatment but instead contended that subsection 18(G) was unconstitutional under the supremacy clause[104] because it conflicted with the federal Atomic Energy Community Act.[105]

The issue before the Tenth Circuit was whether the intent of Congress was to prohibit New Mexico from funding Los Alamos schools in a different manner solely because they received federal funds under AECA. Indicating that supremacy challenges must be decided on a case-by-case basis,[106] the court of appeals went

---

[98] 554 F.2d 423, 426 (10th Cir. 1977).

[99] 557 F.2d 709 (10th Cir. 1977).

[100] N.M. STAT. ANN. § 77-6-19(F) (1953). The challenged subsection is now codified as N.M. STAT. ANN. § 77-6-19(G) (Supp. 1975) and is referred to as subsection 19(G) in text.

[101] 42 U.S.C. §§ 2301-2394 (1970).

[102] N.M. STAT. ANN. § 77-6-19(G) (Supp. 1975).

[103] 557 F.2d 709, 711 (10th Cir. 1977).

[104] U.S. CONST. art. VI, cl. 2.

[105] 42 U.S.C. §§ 2301-2394 (1970).

[106] 557 F.2d at 712.

through a two-step process of first ascertaining the construction of the two statutes and then reaching and determining the constitutional question of whether they are in conflict. Because the New Mexico statute had not been construed authoritatively, the Tenth Circuit relied on the district court's description of the Public School Finance Act as an "equalization formula designed to eliminate adverse education effects caused by disparities in financial resources available to individual school districts."[107] The AECA authorized funds for assistance in operating atomic energy communities with the purpose of providing for the "maintenance of conditions which will not impede the recruitment and retention of personnel essential to the atomic energy program."[108] There was no showing that New Mexico's school district funding level impeded the recruitment or retention of essential personnel in the community of Los Alamos. In justifying its reversal of the district court, the court of appeals noted first that "school finance laws should be entitled to respect"[109] and second that they had been directed to no evidence of any congressional "intent to limit the manner in which states give education aid to atomic energy communities . . . ."[110] Thus, the Tenth Circuit held that since subsection 19(G) did not frustrate the effectiveness of the AECA, subsection 19(G) did not offend the supremacy clause and was therefore constitutional.

James E. Bosik
Margaret N. Dillon
Bette A. Lingis
Karen A. Perez

---

[107] 557 F.2d at 713.
[108] 42 U.S.C. § 2303(a) (1970).
[109] 557 F.2d at 715 (citing San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973)).
[110] 557 F.2d at 715.