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Constitutional Law--Statutory Filling Fee Applied to Indigent Person as a Condition Precedent to Discharge in Bankruptcy Held Violative of Equal Protection

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CONSTITUTIONAL LAW—STATUTORY FILING FEE APPLIED TO INDIGENT PERSON AS A CONDITION PRECEDENT TO DISCHARGE IN BANKRUPTCY HELD VIOLATIVE OF EQUAL PROTECTION

*It was a wise man who said that there is no greater inequality than the equal treatment of unequals.**

In *In re Smith*[1] a three-judge federal district court held that a statutory requirement compelling an indigent person filing a petition in bankruptcy to pay the filing fee, as a condition precedent to being entitled to an order of discharge,[2] violated equal protection.

In support of her petition to file in forma pauperis, the petitioner made both statutory and constitutional arguments. The court rejected the statutory argument which was based on the contention that since the Bankruptcy Act did not specifically prohibit such petitions and in view of its remedial purpose[3] the Act should be construed to permit application of the federal in forma pauperis statute.[4] In its opinion, the court noted that Congress had repealed in forma pauperis bankruptcy proceedings in 1946,[5] and that from the beginning, the bankruptcy system was expected to be self-supporting.[6]

* Frankfurter, Felix in Dennis v. United States, 339 U.S. 162, 184 (1950).

1. 323 F. Supp. 1082 (D. Colo. 1971). Because petitioner's memorandum raised questions concerning the proper construction and the constitutionality of the Bankruptcy Act, the court gave notice to the Attorney General of the United States, in accordance with 28 U.S.C. 2403 (1964). Thereafter, the United States entered the proceeding as amicus curiae and filed a brief in opposition to the motion.

2. 11 U.S.C. 32 (b), (c)(8), 68 (c)(1), 95 (g)(1964).

3. *See* Stellwagen v. Clum, 245 U.S. 605, 617 (1917). "The federal system of bankruptcy is designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts. . . . Our decisions lay great stress upon this feature of the law—as one not only of private, but of public interest in that it secures to the unfortunate debtor who surrenders his property for distribution, a new opportunity in life."

4. 25 U.S.C. 1915 (1964).

5. 11 U.S.C. 68 (a)(1964).

6. 323 F.Supp. 1082, 1085 (D. Colo. 1971). *See also* Note, *Bankruptcy Proceedings In Forma Pauperis,* 69 COLUM. L. REV. 1203, 1206 (1969).

The court found, therefore, that Congress intended to abolish in forma pauperis proceedings in bankruptcy and rejected the petitioner's claim that she was entitled to file under the federal in forma pauperis statute:

> It would be unreasonable to conclude that Congress intended to grant through the earlier *in forma pauperis* [sic] statute what it specifically denied in a later version of the Bankruptcy Act or that Congress intended to leave room for the judiciary to create a common law right. The statutory guide to construction that the specific governs the general seems to us most likely to reflect what Congress intended.[7]

Thus, according to the court in *Smith*, there is no statutory right to file in forma pauperis in bankruptcy proceedings, nor is there any common law right to such a proceeding.

The court did, however, rule that the filing fee requirement, as a condition precedent to obtaining an order of discharge, was violative of the fifth amendment right of due process. In so holding, the court noted that the fifth amendment does not include the equal protection clause to be found in the fourteenth amendment, applicable only to the states.[8] Even so the court recognized that fifth amendment due process, which is applicable to the federal government, does include an equal protection principle and based its holding on the conclusion that the federal Bankruptcy Act's filing fee requirement denied to indigents the equal protection of the laws and was thus violative of the fifth amendment.[9]

THE DUE PROCESS CLAUSE AND THE INDIGENT

In the recent Supreme Court case of *Boddie v. Connecticut*,[10] Mr. Justice Harlan, speaking for the Court, said:

> . . . [G]iven the basic position of the marriage relationship in this society's heirarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit the State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.[11]

In basing its decision on a denial of due process, the Court noted that the state exercised a complete monopoly as

7. 323 F. Supp. 1082, 1085 (D. Colo. 1971).

8. *Id. See also* Boyden v. Commissioner, 441 F.2d 1041, 1044 n.5 (D.C. Cir. 1971) and cases cited therein.

9. 323 F. Supp. 1082, 1085 (D. Colo. 1971).

10. 401 U.S. 371 (1971).

11. *Id.* at 374.

to the legitimate means of resolving private disputes as they relate to the dissolution of allegedly untenable marriages.[12]

> Thus, although they assert here due process rights as would-be plaintiffs, we think appellants' plight, because resort to state courts is the only avenue to dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend its interest in court.[13]

It is well established that due process requires, absent a countervailing state interest of overriding significance, that persons forced to settle their disputes through the judicial process must be given a meaningful opportunity to be heard.[14] The requirement is not one of an actual hearing on the merits, but rather of an opportunity to be heard at a meaningful time and in an appropriate manner.[15] "In short, 'within the limits of practicality,' *Mullane v. Central Hanover Bank & Trust Co.*, . . . a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause."[16] Such opportunity for a hearing must be afforded before the individual is deprived of any significant property interest, except where some valid government interest is at stake that justifies postponing the hearing until after the event.[17]

It is also well established that a statute, valid on its face and enacted in the exercise of some legitimate state power, may be held constitutionally invalid as applied to a specific set of facts when it operates to deprive an individual of a constitutionally protected right. "[T]he right to a meaningful

12. *Id.* at 376.

13. *Id.*

14. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

15. *Id. See also* Armstrong v. Mango, 380 U.S. 545, 552 (1965). What the Constitution does require "is an opportunity . . . granted at a meaningful time and in a meaningful manner" for a hearing appropriate to the nature of the case.

16. 401 U.S. 371, 379 (1971).

17. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961). Deprivation of right of access to military installation for security reasons. Ewing v. Mytinger & Casselbury, Inc., 339 U.S. 594 (1950). Administrative decision to remove misbranded articles from retail outlets (multiple seizures) based on a finding of probable cause, without a hearing, held not to be violative of due process. *See also* Fakey v. Mallonee, 332 U.S. 245 (1947); Bowles v. Willingham, 321 U.S. 503 (1944); and Yokus v. United States, 321 U.S. 414 (1944).

opportunity to be heard . . . must be protected against denial by particular laws that operate to jeopardize it for particular individuals."[18] In *Mullane* the Court held that in a proceeding for judicial settlement of accounts by the trustee of a common trust fund, statutory notice by newspaper publication, while sufficient as to those beneficiaries whose interests or whereabouts could not with due diligence be ascertained, was insufficient and did not satisfy the requirements of due process as to known beneficiaries of a known place of residence.[19]

By analogy, the Court, in *Boddie* reasoned as follows:

> Just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard. The State's obligations under the fourteenth amendment are not simply generalized ones; rather the State owes to each individual that process which, in light of the values of a free society can be characterized as due.[20]

Counsel for the State of Connecticut, the appellee in *Boddie,* argued that the state had a substantial interest in the use of the fee and cost requirements in question to prevent frivolous litigation and to allocate scarce judicial resources. The Court, however, found none of these considerations sufficient to override the interest of the appellants in having access to the only legitimate means of dissolving their allegedly untenable marriages. The Court further pointed out that there was no logical connection between a litigant's assets and the seriousness of his motives in bringing suit, and that other alternatives exist to fees and cost requirements as a means of conserving the court's time and protecting parties from frivolous litigation.[21] Returning to a familiar theme, the court concluded that an individual's wealth should not determine his ability to gain access to the state's judicial machinery particularly when there exist no private law alternatives. In rejecting the state's asserted interest in its fee and costs requirement as a method of cost recoupment, the

18. 401 U.S. 371, 379 (1971).

19. 339 U.S. 306 (1950). *See also* Corey v. Town of Somers, 351 U.S. 141 (1956), wherein notice by publication was held not to satisfy the requirements of due process where the defendant was a known incompetent.

20. 401 U.S. 371, 380 (1971).

21. *Id.* at 381. For example: penalties for false pleadings or affidavits.

Court relied upon *Griffin v. Illinois*,[22] wherein the cost of a transcript beyond the means of the indigent blocked access to the appellate judicial process. In *Griffin* the Court rejected the state's contention that its interest in the financial integrity of the system which provided the transcript service justified the imposition of the statutory fee on criminal appellants, even if in some cases such imposition resulted in the denial of access to the appellate process.

In concluding, the Court in *Boddie* attempting to limit the holding to what the Court perceived to be the determinative factors in its reasoning, said:

> [W]e do not decide that access for all individuals is, in all circumstances, guaranteed by the Due Process Clause of the fourteenth amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter.[23]

Thus, in basing its decision on a denial of due process, the Court was constrained to find, first, that marriage is "a fundamental human relationship" in our society and, second, that there is a constitutionally significant distinction between the state's monopoly of the judicial process and attendant enforcement machinery as it applies to divorce actions, and as it applies to any other action arising under state or federal law.

THE EQUAL PROTECTION CLAUSE AND THE INDIGENT

Both Mr. Justice Douglas and Mr. Justice Brennan, in concurring opinions in *Boddie*, expressed dismay at the grounds upon which the court based its decision. The two Justices felt that the cases decided upon the equal protection principles developed by *Griffin* and its progeny seemed more analogous to the *Boddie* case than the due process grounds used by the court in reaching its decision in *Boddie*.[24] In

22. 351 U.S. 12 (1956).

23. 401 U.S. 371, 382 (1971).

24. *See* Smith v. Bennett, 365 U.S. 708 (1961), wherein the Court held that requiring indigents to pay filing fees before a writ of habeas corpus could be considered in a state court was invalid under the Equal Protection Clause. *See also* Burns v. Ohio, 360 U.S. 252 (1959), wherein the Court invalidated a statute providing that a state supreme court would consider cases only if the filing fee had been paid.

Boddie Connecticut had provided statutory requirements for obtaining a divorce, one of which was the payment of costs and notice fees. The result of this requirement was obvious—the more affluent could obtain a divorce, the indigent could not. To Justices Douglas and Brennan, *Boddie* clearly presented a factual situation to be decided under the Equal Protection Clause. Mr. Justice Douglas further criticized the Court's reasoning by pointing out that "whatever residual element of substantive law the Due Process Clause may still have [*Thompson v. Louisville,* 362 U. S. 199 (1960)] it essentially regulates procedure."[25] Also, the historical due process test of whether the right claimed is "of the very essence of a scheme of ordered liberty"[26] has proved to be highly subjective and dependent upon the idiosyncracies of individual judges.[27]

While it is true that the scope of the Equal Protection Clause is not definable with exact precision, rather definite guidelines have been developed. Several classifications have been recognized as invidiously discriminatory: *race*[28] is one, *aliens*[29] another, *religion*[30] another, and *poverty*[31] still another. In *Boddie* the invidious discrimination was based on one of these guidelines—*poverty.* Thus, Mr. Justice Douglas felt that:

> Just as denying further judicial review in *Burns* and *Smith,* appellate counsel in *Douglas* and a transcript in *Griffin* created an invidious distinction based on wealth, so too does the making of grant or denial of a divorce to turn on the wealth of the parties. Affluence does not pass muster under the Equal Protection Clauses for determining who must remain married and who shall be allowed to separate.[32]

DOES THE ANALYSIS AFFECT THE RESULT?

Thus the debate continues as to how the Court will expand the indigent's opportunities to participate more fully in our

25. 401 U.S. 371, 384 (1971).

26. Palko v. Connecticut, 202 U.S. 319, 325 (1937).

27. *See* Adkins v. Children's Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); and Lockner v. New York, 198 U.S. 45 (1905).

28. McLaughlin v. Florida, 379 U.S. 184 (1964). Stranden v. West Virginia, 100 U.S. 303 (1880).

29. Takahashi v. Fish & Game Comm'n, 334 U. S. 410 (1948).

30. Sherbert v. Verner, 374 U.S. 398 (1963).

31. Griffin v. Illinois, 351 U.S. 12 (1956).

32. 401 U.S. 371, 386 (1971). Cites for the cases noted in the excerpt are more fully set out as follows: Smith v. Bennett and Burns v. Ohio note 24 *supra*; Griffin v. Illinois note 22 *supra;* and Douglas v. California, 372 U.S. 353 (1963).

society. Some say that the end of the equal protection road is the egalitarian redistribution of wealth,[33] while others fear that the due process approach will never effectively insure the indigent's rights to full participation in a consumer oriented society.[34]

The question that immediately comes to mind is, what is the real difference between the two approaches or is there any? Upon examination of the due process approach as formulated by Mr. Justice Harlan, one of the strongest critics of the "new" equal protection doctrine, one finds that his formulation is virtually identical to the equal protection approach he so vigorously disdained. Harlan's due process analysis of discriminatory legislation focuses on "the rationality of the connection between legislative means and purposes, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen."[35] Thus, the crucial question for Harlan became the arbitrariness of the classification, which is very much an equal protection kind of question. Harlan maintained the presumption of legislative rationality, but would have given special scrutiny to legislation involving a "basic liberty." This approach sounds very much like the "suspect criteria" and "compelling governmental interest" aspect of the equal protection approach, and, therefore, just as susceptible to objection as being too subjective and subject to the whims of individual judges in determining what are fundamental rights as the test Harlan attacked. It would seem that the determination of a "basic liberty" would be equally subjective and subject to the whims of individual judges as would the determination of a "fundamental right."[36] On the other hand, Justice Harlan's list of basic liberties was apparently a completed list, to be found in the Bill of Rights

33. *See Michelman, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

34. *See* Boddie v. Connecticut, 401 U.S. 371, 383-86 (1971) (Douglas, J. concurring).

35. Williams v. Illinois, 399 U.S. 235 (1970).

36. Mr. Justice Douglas made this very point in criticising the *Boddie* majority for basing its decision on due process grounds. 401 U.S. 371, 385 (1971). He further pointed out that some definite invidiously discriminatory classifications had already developed making equal protection analysis less subject to the idiosyncracies of individual judges than the due process approach.

and the precedents of the Court, and to that extent his approach would have an objectivity not to be found in the equal protection analysis. Therefore, although there appears to be little difference in principled analysis between the due process and the equal protection approaches, the extent to which the egalitarian ideal is realized may be limited by the due process approach, depending on the extent to which one accepts or rejects the notion of a definitive list of "basic liberties."

RECENT DEVELOPMENTS IN EQUAL PROTECTION ANALYSIS

The incorporation of the notion of fundamental rights, which has long been basic to due process analysis, in an equal protection case is well illustrated by the recent district court case of *In re Smith*.[37] In *Smith* the court noted that under traditional equal protection theory the Bankruptcy Act's filing fee requirement would be constitutional, because all persons, regardless of circumstances, were required to pay the same fee. Numerically equal and otherwise reasonable treatment which has the effect of denying something to the poor has not been considered in itself to work an invidious discrimination.[38] The Supreme Court in *Harper v. Board of Elections*[39] concluded that voting was a fundamental right which once granted could not be conditioned upon an individual's wealth or lack of it. The Court, in so holding, characterized voting as preservative of all rights. Implicit in the Court's holdings in *Harper*, *Griffin* and *Shapiro v. Thompson*[40] is the judgment that when a fundamental interest is involved, equal protection is denied even if performance of a service is conditioned upon payment of a fee which supports the provision of that service. Thus, what the Court requires when a "fundamental right" is involved is a kind of proportional equality. That is, absent some compelling or overriding state interest, the Court requires differences in the treatment of persons in accordance with differences in their circumstances

37. 323 F. Supp. 1082 (D. Colo. 1971).

38. *See* Dandridge v. Williams, 397 U.S. 471 (1970); *but see* Shapiro v. Thompson, 394 U.S. 618 (1969).

39. 383 U.S. 663 (1966).

40. 394 U.S. 618 (1969). Wherein the Court held that statutory prohibition of welfare benefits to residents of less than a year created a classification which constitutes an invidious discrimination denying them equal protection of the laws.

when equal treatment would result in a restriction upon the exercise of a fundamental right or interest by a legislatively, judicially or administratively created classification of people.

The court in *Smith* agreed with the government's contention that bankruptcy is not a fundamental right but viewed the crucial issue not simply as a constitutional right to the remedy of bankruptcy but rather, as access to the judicial process.[41] The court noted, that in holding the bankruptcy filing fee violative of equal protection, it disagreed with the result reached on the constitutional issue by the first circuit in *In re Garland.*[42] In *Garland,* however, the court viewed bankruptcy not as a court proceeding, but rather as a governmental service, for which the recipient should pay.

> If there were substantial injury involved, this financial loss might have to be suffered. We do not find such injury. A bankruptcy discharge is not a fundamental right . . . [W]hile this may basically be a question of meeting the expense of operating the system, we do not think it inappropriate for Congress to determine, from a social point of view, that one who is receiving the privilege of avoiding his past, and by hypothesis, legitimate debts, should experience some slight burden in return.[43]

The *Smith* court in assessing the constitutionality of requiring a fee for discharge in bankruptcy, viewed the resultant deniel of access to the court, in the case of indigent bankrupts, as a denial of a fundamental right.[44] Just as the Supreme Court in *Harper* found voting to be "fundamental" because it is preservative of all rights, it is patently obvious that access to the judicial process could as easily and justly be characterized as preservative of all rights and therefore fundamental.

41. 323 F. Supp. 1082, 1087 (D. Colo. 1971).

42. 428 F.2d 1185 (1970).

43. *Id.* at 1187. In its paternalistic moralizing to the consumer bankrupt in *Garland,* the first circuit appears to have completely overlooked the pratical effect of the filing fee requirement. Since the bankrupt gives up all of his non-exempt assets for distribution among his creditors, requiring a filing fee from such a bankrupt causes him to suffer no burden. In reality it only reduces the total fund available for distribution among his creditors, thus shifting this "burden" to the creditors. The effect of the decision in *Garland* is to deny to those bankrupts who do not have non-exempt assets sufficient to cover the mandatory filing fee, that which is granted as a matter of right to all other petitioners. Under the *Garland* ruling, the determinative test for granting a discharge in bankruptcy is whether or not one has sufficient assets to cover the filing fee.

44. 323 F. Supp. 1082, 1086 (D. Colo. 1971).

Filing fees, of course, were once much more common than they are today, and apparently they were never considered to impose too great a burden on the indigent's right to access to the court. In *Smith,* however, the Colorado District Court did not regard itself as bound by historical notions of what may or may not have been an unconstitutional burden upon access to court. In support for this position the court quoted from *Harper*:

> [T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.[45]

Even so, the court noted that the only other federal court to decide the issue presented was the first circuit in *In re Garland.* The *Smith* court was unable to accept the first circuit's analysis of the issue.

> We disagree that the interest of an assetless person is necessarily less important that the interest of one who has $50 for a filing fee and few, or no, assets to be divided among creditors. The petitioner in this case states as her reason for seeking bankruptcy a desire to escape the embarrassment and strain of creditor harassment, and we think it inappropriate and even impossible to second guess the precise nature of the interests and motives which Congress intended to protect.[46]

The *Garland* court and the government in *Smith* were concerned with the costs of requiring in forma pauperis petitions in bankruptcy. The *Smith* court noted that the federal government would be allowed to make a classification otherwise violative of equal protection if it showed a compelling interest in so doing, but pointed out that *Shapiro, Griffin* and *Harper*:

> . . . [S]uggest that the Supreme Court would not view fiscal integrity, or in the case of bankruptcy, Congress' intent that the system be self-supporting, as a compelling interest. Indeed, it is difficult to imagine that fiscal integrity could ever be described as a compelling interest in other than grave financial conditions.[47]

CRIMINAL-CIVIL DISTINCTIONS

It should be kept in mind that while many of the cases expanding the indigent's right of access to court have been

45. 383 U.S. 663, 669 (1966).
46. 323 F. Supp. 1082, 1090 (D. Colo. 1971).
47. *Id.* at 1088.

criminal cases, the equal protection clause, as well as the due process clause, applies to both civil and criminal cases. The technical distinction between civil and criminal cases should be of no importance in determining which constitutional rights will be protected. The Supreme Court has not felt bound by formal distinctions, but has applied the notions of equal protection to some proceedings traditionally considered civil.[48] The classic example of this application of equal protection analysis to civil matters is *Harper v. Board of Elections*,[49] wherein the Court concluded that a state law making payment of a fee a prerequisite to voting was violative of the Equal Protection Clause of the fourteenth amendment.

While there is a difference betwen civil and criminal cases in that the state is not always the moving party in civil cases, none of the equal protection cases have focused on the state's direct involvement in the case.

> Instead the Court focused on the deficiences of procedures whereby rich litigants received more . . . than did poor litigants. Court procedures which of themselves invidiously discriminate between rich and poor impair guarantees of equal justice which the Constitution was designed to protect.[50]

Thus, equal protection analysis should not be concerned with labels, but rather with the relative deprivations created or sanctioned by statute and court procedures.

Conclusion

There are many as yet unsolved and complex questions involved in expanding the promise of the Constitution to include the participation of all our citizens in the exercise of those rights and interests considered to be fundamental, without regard for classifications based upon wealth. Not the least of these problems is the fact that suggested standards as they exist more readily solve cases of flagrant injustice, but are difficult to apply and become increasingly subjective as the equities are more evenly balanced. What is needed are standards responsive to the great variety of cases and situations which will arise in the future. In setting such standards

48. *See* Gardner v. California, 393 U.S. 367 (1969) (right of free transcript extended to habeas corpus); and Zane v. Brown, 372 U.S. 477 (1963) (right of free transcipt extended to *coram nobis*).

49. 383 U.S. 663 (1966).

50. Lee v. Habib, 424 F.2d 891, 901-02 (D.C. Cir. 1970).

it will be the Court's approach to the problems and the ultimate decision as to the extent that equal protection prohibits state created classifications based upon wealth which will be determinative of the establishment of individual and class justice in the United States. It is incumbent upon the Supreme Court to articulate such standards and upon the lower courts to apply the equal protection and due process standards of recent cases, and those yet to come, to state provision of services considered to affect fundamental rights or interests. The time for the further articulation of such standards and their vigorous application to the remaining vestiges of state sanctioned relative deprivations is now. If the constitutional promise of equal protection and due process is to be realized, the courts must not fear the articulation and application of standards resulting in badly needed social reform. Where fundamental rights or interests are jeopardized by legislation or its application in a particular case, it is the court's duty to engage in the "social reform" necessary to protect those rights or interests without regard for the wealth or indigency of the person or persons so threatened.

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